

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F303701

HOWARD R. POTEAT, EMPLOYEE	CLAIMANT
SEARCY NEWSPAPERS, INC., EMPLOYER	RESPONDENT NO. 1
LUMBERMAN'S MUTUAL CASUALTY CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED AUGUST 10, 2007

Hearing before Administrative Law Judge O. Milton Fine II on May 22, 2007, in Searcy, White County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. David Jones, Attorney at Law, Little Rock, Arkansas.

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

Respondents No. 3 represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas, not appearing.

STATEMENT OF THE CASE

On May 22, 2007, the above-captioned claim was heard in Searcy, Arkansas. A prehearing conference took place on January 8, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following, which I accept:

1. The employee/employer/carrier relationship existed at all relevant times, including November 18, 2002, at which time the Claimant sustained a compensable injury to his lumbar spine.
2. Claimant has undergone three surgical procedures as a result of the November 18, 2002 injury.
3. Claimant sustained a previous compensable injury to his low back while employed by Respondent employer on or about August 20, 1998, as referenced in AWCC File No. E811562.
4. Respondents No. 1 accepted that original claim and did not controvert Claimant's entitlement to benefits.
5. Claimant's then-treating physician, Dr. Ronald Williams, assessed a ten percent (10%) anatomical impairment rating, which Respondents No. 1 paid out as of December 6, 1999.
6. Following his August 20, 1998 injury, Claimant returned to work for Respondent employer, where he continued to work until he sustained a second compensable injury to his low back on or about November 18, 2002, as referenced in the claim at hand.
7. Respondents No. 1 accepted Claimant's claim for his November 18, 2002 injury and did not controvert Claimant's entitlement to appropriate benefits.

8. With regard to Claimant's November 18, 2002 injury, Respondents No. 1 have paid Claimant temporary total disability benefits at the rate of \$347.00 per week and permanent partial disability benefits at the rate of \$260.00 per week. These rates are correct.
9. Claimant reached maximum medical improvement in the current claim, according to his treating physician, Dr. Patrick Chan, on or about January 13, 2004.
10. Dr. Chan assessed a twenty percent (20%) anatomical impairment rating, which has been accepted and paid toward by Respondents No. 1.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Respondents withdrew their issue regarding their entitlement to an offset, resulting in the following being litigated:

Claimant:

1. Whether Claimant is entitled to permanent total disability/wage-loss disability and a controverted attorney's fee.

Respondents No. 1:

1. Whether Claimant is entitled to permanent total disability, and in the alternative, wage-loss benefits.
2. Whether Claimant is entitled to additional benefits.
3. Whether Claimant is entitled to attorney's fees.
4. In the event Claimant is deemed to be entitled to wage-loss benefits, whether the Second Injury Fund is liable for said benefits.

Respondent No. 2:

1. Whether Claimant is entitled to disability benefits in excess of his assigned anatomical impairment rating, and which party is responsible for payment of these benefits.

Respondent No. 3:

1. Whether there is Second Injury Fund liability.

Contentions

Claimant:

1. Claimant sustained admittedly compensable injuries to his spine on or about November 18, 2002. A fifteen percent (15%) impairment has been accepted and paid out as of October 2005.
2. Claimant has been rendered permanently and totally disabled, and in the alternative is entitled to a determination with respect to the extent of wage-loss disability experienced over and above admitted compensable impairment.
3. Claimant has had prior injuries for which involvement of the Second Injury Fund has been made.
4. Both the Second Injury Fund and Death and Permanent Total Disability Trust Fund are parties to this litigation.
5. Claimant is entitled to controverted attorney's fees.

Respondents No. 1:

1. All appropriate benefits have been paid as of October 21, 2005, and Respondents No. 1 have not controverted Claimant's entitlement to appropriate benefits.
2. Claimant is limited to the anatomical impairment rating of twenty percent (20%) assessed by Dr. Chan.
3. Claimant is not permanently and totally disabled.
4. Claimant is not entitled to any wage-loss disability.
5. In the event Claimant is deemed to be entitled to wage-loss disability, the Second Injury Fund would be liable for any wage-loss benefits based upon the present claim combining with Claimant's prior low back injury to cause the alleged wage loss.

Respondent No. 3:

1. The liability of Respondent No. 2, the Second Injury Fund, must be determined prior to consideration of the liability of Respondent No. 3, the Death and Permanent Total Disability Trust Fund.
2. If Respondent No. 2 is found not to have liability and the Claimant is found to be permanently and totally disabled, Respondent No. 3 stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502. Therefore, Respondent No. 3 has not controverted Claimant's entitlement to benefits.
3. Respondent No. 3 will defer to the outcome of this litigation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.
4. Claimant has proven by a preponderance of the evidence that he is entitled to wage-loss disability of thirty percent (30%).
5. Claimant's compensable November 18, 2002 back injury is the major cause of his wage-loss disability.
6. Respondents No. 1 have failed to prove by a preponderance of the evidence that Claimant's prior impairments combined with his 2002 compensable injury to produce his current disability.
7. Respondent No. 2, the Second Injury Fund has no liability under this claim.
8. Respondent No. 3, the Death & Permanent Total Disability Trust Fund, has no liability under this claim.
9. Respondents No. 1 have controverted his entitlement to wage-loss disability benefits over and above his impairment rating.

10. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

CASE IN CHIEF

Summary of Evidence

_____ Two witnesses testified at the hearing: Claimant; and Tanya Owen, who was called by Respondents No. 1.

In addition to the Prehearing Order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, medical records of Claimant, consisting of two index pages and 126 individually numbered pages; Claimant's Exhibit 2, additional medical records of Claimant, consisting of one index page and 27 individually numbered pages; Respondents No. 1 Exhibit 1, medical records of Claimant, consisting of 23 pages of abstract and 118 individually numbered pages; Respondents No. 1 Exhibit 2, consisting of forms filed in connection with Claims Nos. E407307 and E811562 and a vocational evaluation of Claimant prepared by Tanya Owen, consisting of one index page and 19 individually numbered pages; Respondents No. 1 Exhibit 3, the curriculum vitae of Tanya Rutherford Owen, consisting of five pages; and Respondents No. 2 Exhibit 1, containing of a three-page facsimile letter and medical records of Claimant comprised of two index pages and 19 individually numbered pages.

Testimony

Howard Poteat. Claimant testified as follows:

His full name is Howard Randall Poteat. He is 52 years old. He graduated with average grades from Suitland High School in Suitland, Maryland. He attended Harding

University for the 1973-74 school year, but made poor grades. He dropped out and got married. He has had no formal education since that time.

Claimant stated that he worked for The Daily Citizen, a newspaper in Searcy, for a few months in 1980 and then returned in 1998 as a pressman's helper. The job was basically that of a "gopher"—he changed ink, got rolls of paper ready, and caught what came off the press. The job required very heavy lifting, bending, stooping, pushing, pulling, and being on his feet all day long. The rolls of stock he lifted weighed 40 pounds, and he had to lift anywhere from 25 to 50 papers coming off the press. He injured his back and underwent surgery by Dr. Ron Williams. After three months off, he returned to work at The Daily Citizen, performing the same duties as he did prior to the accident.

He stated that he also fractured some bones in his right hand in an accident at home and delayed seeking medical treatment. Claimant estimated that he underwent between seven and ten surgeries on the hand, which is his dominant one. He has a steel plate in his wrist and the wrist is fused. Because this was not a work-related injury, he took vacation and sick leave to seek treatment and ultimately returned to work at full capacity.

Claimant testified that four to five months prior to his November 2002 injury, he became a foreman. In addition to handling inventory, press maintenance and personnel, he was involved in all aspects of the printing operation, including lifting. He was earning a weekly salary of \$520.00, working 46 to 55 hours a week. He stated that he injured his low back on November 18, 2002 while lifting a 100-pound roll of paper with another individual. He went to the emergency room. The doctor there referred him to Dr. McAfee, who in turn referred him to Dr. Patrick Chan, a neurosurgeon.

He stated that he underwent three surgeries: a laminectomy on March 13, 2003, a fusion on April 12, 2003, and another procedure on September 15, 2003. Claimant testified that he felt continuous sharp pain in his back and left leg prior to his surgery. After the first surgery, he felt relief in his leg but still had low back pain. After the fusion surgery, he had some relief, but still had significant pain. Before the third surgery, he underwent steroid injections in his back. Even after the final surgery, and through today, Claimant stated that he still has pain in his low back and infrequent pain in his leg.

Claimant is currently under the treatment of Dr. Charles Schultz for pain management. He has ran tests on Claimant and is prescribing him Soma, Hydrocodone and Morphine. He has been taking the first two drugs for around 18 months, and the third for three months. The Hydrocodone is taken six times a day; and the Morphine and Soma four times a day each. The medications sometimes make him drowsy. There are times when he cannot drive a car; and he is concerned about working around heavy machinery. Claimant also has problems with hypertension, for which he takes medication. A functional capacity evaluation on Claimant had to be discontinued in February 2007 because of his high blood pressure. This was before Claimant underwent any lifting as part of the evaluation. He had to come back a month later. As reflected in the notes on the February evaluation, Claimant had to move around in his seat and get up after 20 minutes. He stated that this was back his "back stiffens up and it—it hurts me quite a bit." He cannot sit still as long as he would like.

Claimant testified that he never returned to work at The Daily Citizen. Dr. Chan had given him a 20-pound lifting restriction, and he was told that there were no light duty positions available there. Presently, he is working at a convenience store about 1/4 of a

mile from his home. Claimant was the former owner of the store. Working around 25 hours a week, he handles the register, waits on customers, and does a small amount of stocking. Not much lifting and bending is involved in the job. Claimant stated the store owner is sympathetic about this condition and lets him sit when he needs to. There are days that Claimant cannot go to work, even with the limited hours, due to his back.

He worked as a tech line supervisor for Land O'Frost from 1983 until he was fired in 1994. Claimant testified that he could not do that job today because of the walking and standing required on the concrete floor of the plant would hurt his back. He stated that he does not know of a job that he has held in the past that he could perform at present, because most of it has involved manual labor. He stated that the convenience store job is "[p]retty much what I can do," and that he knows of no job that he could do on a consistent basis and make the money he made before. He also stated that he could not promise a prospective employer that he could be at work every day, explaining: "My back is better some days than others. I just couldn't do a forty hour week. It just would be too hard on my back." In a typical 30-day period, he has eight to ten "bad days" where he can do nothing but lay on the couch. On his "good days," he mows his lawn, plays with his grandchildren, and helps his wife clean the house. He testified that he cannot predict his condition except that he knows that his back will stiffen after mowing the lawn.

Claimant stated that when he was seen by Tanya Owen for a rehabilitation evaluation, they discussed his physical condition. She had some tests performed on Claimant. At first, he stated that the insurance company never offered rehabilitation, but only physical therapy. However, he then stated that when he first injured his back, he attended "back school" at Arkansas State Rehabilitation Services.

On cross-examination by Respondents No. 1, Claimant testified that he did not drop out of college because of bad grades, but because he got married. He did not seek approval through the insurance company to see Dr. Schultz, but instead put it on his Medicare. With regard to his 1988 back injury, Dr. Williams assigned him a ten percent (10%) impairment rating. As for his ARS class, he clarified that he actually went there after the 1998 injury. He had problems with his back even in 1994. He still had back problems, even after being released to full duty, and continued to have back problems and wear a back brace almost until the 2002 injury. He continued to take medication for his back, including Hydrocodone and Soma, up until the 2002 accident. He stated that he continued to have problems with his right wrist into 2002, but denied that he told his doctor that he was seeking to get on disability for it in 2000. He also cut the tendons in three fingers on his left hand while working at Land O'Frost. He has a ten percent (10%) rating for his hand due to that injury to two of the fingers. In addition, he has had a subclavial carotid artery bypass since the 2002 accident.

At the time of his deposition, he was taking Oxycontin four days per day, Hydrocodone six times a day, and Soma four times a day. He has abused his medication in the past, as early as 1994, leading his doctors to refuse to provide him with pain medication. He went to different doctors to try and get more pain medications. Some providers refused to see him anymore in part because of prescription drug abuse. Again, this abuse happened prior to 2002.

With regard to his convenience store job, Claimant stated that he is paid in cash, so it would be difficult to track what he is actually earning there. However, he stated that it is "well under" the \$860.00 per month he is limited in earning in order to retain his Social

Security disability benefits, which nets to around \$1,400.00 a month. He has performed that job for over a year. He is able to drive. He drove to his Little Rock deposition, and he sometimes drives his grandchildren to and from school.

His position at Land O'Frost required him to supervise over 20 people; but there was not much lifting involved. But he had to be on his feet most of the time, checking operations. He is aware that Ms. Owen has indicated that he is physically able to perform that job, but he disagrees with her opinion. He tried after his termination to get his job back there, but not since his 2002 injury.

Claimant testified that he has not looked for any time of sedentary work position since his January 2004 release. He has not even looked in the Sunday newspaper job listings.

On cross-examination by Respondent No. 2, Claimant stated that his 1998 surgery relieved his symptoms, and that following his release by Dr. Williams with no lifting restrictions in 1998, he went back to school. After he returned to work at The Daily Citizen, he had to relearn his job on new equipment that had been brought in. For most of his work history at The Daily Citizen, he worked in excess of 40 hours a week.

While he has a plate in his right wrist, he is still able to grasp and lift with it. He does not have to perform any exercises with the wrist, and has not had to seek any follow-up treatment for it following his release by Dr. Weber. At this point, his wrist and fingers are fine. As for his artery problem, that occurred after his 2002 back injury. Regarding his prescriptions, he testified that he switched from Oxycontin to Morphine because the latter is cheaper. He last saw Dr. Schultz in April 2007, and was continued on the regimen of medications.

Claimant testified that while working at the convenience store, he sits on a stool when he is not waiting on customers. One reason he does not work more hours is that there are other regular employees that need the hours. The store has a computerized cash register that he is able to operate. While there is a computer in Claimant's home, he is not familiar with the Internet or email; however, he believes he could learn how to use them. He also confirmed that he really does not have any interest in going back to work unless he is making the same kind of money that he was making at The Daily Citizen. He has been approved for Social Security for two or three years.

On redirect examination, Claimant stated that while his grades were not his reason for leaving Harding, it would have been a struggle to continue there. As for the convenience store job, he testified that he took it because he was not able to make it on disability alone. He stated that he had to sell the convenience store in 1998 because he was bankrupt. He felt that the stress of a job like that would kill him now. He was on medications for migraine headaches due to running that business.

Claimant stated that he is still experiencing problems. Occasionally, he has to lie on the floor, take a hot shower, or use a heating pad. When he last saw Dr. Schultz, he was still experiencing muscle spasms. The most he can walk is a quarter of a mile. After that point, his legs and back would give out on him. He can only sit for one hour before needing to get up and move around. He doubted that he could stand or walk for an hour without having to sit down. The Land O'Frost supervisor job he held required him to be on his feet for ten hours, an hour before the shift and an hour after. He never saw anyone at that business being given a stool to sit on if they were experiencing back trouble. Claimant stated that he does not believe he could stay on his feet that long. Even if he had not been

injured in 2002, he would still be spending time with and doing things for his grandchildren. However, he admitted on recross examination by Respondents No. 1 that a full-time day job would curtail this.

Tanya Rutherford Owen. Called by Respondents No. 1, Ms. Owen testified as follows:

She has a masters degree in counseling psychology and is licensed counselor in Arkansas. Her curriculum vitae, Respondents No. 1 Exhibit 3, accurately reflects her background and educational studies. Claimant stipulated to the contents of her CV. Pages 5-19 of Respondents No. 1 Exhibit 2 is the evaluation she performed in connection with this claim. In preparation for conducting the evaluation, Ms. Owen reviewed Claimant's medical records as outlined in the report. She also reviewed his deposition and interrogatories. She met with him in March 2006 to conduct an evaluation and perform testing. The interview lasted approximately two and a half hours.

Based on Claimant's current skill level, physical restrictions, work history, educational background, and his current physical capabilities as outlined in the functional capacity examination, Ms. Owen outlined a number of positions that she opined he qualified for. These include a retail store manager, a retail sales clerk, a dispensing optician, a cashier, a packaging supervisor, a buyer's assistant, a printing supply sales representative, and a silk screen machine operator. The positions are based upon things Ms. Owen has determined that Claimant is qualified to do and is physically capable of doing. Ms. Owen testified that she has performed a number of these evaluations in the past. She stated that she found Claimant to be one of the most personable claimants she ever evaluated. He was agreeable to the tasks she asked of him and shared information freely. His good

attitude would weigh in his favor in seeking a job. While Claimant had told her that he had taken Morphine that day, she did not perceive that it affected him. He told her that it made him uncomfortable operating heavy machinery, however. Ms. Owen in making her findings took note that Claimant was restricted from lifting more than ten pounds and from working more than eight hours a day. He also was restricted from excessive bending or twisting at the waist, or squatting.

Ms. Owen testified that she conducted vocational research in an area of fifty miles surrounding Claimant's residence. In this area, she found four openings for a retail store manager. The only salary listed was \$26,000.00 to \$30,000.00 per year. This comported with Arkansas Employment Security Division data, which indicated a mean annual wage of \$30,060.00. This is comparable with his \$28,000.00 wage at The Daily Citizen. She also testified that she contacted Land O'Frost and was told by a person in human resources there that someone with a lifting restriction of 20 pounds and the other restrictions placed on Claimant could perform his former job there.

When cross-examined by Claimant, Ms. Owen stated that she has testified in fewer than ten workers' compensation cases. She is qualified to testify in Social Security disability cases. She is also a certified rehabilitation counselor. With reference to her contact with Land O'Frost, she stated that she did not give the person Claimant's name or tell him that Claimant had been terminated from the company. She would not opine whether the circumstances of his departure made him a candidate for rehire there. Ms. Owen clarified that the FCE talks in terms of functional abilities, not restrictions, and that is how she presented the hypothetical to Land O'Frost. She also admitted that there was no current opening there for a packaging supervisor.

As for her flagging retail store manager as a possible line of work, Ms. Owen agreed that someone who had experienced migraine headaches and had to declare bankruptcy in the past when operating a store might not be an ideal candidate for such a position. As for the shoe store manager position in Searcy, she stated that the positions have all been studied by the Department of Labor and those outlined in her report should all be within Claimant's capacities as outlined in his FCE. However, she admitted that the study did not specify the exact number of hours required to walk and stand. She also admitted that while her study of positions is geographically limited, she does not factor in the higher cost for someone to commute a lengthy distance to a job.

Ms. Owen testified that her vocational evaluation for Claimant references actual job openings. However, she stated that none of these leads were communicated to Claimant. She was not retained to provide job placement assistance. Hence, it is unknown whether the openings still exist. Also, she was unaware of the salaries of some of these positions, or the inventories handled by the retail stores at issue. As for the positions with salaries listed at levels below Claimant's previous salary, Ms. Owen stated that she looks for positions that are "physically appropriate," not for a given pay level. With respect to the Home Depot job listed, she was unsure if Claimant's prescription drug use would disqualify him for such a position. She also admitted that if Claimant could not get out of bed eight to ten days a month and enough of those were work days, he might not be a dependable worker. As for the location of such positions, she stated that while she tries to limit her search to a 50-mile radius from the claimant's residence, she would not eliminate a prospective job that was up to 60 miles away.

On redirect examination, Ms. Owen stated that the vast majority of her case load is not litigated. Approximately 80 percent (80%) of the life care planning she handles is done for plaintiff attorneys, and 50 percent (50%) to 60 percent (60%) of her work is with unrepresented claimants. As for litigated cases, half of her work is for claimants and half for respondents.

She testified that she advises claimants to ask for work accommodations once a job offer has been made. If Claimant has not sought work, he would not know if his restrictions could or would be accommodated. Ms. Owen also stated that she had jobs listed that would possibly pay more than Claimant's job at The Daily Citizen. Claimant has not registered with the Employment Security Division, to be contacted if and when jobs fitting his skill level or profile come open.

On recross examination, Ms. Owen stated that her reports, with its job leads, typically wind up in the hands of the claimants through their attorneys.

Records—Medical

Claimant's Exhibits 1 and 2/Respondents No. 1 Exhibit 1/Respondent No. 2 Exhibit

1. The medical records of Claimant that were introduced at the May 22, 2007 hearing and are part of Claimant Exhibits 1 and 2, Respondents No. 1 Exhibit 1 and/or Respondent No. 2 Exhibit 1 reflect the following:

On May 16, 1994, while employed at Land O'Frost, Claimant presented to Dr. David Staggs with a marked lower lumbar spasm with severe pain. He was diagnosed with severe low back strain. The x-rays of the back were normal. He was prescribed Percocet and ultimately admitted to Central Arkansas Hospital on May 23, 1994. An MRI showed a minimal midline herniation at L5-S1 without any compression of the thecal sac.

Conservative treatment was recommended. On June 29, 1994, he presented with slurred speech and a thick tongue, along with slightly dilated pupils. He was assessed as having a probable drug addiction, although he denied it. He was scheduled to be admitted at Bridgeway Hospital on July 1, 1994 for pain medication abuse, but his insurance did not cover the treatment. His July 5, 1994 urine drug screen showed benzodiazepam and barbiturate. A note in the record for July 25, 1994 reads, "NO MORE STADOL SHOTS EVER!" (emphasis in original) On July 29, 1994, he again presented with a request for Stadol, which was refused. He was recommended for, inter alia, counseling.

On October 3, 1994, he presented with moderate diffuse spasm of and tenderness in the lumbosacral spine. He was assessed as having low back strain. The record notes that Claimant has minimal disk herniation of L3-4, but that it is not significant. The note reflects that Claimant "[n]o longer has a job and seems to be doing better psychologically."

In 1997, 1998 and 1999 Claimant presented on a number of occasions with severe headaches and was prescribed, inter alia, Phenergan, Stadol and Hydrocodone. In a note on August 29, 1997, his doctor noted that the only reason that he was giving him Hydrocodone was that a "long weekend" was coming up. On March 11, 1998 at White County Medical Center he was refused Stadol and Phenergan for his headache. He then became upset and left. On May 12, 1998, he was refused injections for migraine, leading him to leave the office.

On September 26, 1997, Claimant presented at White County Medical Center with low back pain. He stated that he was lifted at work four or five days ago and injured his back. He complained of radicular symptoms down his left leg. He was prescribed pain relievers and muscle relaxers.

On January 27, 1998, Searcy Medical Center wrote Claimant that its doctors could no longer serve as his providers, and terminated him as a patient effective four weeks after the letter.

On March 16, 1998, he presented with moderate diffuse lower back tenderness. He was diagnosed as having chronic and acute low back strain and was recommended for an MRI and a possible steroid injection if he did not improve. On April 4, 1998, he again complained of back pain and numbness down his left leg and just above the knee. He was diagnosed with having acute exacerbation of chronic back pain.

When he presented on Dr. Davidson on August 20, 1998 with a lower back spasm and pain running down his leg, he demanded Stadol and Phenergan before he would leave and go to the hospital. When he was admitted to Central Arkansas Hospital, he stated that the back pain began a few days ago when lifting a printer shaft. An MRI performed on August 21, 1998 showed degenerative disk disease at L5-S1 and minimal midline disk herniation at L5-S1. A steroid injection was offered Claimant, but he refused. He was released to return to work on August 27 1998. He was also referred upon request to a neurosurgeon. When he presented to Dr. Ronald Williams on September 1, 1998, he stated that he had back pain four or five years prior that had responded well to conservative treatment. A CT scan revealed a central/left herniated nucleus pulposus at L5-S1. A myelogram of the lumbar spine showed a possible intradural defect at L5-S1, and an unusual appearance of the S1 nerve rootlet. He wrote on September 3, 1998, that the myelogram and the post-myelogram CT "suggests the likelihood of a ruptured disc at L5-S1 on the left." Claimant expressed a desire to proceed with surgery.

Dr. Daniel Davidson noted on September 16, 1998, that when Claimant came to his office on the 14th and was given a prescription for Tylox, #6, he altered it to read #36. Dr. Davidson warned him that this was a crime and told him that the only pain medication he would give him from then on would be Stadol shots.

On September 18, 1998, Dr. Williams performed a laminectomy on Claimant at L5-S1, left. The post-operative diagnosis was herniated nucleus pulposus at L5-S1. In a visit on September 21, Claimant stated that his left leg was still numb but that the pain in the leg was gone. Dr. Davidson stated in his note that he was concerned that Claimant had become "dependent upon Stadol at this time. Definitely has inadequate personality to cope with pain." On September 25, Claimant requested "a Stadol shot and a couple dozen Tylox" from Dr. David Staggs. He refused and told him no narcotics would be dispensed. Claimant went to White County Medical Center on September 28 and requested Stadol. He was refused.

Dr. Williams on January 25, 1999 wrote that the last time he had seen Claimant was on November 3, 1998, when he told him that he could return to work in two weeks. He had not been heard from since. Based on the lumbar laminectomy, Dr. Williams assigned Claimant a ten percent (10%) impairment rating to the whole person.

On October 19, 1999, Claimant presented to Dr. Berry Thompson at Ortho Arkansas with pain in his right hand. He was diagnosed with tendinitis. He underwent surgery on December 17, 1999. The post-operative diagnosis was extensor tenosynovitis at the extensor carpi radialis longus, extensor carpi radialis brevis, and extensor pollicis intersection, plus synovitis involving the wrist joint. Dr. Staggs on December 30, 1999 saw Claimant for post-operative pain. He wrote that he was "[s]till . . . greatly concerned about

this patient's continued narcotic seeking behavior." He also presented for treatment of hand pain at White County Medical Center. Dr. Randy Maddox wrote that Claimant had "[p]ossible drug-seeking behavior." Claimant underwent a second wrist surgery, a release of the first dorsal compartment, on February 23, 2000. The post-operative diagnosis was DeQuervain's tenosynovitis, right wrist. Dr. Thompson notes that when he saw Claimant's wife in the waiting room, she commented on his problems with taking narcotic pain medication. In a note dated March 9, 2000, Dr. Thompson released Claimant to full duty and stated that he had reached maximum medical improvement.

He returned to White County Medical Center on June 19, 2000, stating that he injured his right hand when a wrench threw his hand against a machine. The x-rays showed no fracture but triangular fibrocartilage injury. He was diagnosed with a wrist sprain, old to recent scapholunate dissociation, and osteoarthritis of the radial scaphoid articulation. Dr. Terry Green wrote that a wrist arthrodesis might be required in the future. He saw Dr. Davidson regarding wrist pain on July 3, 2000 and was seeking Hydrocodone. When he was refused, Claimant left the clinic. Dr. Thompson wrote Dr. Green on August 1, 2000 that he should be "cautious about continuing [Claimant] on long-term narcotic analgesics." He saw Dr. Davidson on September 14, 2000, and stated that he was trying to get on disability due to his wrist. He asked for narcotics but was refused.

On November 18, 2002, Claimant presented to the ER at White County Medical Center with severe pain in his lumbar region, plus his left side and hip. He had attempted to lift a 100-pound roll of paper when he felt a pull in his lower back. He was noted to have a straightening of the Lordotic curve and was diagnosed as having a lumbar strain. On November 22, he still presented with pain and was placed on light duty until further notice.

This was continued on December 2, 2002. An MRI on December 12, 2002 showed disk herniation at L5-S1. On January 7, 2003, he was ordered off work indefinitely. Dr. Patrick Chan on January 23, 2003 gave Claimant an epidural steroid injection and gave him the diagnoses of low back pain secondary to work-related injury and lumbar spondylosis. The treatment, by Claimant's report, alleviated his symptoms. He was sent to physical therapy. There, it was reported that he performed well, but complained of constant lumbar pain. Due to the fact that the pain was not alleviated, Claimant underwent a second epidural steroid injection on February 27, 2003. Claimant returned to work on light duty, but again presented with severe pain.

He underwent a third epidural steroid injection on March 13, 2003. In addition, Dr. Chan performed the following surgical procedures:

1. left L5-S1 partial hemilaminectomy;
2. partial medial facetectomy;
3. lateral recess decompression and foraminotomy;
4. removal of the left L5-S1 HNP; and
5. microscopic decompression of thecal sac and nerve roots

His postoperative diagnoses were L5-S1 degenerative disk disease and left L5-S1 HNP with lateral recess stenosis.

On April 12, 2003, Claimant underwent a second back surgery, a lumbar fusion. The following procedures were performed by Dr. Chan:

1. Bilateral L4-5 partial hemilaminectomy, partial medial facetectomy, lateral recess decompression and foraminotomy;
2. Bilateral L5-S1 hemilaminectomy, medial facetectomy, lateral recess decompression and foraminotomy;
3. Bilateral L5-S1 discectomy;
4. Bilateral L5-S1 application of posterior interbody bone dowels;
5. Bilateral L5-S1 posterior lumbar interbody fusion (PLIF);
6. L5-S1 posterior instrumentation with pedicle screws;
7. L5-S1 posterolateral fusion;

8. Microscopic compression of thecal sac and nerve roots;
9. Intraoperative fluoroscopy;
10. Harvest of autologous bone graft from the left posterior iliac crest;
11. Intraoperative neurophysiologic monitoring; and
12. Intraoperative testing of bilateral L5 and bilateral S1 nerve roots.

His post-operative diagnoses were status post left L5-S1 decompression, low back pain secondary to work-related injury, L5-S1 degenerative disc disease with Grade 1 spondylolisthesis, and L4-5 stenosis.

Claimant was scheduled to return to work on July 2, 2003, but that was delayed. He was sent to physical therapy. While the pain in his lumbar spine improved, he had persistent pain in his sacroiliac joint that persisted due to the bone graft. On July 11, 2003, he underwent an injection of the joint. A note on August 4, 2003 reflects that he presented with severe pain in his lumbar spine that radiated into his left leg. He was continued off work. Claimant was experiencing pain in his lower extremities, along with numbness and paresthesia. A workup with a CT scan and myelogram showed severe stenosis at L4-L5 with what appeared to be a L4-L5 synovial cyst compression on the thecal sac, in addition to circumferential stenosis at the L4-L5 level. On September 3, 2003, he underwent a third operation by Dr. Chan, consisting of the following:

1. Inferior L-4 and superior L-5 decompressive laminectomy, partial medial facetectomy, lateral recess decompression and foraminotomy;
2. Microscopic decompression of thecal sac and nerve roots; and
3. Injection of lumbar epidural steroids.

A lumbar spine x-ray on October 8, 2003 showed solid fusion at the L5-S1 space, with the pedicle screws in good position. On January 13, 2004, Dr. Chan found that Claimant had reached maximum medical improvement, and stated that Claimant could return to work with restrictions on January 20, 2004. On January 30, he was again taken

off work. He assigned him an impairment rating of twenty percent (20%) to the whole body based on the 5th Edition of the AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (hereinafter "AMA Guides"). On March 12, 2004, Dr. Chan clarified that this rating pertained only to his November 18, 2002 injury, and did not include his prior back injury.

Dr. Jim Moore performed an independent medical evaluation on Claimant and on April 13, 2004 released his findings. He mistakenly states that Claimant has undergone three surgeries, including the one in 1998—neglecting to mention the first surgery by Dr. Chan on March 13, 2003. Dr. Moore's findings, In pertinent part, are as follows:

This patient then is in a post-operative status more recently of the surgeries as outlined by Dr. Chan. It is some four or five years between the patient's initial surgery and I do not see any relationship between the two surgeries. Certainly Dr. Chan's procedures have been much more extensive. Dr. Chan is employing a DRE lumbar category IV of 20%. This is based upon 5th Edition of AMA. This is consistent with 4th Edition AMA, Table 72, DRE IV of 20% permanent partial to the body as a whole. This patient will require continued follow [sic]. At this particular point I see no indication that anything of a more aggressive nature is going to be indicated although medication management is going to be required. I think the patient might benefit from the use of a TENS unit. A great deal of his problems appear more structural than neurogenic at this particular time as he describes no radiational pain at this particular point. However, the patient does show neurologic residuals specifically of the weak toe strength dorsiflexion which incriminates the L5 nerve on the left side. The absent Achille's reflex would reflect involvement of the S1 nerve on the left side.

DIAGNOSIS: Failed back syndrome.

Thereafter, when Claimant saw Dr. Chan in 2004, his leg symptoms had abated, while his lumbar pain remained. In his visit on March 2, 2005, Dr. Chan noted that Claimant was now on disability.

On January 12, 2005, Claimant was referred to Dr. Charles Schultz. He noted that Claimant underwent an EMG and nerve conduction study and they showed “show[ed] evidence of a chronic left L5-S1 radiculopathy.” He placed Claimant on Bextra, Hydrocodone, and Soma, and required Claimant to agree not to obtain the latter two medications from other physicians due to their addictive nature. He continued Claimant on this regimen following his April 5, 2005 follow-up visit. On July 1, 2005, he did the same. Claimant agreed to undergo lumbar facet joint injections. He did the same on October 3, 2005. On February 3, 2006, Claimant was prescribed Morphine, and underwent lumbar facet joint injections and a steroid injection at L5-S1. On August 30, 2006, Dr. Schultz switched Claimant from Morphine to Oxycontin, but switched them back on December 1, 2006 due to the cost of Oxycontin.

An x-ray on December 11, 2006 showed a “[m]ild loss of height anteriorly of the T7 vertebral body which may represent compression fracture”

On March 15, 2007, Claimant underwent a functional capacity evaluation. The evaluation found that Claimant gave a reliable effort, with 52 of 56 consistency measures within expected limits. Moreover, his movement patterns were consistent with his subjective pain ratings, his subjective pain complaints were limited to activities directly related to his diagnosis, and he denied increased low back pain with all activities unrelated to his diagnosis. Overall, Claimant demonstrated the ability to perform work in the LIGHT category of work with an occasional lift/carry of up to 30 pounds. He also demonstrated the ability to perform the following activities on a constant basis: balance, reach immediate (L), reach immediate (R), reach overhead (L), reach overhead (R), reach with five-pound weight (R) or (L) handling (L), handling (R), bi-manual handling, fingering (L), fingering (R) and bi-

manual fingering. He also demonstrated the ability to perform the following activities on a frequent basis: walk, carry up to ten pounds, push a cart-45 pounds, pull a cart-45 pounds, kneel, crouch, climb stairs, sitting and standing. Finally, he demonstrated the ability to carry up to 25 pounds and to stoop on an occasional basis. As for Claimant's functional limitations, the evaluator found:

Mr. Poteat demonstrated functional limitations in the area of material handling as he exhibits the ability to lift/carry up to 25 lbs. on an Occasional basis. Mr. Poteat demonstrates moderate lumbar AROM deficits that did limit his ability to perform Stooping/Bending on an Occasional basis. Mr. Poteat demonstrates decreased tolerances to general mobility tasks as well as he is limited to the Frequent category with Kneeling, Crouching, Climbing Stairs, Walking, Standing and Sitting. Mr. Poteat demonstrates no functional deficits related to reaching, handling, or fingering with either [upper extremity]. Mr. Poteat's blood pressure was [within normal limits] throughout testing this date.

Records-Non-medical

Forms re: Claim No. E407307. The Forms AR-1, AR-2 and AR-4 filed with respect to his claim, part of Respondents No. 1 Exhibit No. 2, reflect that Claimant reported that he strained his lower back on May 16, 1994 while lifting a roll of film at Land O'Frost. The claim was accepted as compensable.

Vocational Evaluation. Claimant underwent a vocational evaluation by Tanya Owen. The evaluation, part of Respondents No. 1 Exhibit 2, consisted of a personal interview with Claimant, a review of labor market data, a review of his medical records (including his March 15, 2007 FCE), a transferable skills analysis and a vocational assessment. The following occupations were identified as transferable skills occupations:

Manager, Retail Store
Cashier II
Sales Clerk
Dispensing Optician
Packaging Supervisor

Buyer Assistant
Printing Supplies Sales Representative
Silk Screen Printing Machine Operator

Ms. Owen identified open positions in these areas and approximately within 50 miles of Claimant's home during vocational research conducted on March 26-27, 2007. She listed the following as obstacles to his return to employment:

- I. Continued reports of pain and discomfort
- II. Continued use of pain medications on a daily basis
- III. County of residence reflects few opportunities
- IV. Currently receiving SSDI with capped earnings

Her assessment of his job search attitude inventory showed that Claimant scored in the high range of the Luck vs. Planning aspect of the test, and average in the other areas, revealing that, inter alia, he was somewhat interested in learning how to find a job, somewhat willing to commit the time and effort needed to find a job, and somewhat interested in his own career development.

Ms. Owen's summary reads in pertinent part:

Mr. Poteat's [sic] sustained an injury on November 18, 2002 that would prevent him from working as a press foreman. With his current physical capacities, he should be able to return to work in the previously held positions of convenience store manager or packing supervisor. Additionally, utilizing his transferable skills, there are jobs that are available for which he would qualify given his current capacity and skill level.

Curriculum Vitae. This document, Respondents No. 1 Exhibit 3, is the CV for hearing witness Tanya Owen.

ADJUDICATION**A. Permanent and Total Disability/Wage Loss Disability**

Claimant has asserted that he is permanently and totally disabled, and that in the alternative, he is entitled to wage loss disability over and above his twenty percent (20%) impairment rating to the body as a whole that Respondents No. 1 have accepted and paid toward. Respondents No. 1 contend that Claimant should be limited to his rating.

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). Claimant's back injury is not a scheduled injury. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2002). For that reason, his entitlement to permanent disability benefits is controlled by § 11-9-522(b)(1), which states:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such "other matters" include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The term "permanent

total disability” is defined in the statute as “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” Ark. Code Ann. § 11-9-519(e)(1). The wage loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant’s future earning capacity, the Commission considers his motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of his loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides:

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

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

“Major cause” is more than fifty percent (50%) of the cause, and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). “Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” *Id.* § 11-9-102(8).

Claimant is 52 years old. He graduated with average grades from high school. He attended Harding University for one school year, but made poor grades. He dropped out

to get married, and has had no formal education since that time. He worked as a tech line supervisor for Land O'Frost from 1983 until he was fired in 1994. He testified that he could not do that job at present because of the walking and standing required on the concrete floor of the plant would hurt his back. Claimant worked for The Daily Citizen, a newspaper in Searcy, for a few months in 1980 and then returned in 1998 as a pressman's helper, where he worked until the date of his injury, November 18, 2002. While he was initially a "gopher" there, four to five months prior to his 2002 injury, he became a foreman. In addition to handling inventory, press maintenance and personnel, he was involved in all aspects of the printing operation, including lifting. He also owned a convenience store at one time; but he testified that the stress of the business caused him to develop migraine headaches, and ultimately he went bankrupt. At present, he is working for the new owner of the store; but he works no more than 25 hours per week and while he waits on customers and does some stocking of merchandise, the owner allows him to sit when he is not waiting on someone and he does not report to work when his back is particularly bothering him.

Claimant underwent an independent medical evaluation by Dr. Jim Moore in April 2004. He diagnosed Claimant with failed back syndrome, and found that while Dr. Chan mistakenly employed the Fifth Edition of the AMA Guides in awarding the twenty percent (20%) impairment rating, the rating was equally valid under the Fourth Edition.

Claimant underwent a functional capacity evaluation in March 2007. The evaluation showed that he gave a reliable effort. Overall, according to the FCE, he demonstrated the ability to perform work in the LIGHT category of work with an occasional lift/carry of up to 30 pounds. He was able to perform the following activities on a constant basis: balance, reach immediate (L), reach immediate (R), reach overhead (L), reach overhead (R), reach

with five-pound weight (R) or L) handling (L), handling (R), bi-manual handling, fingering (L), fingering (R) and bi-manual fingering. He also showed that on a frequent basis, he could do the following: walk, carry up to ten pounds, push a cart-45 pounds, pull a cart-45 pounds, kneel, crouch, climb stairs, sitting and standing. He could also carry up to 25 pounds and to stoop on an occasional basis.

Hearing witness Tanya Owen performed a vocational evaluation on Claimant in March 2007. Ms. Owen stated that based upon her analysis, while Claimant could not return to his old position at The Daily Citizen, he was capable of returning to his former jobs of convenience store manager and packing supervisor. She also identified the following occupations as transferable skills occupations for him:

1. Manager, Retail Store
2. Cashier II
3. Sales Clerk
4. Dispensing Optician
5. Packaging Supervisor
6. Buyer Assistant
7. Printing Supplies Sales Representative
8. Silk Screen Printing Machine Operator

She identified open positions in these areas and approximately within 50 miles of Claimant's home as a result of vocational research conducted that month, and listed the following as obstacles to his return to employment:

- I. Continued reports of pain and discomfort
- II. Continued use of pain medications on a daily basis
- III. County of residence reflects few opportunities
- IV. Currently receiving SSDI with capped earnings

His job search attitude inventory showed that Claimant scored in the high range of the Luck vs. Planning aspect of the test, and average in the other areas. She opined that this showed that he was somewhat interested in learning how to find a job, somewhat willing to

commit the time and effort needed to find a job, and somewhat interested in his own career development. Despite these findings, the fact remains that Claimant has never registered with the Employment Security Division to find a job, and has not looked for work on his own. He testified that he is concerned about his earnings impairing his Social Security disability benefits. He also stated on the stand that he is not interested in returning to work at a job that pays less than what he earned at The Daily Citizen.

Claimant has undergone three surgeries, including a laminectomy and a fusion, as a result of his 2002 low back injury. He takes significant quantities of pain killers (including Morphine) and muscle relaxers (Soma) on a daily basis. While his medical records reflect that he has had problems with prescription drug abuse in the past, it does not appear that he has this problem at present. By his own testimony, he can perform household chores, mow his lawn, play with his grandchildren, and work in a convenience store on a part-time basis.

Based upon my review of all the evidence, including extensive documentation and testimony from Claimant and Ms. Owens, and having had the opportunity to assess their credibility, I find that Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled. He is somewhat motivated to return to work, and is capable of performing a job entailing light duty work. While I take issue with Ms. Owen's opinion that Claimant is capable of returning to his former position at Land O'Frost, it does appear that he is capable of working as a convenience store manager; and there are suitable transferable skills occupations available as well.

However, I do find that after considering Claimant's age, education, work experience, the nature and extent of his injury, his permanent restrictions, and all other relevant factors,

he has sustained a thirty percent (30%) impairment to his wage earning capacity in excess of his twenty percent (20%) anatomical impairment. In so doing, I find that Claimant's compensable November 18, 2002 back injury is the major cause of his wage-loss disability.

B. Second Injury Fund Liability

The Second Injury Trust Fund is a special fund designed to ensure that an employer employing a handicapped worker will not, in the event that the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. Ark. Code Ann. § 11-9-525(a)(1). However, the Fund is only liable if three elements are present. First, the claimant must have suffered a compensable injury at his present place of employment. Second, prior to that injury the claimant 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. See *id.* § 11-9-525(b); *Mid-State Const. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

The evidence adduced at the hearing along with the stipulations of the parties show that Claimant did sustain a compensable injury to his back on August 20, 1998 while working for Respondent employer that resulted in his undergoing a lumbar laminectomy and Dr. Williams assigning him an impairment rating of ten percent (10%) to the whole person that was accepted and paid. Hence, the first and second prongs of the *Mid-State* test have been met. However, the third prong is not satisfied. Dr. Williams on January 25, 1999 wrote that the last time he had seen Claimant was on November 3, 1998, when the doctor had told him that he could return to work in two weeks. He had not been heard from since. Claimant was released without restrictions. He testified that he returned to work

approximately three months after the accident—and worked five years before being injured again. In both 1998 and 2002 Claimant injured his lumbar spine, and Claimant testified that he took back medication, including Soma and Hydrocodone, up until the 2002 accident. But Dr. Jim Moore conducted an independent medical evaluation on Claimant and on April 13, 2004 wrote that he could see no relationship between the 1998 laminectomy by Dr. Williams and the three surgeries by Dr. Patrick Chan in 2003. Dr. Chan on March 12, 2004, wrote and stated that the rating he gave Claimant pertained only to his November 18, 2002 injury, and did not include his 1998 injury. As for his wrist and hand injury, they bear no relation to Claimant's disability that arose from his 2002 back injury and surgeries. In sum, Respondents No. 1 have failed to prove by a preponderance of the evidence that Claimant's prior impairments combined with 2002 compensable injury to produce his current disability. For that reason, the Second Injury Fund has no liability under this claim.

C. Attorney's Fee

I find that Respondents No. 1 have controverted his entitlement to wage-loss disability benefits over and above his impairment rating. Claimant's attorney is thus entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

CONCLUSION AND AWARD

Respondents No. 1 are directed to pay benefits in accordance with the findings of fact set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents No. 1 in accordance with Ark. Code Ann. § 11-9-715. See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge