

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209707

ROBERT BARRON		CLAIMANT
LOWE'S HOME CENTER SELF INSURED	NO. 1	RESPONDENT
SPECIALTY RISK, TPA	NO. 2	RESPONDENT
SECOND INJURY FUND	NO. 3	RESPONDENT

OPINION FILED **JUNE 19, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by ROY GEAN, JR., Attorney, Fort Smith, Arkansas.

Respondent No. 1 represented by RANDY MURPHY, Attorney, Little Rock, Arkansas.

Respondent No. 3 represented by DAVID SIMMONS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 25, 2008, in Fort Smith, Arkansas. The deposition of the claimant was taken on March 5, 2008, and was admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on December 27, 2007. The pre-hearing 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 pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On August 18, 2002, the relationship of employee-self insured employer- third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$271.00 for total disability and \$203.00 for permanent partial disability.

3. On August 18, 2002, the claimant sustained a compensable injury to his low back.
4. There is no dispute over the payment of medical expenses incurred through May of 2004.
5. There is no dispute over temporary total disability benefits, accruing through September 18, 2003.
6. Respondents have accepted liability for permanent partial disability benefits for a permanent physical impairment of 7 percent to the body as a whole and commenced payment of the permanent partial disability benefits beginning on September 19, 2003.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services after May of 2004.
2. The claimant's entitlement to additional temporary total disability from September 18, 2003 through August 1, 2007.
3. The end of the claimant's healing period.
4. The extent of permanent disability, both for permanent physical impairment and loss of wage earning capacity and including permanent total disability.
5. Second Injury Fund liability.
6. Controversion and appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The employee has not received any workers' compensation benefits for over the last three years. There have been medical expenses and the permanent disability should be determined."

In regard to these issues, the respondent employer and TPA contends:

“Respondent No. 1 contends that claimant has received all benefits to which he is entitled. The Second Injury Fund has been joined as a party based on a prior injury and impairment sustained by claimant. Respondent No. 1 contends that the Second Injury Fund has liability for any disability benefits in excess of the 7 percent impairment rating.”

In regard to these issues, the Second Injury Fund contends that it is not liable for any benefits.

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

_____The first issue concerns the claimant’s entitlement to additional medical services, after May of 2004. The burden rests upon the claimant to prove that the various medical services that he received after May of 2004 constitute “reasonably necessary medical services”, as that term is used in the Act.

In order to meet his burden, the claimant must show that the disputed medical services were necessitated by or connected with his admittedly compensable injury to his low back. Further, he must show that these medical services had or have a reasonable expectation of accomplishing their intended purpose or goal, at the time the services are rendered. He is not required to prove that these services were actually successful in accomplishing their intended purpose or goal.

It would appear from the medical record that the only medical services in dispute were those provided the claimant by and at the direction of Dr. Terry Hoyt, after May of 2004. The records of Dr. Hoyt indicate that he treated the claimant for a number of complaints after May of 2004. In his note of May 3, 2005, Dr. Hoyt indicated that he was seeing the claimant for follow up of his low back pain and also for parascapular pain, depression, GAD-PTSD, and

migraines. He also prescribed Lunesta for the claimant's difficulty in sleeping. On June 2, 2005, the claimant was again seen by Dr. Hoyt for follow up of his chronic back pain. However, it appears that this visit focused on the difficulties that Dr. Holder had diagnosed as depression and PSD (post-traumatic stress disorder). Except for the foregoing visits, the only other medical services indicated by the current record is an MRI, which was performed on January 11, 2007, rental and supplies for a TENS unit, and various medications.

There is no stipulation or determination that the claimant sustained any compensable injuries to his upper back or thoracic spine in the employment-related accident of August 18, 2002. There is also no stipulation or determination that the claimant sustained a compensable injury to his neck or cervical spine in this employment related incident. Finally, there is no stipulation or determination that the claimant has experienced a compensable mental or psychological injury, in the form of depression, as a result of his compensable lumbar injury. No request for a determination of the compensability of these various conditions has been made through the present date. Absent such a stipulation or determination on the compensability of these various conditions, medical services directed toward the treatment of these conditions would not represent reasonably necessary medical services for a compensable injury, as required by Ark. Code Ann. §11-9-508. Therefore, the respondents cannot be held liable for the expense of these services, at the present time.

However, I find that the medical services provided the claimant by and at the direction of Dr. Hoyt for his chronic low back difficulties were and are necessitated by or connected with his compensable lumbar injury of August 18, 2002. Further, the nature of these medical services (i.e. pain medication, use of a TENS unit, muscle relaxers, and periodic follow up or monitoring visits) are

all commonly recognized by the medical community as being appropriate treatment for chronic pain complaints, such as those experienced by the claimant as a result of his compensable lumbar injury. In fact, the respondents appear to have provided the claimant with these exact same services through May of 2004. It is also not uncommon that such services may be required for an extended period of time.

In summary, I find that the claimant is entitled to the payment of expenses incurred for medical services provided him by Dr. Terry Hoyt, after May of 2004, in the form of periodic evaluations and testing, a TENS unit, appropriate medication for pain and muscle relaxation and appropriate medication to assist the claimant in sleeping. However, at this time, the claimant has failed to prove that any medical services provided him by and at the direction of Dr. Hoyt for his upper back or thoracic spine difficulties, his neck or cervical difficulties, his breathing difficulties, and any psychological or mental difficulties constitute reasonably necessary medical services for a compensable injury. Thus, the respondents cannot be held liable for the expense of these services, at the present time.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

_____The next issue concerns the claimant's entitlement to additional temporary total disability benefits from September 18, 2003 through August 1, 2007. A corollary issue would be the end of the claimant's healing period. The burden rests upon the claimant to prove his entitlement to the additional temporary total disability benefits he now seeks.

In order to meet this burden, the claimant must prove that during this time he continued within his healing period from the effects of his compensable injury. He must also prove that he continued to be rendered totally disabled

from performing all forms of regular gainful employment, as a result of this injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the actual physical damage caused by the compensable injury has resolved or at least stabilized, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement. The mere continuation of medical services to reduce chronic symptoms is not sufficient, in and of itself, to extend the healing period.

In the present case, the medical evidence presented shows that the claimant had reached the end of his healing period from the effects of his compensable lumbar injury on or before September 18, 2003. Prior to that date, the claimant had undergone numerous examinations and evaluations, including neurosurgical evaluations by Dr. Michael Standefer and Dr. Carl Kendrick. He had also been evaluated by Dr. Robert Thompson, an orthopaedic surgeon. The claimant had undergone extensive testing, including medical plain x-rays, a lumbar MRI, and a Functional Capacity Evaluation. The nature and extent of his compensable injury had been adequately investigated and accurately determined. The claimant was found not to require surgery and, as a result, received prolonged and extensive conservative treatment modalities. These treatment modalities included the use of numerous oral medications, a TENS unit, rest, and physical therapy.

The records of Dr. Terry Hoyt, the claimant's primary treating physician, indicate that the claimant had reached maximum medical improvement on or before September 18, 2003. In his progress note of March 10, 2003, Dr. Hoyt related that he had discussed with the claimant a referral for a permanent

disability rating. In his note of March 17, 2003, Dr. Hoyt stated that he had ordered the physical therapist to perform a Functional Capacity Evaluation "in preparation for referral of this patient for permanent disability rating". This Functional Capacity Evaluation was carried out on April 4, 2003. In his progress note of April 9, 2003, Dr. Hoyt stated that he is awaiting the Functional Capacity study and will send his recommendation to the Workers Compensation carrier and the claimant's attorney after review of this report. In his progress note of May 12, 2003, Dr. Hoyt clearly stated that it was his opinion that the claimant needed a permanent disability rating. In his note of July 13, 2003, Dr. Hoyt indicated that he was still awaiting "tools" to determine the permanent disability of the claimant. Finally, in a report, dated September 16, 2003, Dr. Hoyt assessed the extent of permanent physical impairment of the claimant's lumbar spine at 18 percent to the body as a whole.

I would further note that both the medical evidence and the claimant's testimony failed to show any apparent change in the condition of his low back or lumbar spine after September 18, 2003. It further appears from the medical evidence presented that the claimant's condition with his lumbar spine has remained static since September 18, 2003, and no change appears to be anticipated. The actual treatment provided the claimant for his lumbar difficulties, after September 18, 2003, has all been directed solely toward a program of medical management of the claimant's chronic symptoms, primarily pain. No actual treatment directed toward the actual physical damage caused by the compensable lumbar injury has been provided or even recommended.

As the claimant has failed to prove the necessary requirement that he continued within his healing period from the effects of his compensable lumbar

injury on and after September 18, 2003, he cannot be awarded any temporary disability benefits after that date. His request for such benefits must be denied.

III. EXTENT OF PERMANENT DISABILITY AND SECOND INJURY FUND LIABILITY

The next issues concern the extent of permanent disability and Second Injury Fund liability. As these issues are intertwined, they are best discussed together. Clearly, the claimant has the burden of proving the existence and extent of permanent disability. The burden of proving Second Injury Fund liability is not as clear, and apparently rests on either or both the claimant and/or the respondents.

The first matter to be examined is the existence and extent of permanent physical impairment from the claimant's compensable lumbar injury. It is the duty of this Commission to determine the existence and extent of permanent physical impairment in a manner that conforms to the various requirements of the Act. The Act requires that the existence and extent of permanent physical impairment must be based upon "objective and measurable physical or mental findings", Ark. Code Ann. §11-9-704(c)(1)(B). The term "objective physical findings" is defined by Ark. Code Ann. §11-9-102(16)(A) as those findings which cannot come under the claimant's voluntary control. This subsection further expressly prohibits giving any consideration in determining the existence and extent of permanent physical or anatomical impairment, to pain. In regard to impairment ratings of the spine, the results of straight leg raising tests and range of motion tests are also expressly excluded from consideration. Ark. Code Ann. §11-9-522(g) requires that any permanent physical impairment ratings to the body as a whole must be calculated in a manner that would conform to the official rating guide. Finally, Ark. Code Ann. §11-9-102(4)(F)

requires that the compensable injury must be the major cause (more than 50 percent of the cause) of the permanent physical impairment experienced.

While expert medical opinion is no longer absolutely required in determining the existence or extent of permanent physical impairment, it is certainly helpful and clearly cannot be arbitrarily disregarded. However, in order to be considered or afforded any weight, the expert medical opinion offered must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B). This expert medical opinion must also comply with all of the statutory requirements of the Act.

Dr. Terry Hoyt has authored 3 separate reports purporting to assess the permanent physical impairment experienced by the claimant. The first of these reports is dated September 16, 2003. In this report, he assessed a 15 percent permanent physical impairment based upon limitations of range of motion of the claimant's cervical spine, a 2 percent permanent physical impairment to the body as a whole for limitation of range of motion of the thoracic spine, and a 18 percent impairment to the body as a whole for limitations of range of motion of the claimant's lumbar spine. Dr. Hoyt further appeared to base some of the foregoing impairment on complaints of pain. Finally, he stated that all of these impairments were calculated by using the American Medical Association's Guides to the Evaluation of Permanent Impairment, fifth edition.

The second assessment of permanent physical impairment was made by Dr. Hoyt in a report dated February 24, 2004. Apparently, Dr. Hoyt had been advised that impairment must be calculated by the use of the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition. In this report, Dr. Hoyt assessed an 8 percent permanent physical impairment to the body as whole for loss of range of motion of the cervical

spine. He assessed a further 7 percent permanent physical impairment to the body as a whole for loss of range of motion of the thoracic spine. Finally, he assessed a permanent physical impairment of 18 percent to the body as a whole for loss of range of motion for the lumbar spine. In addition, he assessed a 4 percent permanent physical impairment to the body as whole for defects involving the claimant's cervical spine, a 2 percent permanent physical impairment to the body as a whole for defects involving the claimant's thoracic spine, and a 5 percent permanent physical impairment to the body as a whole for defects involving the claimant's lumbar spine. He indicated that these assessments were made by use of table 75 on page 113, section II(C) of the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.

Dr. Hoyt's final assessment of permanent physical impairment is contained in his report of April 4, 2006. In this report, he assessed a permanent physical impairment of 8 percent to the body as a whole for loss of range of motion of the cervical spine, a permanent physical impairment of 7 percent to the body as a whole for loss of range of motion of the thoracic spine, and an 18 percent permanent physical impairment to the body as a whole for loss of range of motion of the lumbar spine. In addition, he assessed a permanent physical impairment of 4 percent to the body as a whole for structural defects related to the claimant's cervical spine, a permanent physical impairment of 2 percent to the body as a whole for structural defects related to the claimant's thoracic spine, and a 5 percent permanent physical impairment to the body as a whole for structural defects involving the claimant's lumbosacral spine. In this report, Dr. Hoyt further concluded that the claimant had experienced neurological damage ("demyelination") which was secondary to a proximal compromise of

the S1 nerve root. For this neurological defect, Dr. Hoyt assessed a 1 percent permanent physical impairment to the body as a whole based upon sensory loss, a 7 percent permanent physical impairment to the body as a whole that is based on motor involvement, and an additional 1 percent permanent physical impairment to the body a whole based upon "dysesthesias".

The only other assessment of permanent physical impairment that is contained in the medical evidence was made by Dr. Frankie Griffin, an orthopaedic surgeon, on March 2, 2004. The claimant was evaluated and his records were reviewed by Dr. Griffin prior to this report. This was apparently done at the request of the respondents. Dr. Griffin assessed a permanent physical impairment of 7 percent to the body as a whole for the claimant's compensable lumbar injury. He stated that he arrived at this degree of permanent physical impairment by utilizing the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, table 75 on page 113. It was his opinion that the claimant fell under the category of "an unoperated stable herniated disc with or without radiculopathy."

After consideration of all the evidence presented, it is my opinion that the degree of permanent physical impairment assessed by Dr. Griffin is an accurate depiction of the appropriate degree of physical impairment that has resulted from the claimant's compensable lumbar injury and was calculated in a manner that would conform to the various statutory requirements of the Act. In evaluating the opinions of Dr. Griffin and Dr. Hoyt, on the degree of permanent physical impairment produced by the claimant's compensable injury, I have considered the fact that Dr. Hoyt has been the claimant's primary treating physician and Dr. Griffin only evaluated the claimant on one occasion. However, Dr. Griffin has greater credentials and expertise in the area of

medicine associated with the evaluation and treatment of spinal injuries and conditions and the assessment of permanent physical impairment, than that possessed by Dr. Hoyt. It is clear that he is more accustomed to the assessment of permanent physical impairment for spinal injuries in a manner that would comply with the provisions of the Arkansas Workers' Compensation Act, than Dr. Hoyt.

I would note that the majority of the permanent physical impairment that was assessed by Dr. Hoyt, in his various reports, was based upon a loss of range of motion of the spine. Such loss of range of motion of the spine is expressly excluded from the consideration in calculating the degree of permanent physical impairment for workers' compensation injuries, Ark. Code Ann. §11-9-102(16)(A)(ii)(b). It would also appear that some of Dr. Hoyt's calculations of permanent physical impairment are based upon consideration of complaints of pain. Again, complaints of pain are also expressly excluded from consideration in the assessment of permanent physical impairment for workers' compensation injuries, Ark. Code Ann. §11-9-102(16)(A)(ii)(a).

It must also be noted that a substantial portion of the various percentages of permanent physical impairment that have been assessed by Dr. Hoyt involved defects and conditions, which involve the claimant's cervical and thoracic spine. As previously noted, there is no stipulation that the claimant sustained compensable injuries to these portions of his body in the employment related accident of August 18, 2002. There is also no finding of any compensable injuries to these portions of the claimant's body, nor has such a finding been requested. Therefore, any difficulties with the claimant's cervical and thoracic spines cannot be considered in the present determination of the extent of permanent physical impairment for a compensable injury.

I would note that should the impermissible factors be excluded from Dr. Hoyt's reports, his remaining assessment of permanent impairment for the claimant's compensable lumbar injury would be less than that of Dr. Griffin. In his use of table 75 on page 113 of the guides, Dr. Hoyt assessed a 5 percent permanent physical impairment to the body as a whole for the claimant's lumbar defect. This would not appear to be an accurate classification of this defect. Rather, this defect would fall under IIC of table 75, which would carry a 7 percent permanent physical impairment to the body as a whole. This is the impairment assessed by Dr. Griffin.

Dr. Hoyt has also assessed a permanent physical impairment totaling 12 percent to the body as a whole for neurological damage, which he attributes to a "compromise" or impingement on the S1 nerve root by the claimant's disc protrusion at L5-S1. Although he stated that these assessments for neurological damage conformed to the Commission's official rating guide, the method he used to arrive at these specific amounts is not entirely clear.

Dr. Hoyt also stated that the objective support for this neurological damage was a nerve conduction study which was performed on June 8, 2005, some 3 years following the claimant's accident and employment related injury. Curiously, Dr. Hoyt did not mention the electromyogram (EMG) and the nerve conduction studies (NVS) that was performed on the claimant on August 25, 2003, which was performed approximately one year after the accident and injury. According to the report of Dr. Griffin, this study was interpreted as entirely normal.

Dr. Hoyt's conclusion that the claimant's compensable injury had produced compromise or impingement of his S1 nerve root with resulting neurological deficit would also be contrary to the two lumbar MRI studies that

were performed on the claimant on September 13, 2002 and January 11, 2007. Both of these studies were interpreted as failing to show any impingement of the S1 nerve root.

It is further apparent that neither Dr. Standefer or Dr. Kendrick found any evidence of nerve root impingement or neurological deficit during their evaluations of the claimant. The presence of such a condition would clearly have made the claimant a surgical candidate to relieve this impingement.

Unfortunately, neither party has offered the actual EMG/NCV results into evidence. Thus, this Commission does not have the benefit of the neurologist's interpretation of the actual tests. However, I am persuaded that if such deficit existed, it would have been noted by Dr. Standefer, Dr. Kendrick, or Dr. Griffin, all of whom have far more expertise in the diagnosis of neurological deficit and nerve root compromise.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant's compensable lumbar injury was the major cause of a 7 percent permanent physical impairment to the body as a whole. This degree or percentage of permanent physical impairment is supported by objective and measurable physical findings, was calculated in a manner that conforms with the Commission's official rating guide, and gives no consideration to pain, range of motion testing, or other prohibited findings.

IV. FUNCTIONAL DISABILITY AND SECOND INJURY FUND LIABILITY

The remaining two issues consist of the extent of permanent functional disability (including permanent total disability) and Second Injury Fund liability. These issues are so intertwined that they must be discussed together.

The matter of Second Injury Fund liability is controlled by the provisions of Ark. Code Ann. §11-9-525. Under this subsection, certain preliminary facts must be established before this subsection becomes applicable. First, the claimant must be experiencing some degree of permanent impairment or disability, from employment related injury or otherwise, at the time of the compensable injury giving rise to this claim. Secondly, the compensable injury giving rise to this claim must produce additional permanent impairment or disability, and the claimant must be entitled to benefits under the Act for this impairment or disability. Finally, the combined permanent impairments or disabilities must exceed the impairment and disability that resulted from the last compensable injury considered alone and of itself.

It is obvious from the evidence presented that the first requirement for the application of Ark. Code Ann. §11-9-525 has been met. The evidence reveals that the claimant sustained a prior compensable injury in 1993 to his cervical spine. Tests performed in 1993 showed that, at the time of this prior injury, the claimant already had extensive pre-existing degenerative changes and defects involving his cervical spine. The record further shows that the claimant's 1993 employment related injury required surgical intervention for a herniated intervertebral disc, in the form of a discectomy and fusion at C5-6. Under table 75 on page 113 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, this prior cervical injury and resulting surgery would have produced a permanent physical impairment of 10 percent to the body as a whole.

Following the claimant's 1993 employment related injury, the claimant applied for and was granted social security disability benefits. Apparently, the claimant continued to receive these social security disability benefits and was

not gainfully employed until he went to work for this respondent in late May of 2002. Except for the claimant's brief period of employment with this respondent (approximately 10 weeks) and a subsequent brief period of employment at Home Depot (approximately 6 months), the claimant has not been regularly gainfully employed since his cervical injury in 1993.

Thus, it is apparent that the claimant was experiencing both permanent physical impairment and actual disability at the time of the compensable injury giving rise to this claim. This would satisfy the first threshold requirement for application of Ark. Code Ann. §11-525.

It is further apparent that the compensable injury of August 18, 2002 to the claimant's lumbar spine has produced additional permanent physical impairment. The claimant is also unquestionably entitled to appropriate permanent partial disability benefits for this permanent physical impairment under the Act. Thus, the second requirement for application of Ark. Code Ann. §11-9-525 has been met.

Finally, it is also apparent that the evidence shows that the combined degrees or percentages of permanent impairment and disability are greater than that which would have resulted from the last injury alone and of itself. The last injury, considered alone and of itself, would only have resulted in a permanent physical impairment of 7 percent to the body as a whole.

The actual permanent percentage of permanent functional disability for loss of wage earning capacity produced by the last injury, considered alone and of itself, has been made difficult to determine by the multiple inconsistencies and self limiting behaviors that were demonstrated by the claimant on the Functional Capacity Evaluation (FCE) which was performed at the request of Dr. Hoyt on April 3, 2003. However, the restrictions and limitations that would

be reasonably expected from a lumbar injury of the type and nature experienced by the claimant, on August 18, 2002, would be no heavy lifting (in excess of 50 pounds) on an infrequent basis, no repetitive lifting, bending, or twisting at the waist, and no prolonged bending or stooping at the waist.

However, the physical restrictions and limitations on the claimant's potential employment activities, considered alone and of themselves, would produce a percentage or degree of permanent functional disability substantially less than the percentage or degree of combined disability which the claimant is currently experiencing from all injuries and defects, including those to his cervical and thoracic spine. Thus, the final requirement for application of Ark. Code Ann. §11-9-525 has been met.

At this point, it becomes necessary to determine the extent of the overall permanent disability, which the claimant is now experiencing from all causes. The claimant contends that he is currently permanently totally disabled. The burden rests upon the claimant to prove this fact.

A determination of the extent of actual overall permanent disability is complicated by a number of factors. These factors primarily involve the claimant's credibility and motivation.

The claimant's prior work record and experience is somewhat sketchy. In his testimony, the claimant had indicated that he had been a truck driver for approximately 30 years. However, the amount of his social security disability check would indicate rather low social security earnings. In fact, the amount of this check would indicate that it was actually SSI, rather than regular social security disability. If this is the case, then the claimant had not paid in 40 quarters of social security during this described 30 year employment as a truck driver.

After his employment related injury in 1993, the claimant was apparently not gainfully employed in any capacity, until he obtained employment with this respondent on May 22, 2002. In his testimony, the claimant admitted that, when he obtained employment with this respondent, he intentionally lied on his employment application about prior workers' compensation claims and did not inform this respondent that he was currently receiving social security disability benefits or SSI. He also continued to receive these benefits during his brief period of employment with this respondent. In fact, he has continuously drawn these benefits from 1994 through the present.

During the latter part of 2004, the claimant obtained employment as a delivery driver with the Home Depot. He continued with this position for some 6 to 7 months. In April of May of 2005, the claimant indicated that he voluntarily terminated his employment with Home Depot. It was his testimony that he took this action because his right leg was going numb and this caused him to have a wreck. During his employment with Home Depot, the claimant continued to draw his regular benefits from the Social Security Administration.

In his second deposition, the claimant stated that at some time prior to this deposition, his difficulties with his neck or cervical spine had essentially resolved, that he was experiencing no problems with his neck or cervical spine at the time of this deposition, and that he was not seeking the payment of any medical treatment related to his neck or cervical spine (D.21). Obviously, if his neck difficulties had resolved, prior to his lumbar injury of August 18, 2002, the claimant failed to advise the Social Security Administration of this fact. His testimony about his neck or cervical difficulties is also clearly contradictory to the extensive and frequent subjective complaints noted by Dr. Hoyt.

As previously noted, the Functional Capacity Evaluation or FCE, which was performed on the claimant on April 3, 2003, was interpreted as showing multiple inconsistencies in effort and self limiting behaviors by the claimant throughout the testing. However, even with this lack of effort by the claimant, the testing showed still that the claimant was physically capable of performing at least sedentary employment. This was also the expert medical opinion of Dr. Standefer. In fact, it was his opinion that the claimant could have engaged in this type of employment, as early as October 7, 2002. However, the claimant has made no attempt to seek or obtain any type of employment, after he terminated his employment with Home Depot in April or May of 2005.

After consideration of all the evidence presented, I simply do not find the claimant's testimony to be credible, in regard to the nature and extent of his physical limitations, either from his previous injuries or defects or from the compensable injury to his lumbar spine on August 18, 2002. Therefore, in determining the claimant's actual physical limitations and restrictions, I have considered only the usual and reasonably expected limitations that would result from the type of injuries or condition sustained. Both the claimant's prior cervical injury and effects and his compensable lumbar injury would preclude heavy lifting (i.e. over 50 pounds), even on an infrequent basis. These injuries and conditions would further prohibit repetitive lifting of more than 5 pounds. The claimant's cervical injury and condition would prevent him from frequently bending or twisting his neck and tilting his head up and down. His cervical injury and defects would prevent him from maintaining his head in any tilted or twisted position for an extended period of time and from working with his arms at or above shoulder level. The claimant's compensable lumbar injury would prevent him from sitting or standing for extended periods, without the

opportunity to change position. His compensable lumbar injury would also prevent him from repetitive twisting or bending at the waist or working in a prolonged stooped over posture.

Although the claimant testified that he experienced rashes due to his exposure to Agent Orange and problems with post-traumatic stress disorder from his time in the military, there is no evidence that these conditions in any way restrict the claimant's potential employment activities. Therefore, no consideration has been given to these conditions in assessing the claimant's current disability status.

The physical restrictions and limitations, which have been imposed upon the claimant's potential employment activities by both his pre-existing injuries and conditions and his compensable lumbar injury of August 18, 2002, must be considered in light of his age, prior work experience, education, level of intellectual functioning and any other matters reflecting in his employability. The record reveals that the claimant is 57 years old, has a high school education, and has apparently worked primarily as a truck driver. At the hearing, the claimant appeared to be at least of average intelligence. He further appeared to be functioning intellectually at a level greater than that expected from a ninth grade education.

After consideration of all the evidence presented, it is my finding that the claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled from performing all forms of regular gainful employment, as a result of his combined impairments and disabilities. It is my opinion that the claimant continues to be physically capable of performing a number of employments in the clerical and sales area. Further, he is physically capable of performing employments such as

dispatching and light delivery. These potential employments are within the claimant's qualifications and exist in sufficient number to present the claimant with a reasonable expectation of obtain regular gainful employment, were he motivated to do so. Thus, I find that the claimant is not entitled to permanent total disability benefits.

In reaching this decision, I am aware that the claimant has apparently been declared totally disabled by the Social Security Administration. However, the rules and regulations governing such a determination by the Social Security Administration are entirely different than those governing a finding of permanent total disability under the Arkansas Workers' Compensation Act. This Commission is in no way bound by the determination of the Social Security Administration. I would further note that, if this Commission were so bound, the claimant would have been permanently totally disabled prior to the compensable injury prior to this claim. Thus, at the time of this compensable injury he would have had no wage earning capacity to lose.

Pursuant to the provisions of Ark. Code Ann. §11-9-525, I find that the greater weight of the credible evidence establishes that the claimant is currently experiencing permanent partial disability in the amount of 60 percent to the body as a whole. Of this amount, 30 percent is attributable to the claimant's pre-existing cervical injury and defects. This include a permanent physical impairment of 10 percent to the body as a whole and a permanent functional disability (i.e. loss of wage earning capacity) in the amount of 20 percent to the body as a whole. Of the remaining 30 percent, 7 percent reflects the permanent physical impairment caused by the compensable lumbar injury of August 18, 2002. Liability for this 7 percent permanent partial disability rests upon the respondent, Lowe's Home Centers, Inc. The remaining permanent partial

disability of 23 percent to the body as whole is the liability of the Second Injury Fund of the State of Arkansas.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On August 18, 2002, the relationship of employee-self insured employer existed between the parties.

3. On August 18, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$271.00 for total disability and \$203.00 for permanent partial disability.

4. On August 18, 2002, the claimant sustained a compensable injury to his low back or lumbar spine.

5. There is no dispute over the payment of medical expenses incurred through May 4, 2004.

6. The additional medical services rendered to the claimant by and at the direction of Dr. Hoyt, after May of 2004 for the claimant's compensable lumbar injury constitutes reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission. The respondents are not liable for any medical services provided the claimant by or at the direction of Dr. Hoyt for difficulties involving any other portion of his body.

7. There is no dispute over the payment of temporary total disability benefits through September 18, 2003.

8. The claimant has failed to prove by the greater weight of the credible evidence that he continued to be temporarily totally disabled as the result of

his compensable lumbar injury, after September 18, 2003. Specifically, he has failed to prove by the greater weight of the credible evidence that he continued within his healing period from the effects of this compensable injury after September 18, 2003.

9. The claimant's healing period from his compensable lumbar injury ended on September 16, 2003.

10. Ark. Code Ann. §11-9-525 is applicable to the present claim and the Second Injury Fund is liable for benefits as set out in this subsection. Specifically, the greater weight of the evidence establishes that the claimant had pre-existing and permanent disability at the time of his compensable lumbar injury on September 18, 2003. The compensable lumbar injury of September 18, 2003 resulted in additional permanent impairment and disability. The claimant's combined permanent impairments and disabilities exceed the permanent impairment and disability resulting from the compensable lumbar injury of August 18, 2002, considered alone and of itself.

11. The claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled by either the compensable injury of September 18, 2003 or the combined effects of his pre-existing disabilities and impairments together with the disability and impairment produced by the compensable injury of September 18, 2003.

12. The claimant has experienced a combined permanent impairment and disability equivalent to a permanent partial disability of 60 percent to the body as a whole. Of this amount, 30 percent represents the degree or percentage of disability and impairment attributable to all injuries or conditions existing at the time the compensable lumbar injury on August 18, 2002. A permanent partial disability of 7 percent to the body as a whole represents the

permanent impairment produced by the compensable lumbar injury of August 18, 2002. This degree or percentage of permanent physical impairment is the liability of the respondent self insured employer. The balance of a 23 percent permanent partial disability to the body as a whole is the liability of the Second Injury Fund of the State of Arkansas.

13. The respondent self insured employer has controverted the claimant's entitlement to any medical expenses incurred after May of 2004, any temporary total disability benefits accruing after September 18, 2003, and any permanent disability benefits in excess of a permanent partial disability of 7 percent to the body as a whole.

14. The Second Injury Fund has controverted the claimant's entitlement to any permanent disability benefits from the Fund.

15. An appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded. Said fee is solely the obligation of the Second Injury Fund.

ORDER

The respondent self insured employer shall be liable for the expense of the reasonably necessary medical services provided to the claimant for his compensable lumbar injury by and at the direction of Dr. Hoyt, after May 4, 2004. This liability is subject to the medical fee schedule established by this Commission.

The respondent self insured employer shall be liable to the claimant for permanent partial disability benefits equivalent to a permanent partial disability of 7 percent to the body as a whole, and shall be entitled to credit for such benefits previously paid.

The Second Injury Fund of the State of Arkansas shall pay to the claimant permanent partial disability benefits equivalent to a 23 percent permanent partial disability to the body as a whole.

The Second Injury Fund of the State of Arkansas shall pay to the claimant's attorney the maximum statutory attorney's fee on such permanent partial disability benefits. This attorney's fee is to be in addition to such benefits.

The claimant's request for additional temporary total disability benefits should be and hereby is denied for the reasons heretofore set forth in this Opinion.

The claimant's request for permanent total disability benefits should be and hereby is denied for the reasons heretofore set forth in this Opinion.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE