

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E901651

JERRY GEHEB		CLAIMANT
GERBER PRODUCTS		RESPONDENT
ST. PAUL TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	NO. 2	RESPONDENT

OPINION FILED FEBRUARY 19, 2008

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents No. 1 represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

Death & Permanent Disability Trust Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 13, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on August 22, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. However, prior to the commencement of the hearing, various changes were made in the pre-hearing order. First, the stipulation that there was no dispute, at present, over temporary total disability benefits was withdrawn and the issue of the claimant's entitlement to additional temporary total disability benefits, from March 5, 2007 through April 11, 2007 was added. The stipulations were also amended to reflect that the claimant's FINAL

healing period ended on May 7, 2007 (there are contentions by the parties that the claimant has undergone a series of healing periods). A copy of the pre-hearing order with the foregoing amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including January 22, 1999, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$303.00 for total disability and \$227.00 for permanent partial disability.
3. On January 22, 1999, the claimant sustained compensable injuries to his cervical spine and right shoulder.
4. There is no dispute, at present, over payment of medical expenses.
5. The respondents have paid permanent partial benefits for a permanent physical impairment of 16 percent to the body as a whole for the compensable shoulder injury and a 7% permanent physical impairment to the body as a whole for the compensable cervical injury.
6. The claimant's final healing period ended on May 7, 2007.

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

1. whether the claimant sustained a compensable injury to his back in the accident on January 22, 1999.
2. The extent of permanent physical impairment produced by the claimant's compensable injuries.
3. The extent of permanent disability, including permanent total disability.
4. The benefits subject to the respondents' \$75,000.00 limited on permanent total disability benefits.
5. Appropriate attorney's fees.
6. The claimant's entitlement to additional temporary total disability from March 5, 2007 through April 11, 2007.

In regard to these issues, the claimant contends:

"The claimant is entitled to temporary total disability from March 1, 2007 through a date yet to be determined as well as a statutory attorney's fee."

In regard to these issues, the respondent employer-carrier contends:

"The respondents will contend that the claimant repeatedly missed appointments with or made at the direction of his medical providers and that this refusal to cooperate with the treatment recommended by his medical providers warranted suspension of indemnity benefits for the disputed period."

In regard to these issues, the respondent Death & Permanent Total Disability Trust Fund contends:

"If the claimant is found to be permanently and totally disabled, Respondent No. 1 is not entitled to credit for payment of permanent disability benefits against its maximum liability as defined in A.C.A. §11-9-502 prior to the date upon which the claimant reached the end of his healing period and became

permanently and totally disabled pursuant to Death and Permanent Total Disability Trust Fund v. Legacy Insurance, ___ Ark. App. ___ (2006).”

DISCUSSION

I. BACK INJURY

The first issue is whether the claimant also sustained a “compensable” injury to his back in the employment related accident of January 22, 1999. The burden rests upon the claimant to prove all of the statutory requirements for a “compensable” injury to this portion of his anatomy.

In order to prove that he sustained a “compensable” injury to his back, the claimant must first satisfy the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). This subsection of the Act requires that the claimant establish by medical evidence the actual existence of the physical injury to his back, which he now alleges to be compensable. Further, this subsection requires that the actual existence of this physical injury must be supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The claimant must next prove that any medically established and objectively documented physical injury to his back satisfies the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) That the injury arose out of and occurred in the course of the employment;
- (2) That the injury was caused by a specific incident;

(3) That the injury is identifiable by time and place of occurrence;

(4) That the injury caused internal or external physical harm to the claimant's body;

(5) That the injury required medical services or resulted in disability.

In the present claim, the medical evidence presented totally fails to "establish" the actual existence of any physical injury involving any portion of the claimant's spine, except his cervical spine or neck. There is also absolutely no evidence (medical or otherwise) of any objective findings to support a physical injury to any portion of the claimant's spine, except his cervical spine or neck.

Since his employment related accident in 1999, the claimant has been seen and treated by multitude of physicians. These physicians include two neurosurgeons, three orthopaedic surgeons, two neurologists, a chronic pain management specialist, and various general practitioners and emergency room physicians. During this period, the claimant has undergone extensive diagnostic testing and innumerable physical examinations. There is not a single medical report or record, which indicates that any of these physicians have diagnosed the presence of a physical injury involving the claimant's "back" or spine, other than his cervical spine or "neck". There is also no indication in the medical record that any of the numerous tests and evaluations that have been performed on the claimant note the presence of symptoms or findings, either objective or subjective, that would be indicative of the presence

of a physical injury to the claimant's back (i.e. any portion of his spine, other than his cervical spine).

Essentially, the only evidence the claimant has presented to support his claim that he also sustained an injury to his back (i.e. his spine other than his cervical spine) in the employment related accident of January 22, 1999, is his own testimony. While the claimant's testimony, if credible, could be sufficient to satisfy the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i), it would in no way satisfy or excuse the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). The claimant's failure to present any medical evidence to establish the actual existence of a physical injury to his back (i.e. his spine other than his cervical spine) and his failure to prove the presence of any "objective findings" to support the existence of such an injury prevents a finding that he also sustained a "compensable injury" to his back in the employment related incident of January 22, 1999.

In passing, I would note that even had the claimant satisfied the statutory requirements of Ark. Code Ann. §11-9-102(4)(D), his testimony is not sufficiently credible to prove the existence of a causal relationship between the employment related accident of January 22, 1999 and any physical injury to his back (i.e. his spine, other than his cervical spine). First, the claimant's testimony, in regard to his alleged "back" difficulties is internally inconsistent. He initially testified that he began experiencing difficulties with his "back" following his surgery. He subsequently testified that these difficulties (in the form of

pain) had been present, since the employment related accident. Secondly, the claimant's testimony, in regard to his alleged "back" complaints, is contradictory to the medical evidence presented. In the voluminous medical record, there is absolutely no mention of any findings or symptoms, either objective or subjective which involve any portion of the claimant's spine, other than his cervical spine. In fact, many of the records describing the various examinations and testing on the claimant expressly note that this portion of the claimant's body appears to be functioning normally. If the claimant had been continuously experiencing difficulties with his "back" since 1999, he would have consistently failed to report these symptoms to his numerous physicians. It would be even more inconceivable that all of these physicians would have failed to record such complaints.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to additional temporary total disability benefits for the period of March 5, 2007 through April 11, 2007. The burden rests upon the claimant to prove that, during this period, he was within his healing period from the effects of either his admittedly compensable cervical injury or his admittedly compensable right shoulder injury and was also rendered totally disabled from regular gainful employment as a result of one or both of these injuries.

The duration of the healing period is a medical question, which must be resolved on the basis of the medical evidence presented. The healing period is defined as the period for healing

of the actual physical damage caused by the compensable injury, Ark. Code Ann. §11-9-102(12). Once the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury and nothing further in the way of time or medical treatment offers the expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms and the necessity of treatment for these symptoms is not sufficient, in and of itself, to extend the healing period, once the underlying physical damage caused by the compensable injury has stabilized. However, the claimant may re-enter his healing period, if the actual physical damage from the compensable injury again becomes unstable and requires additional medical services to restore stability.

The reports and records of Dr. Joseph Queeney and Dr. James Blankenship show that the actual physical damage caused by the claimant's compensable cervical injury (at the C5-6 level) had stabilized, prior to March 5, 2007. Although these physicians noted the occurrence of various degenerative changes to the claimant's cervical spine (at levels above and below the initial injury site), both of these physicians attributed the claimant's continuing chronic complaints with his neck and upper extremities to permanent neurological damage that occurred contemporaneously with or shortly after the initial compensable injury. It was the further opinion of both of these physicians that further active medical treatment would not be reasonably expected to reduce or

improve this permanent damage. The only further medical services recommended for the claimant's compensable cervical injury were in the form of medication intended merely to manage or reduce the claimant's chronic pain.

Both Dr. Queeney and Dr. Blankenship are board certified and are competent neurosurgeons with considerable expertise in the area of medicine associated with the treatment of cervical injuries, such as that sustained by the claimant. Their expert medical opinions are clearly entitled to substantial weight and credit. In the present case, I find these opinions to be convincing. As the claimant has failed to prove that he continued within his healing period for his compensable cervical injury, on and after March 5, 2007, he would not be entitled to additional temporary total disability benefits for the period of March 5, 2007 through April 11, 2007, as a result of his admittedly compensable cervical injury.

The reports and records of Dr. Greg Jones show that the claimant underwent a fifth surgery for his compensable right shoulder injury on September 14, 2006. This surgery was in the form of an arthroscopic biceps tenotomy and debridement of recurrent scarring or adhesions. Following this procedure, the claimant underwent a routine follow up, which included a course of physical therapy. The last physical therapy record is dated September 18, 2006. There are no records or reports of any follow up treatment by Dr. Jones after September of 2006.

During December of 2006, the claimant underwent an extensive evaluation by Dr. Blankenship, primarily for his compensable cervical injury. On March 23, 2007, the claimant was seen by Dr. Bart Stills (apparently the claimant's family physician) for blood pressure difficulties. On April 6, 2007, the claimant was again seen by Dr. Stills for treatment of an abscess on his scalp or neck.

On April 12, 2007, the claimant underwent a Functional Capacity Evaluation, at the request of Dr. Jones. The claimant was again evaluated by Dr. Jones on May 7, 2007. According to the report of Dr. Jones, it would appear that the purpose of this evaluation was to go over the Functional Capacity Assessment and discuss the results with the claimant. Although Dr. Jones indicated that future potential treatment for the shoulder was discussed, it is clear from his report that he was not recommending this treatment at that time.

After consideration of all of the medical evidence presented, it is my opinion that the greater weight of the medical evidence fails to show that, during the period of March 5, 2007 through April 11, 2007, the claimant actually received or reasonably required any medical services directed toward the treatment of the actual physical damage caused by his compensable right shoulder injury. While the claimant may have undoubtedly continued to experience chronic symptoms, during this period, these symptoms were chronic or permanent and their mere presence is not

sufficient, in and of itself, to prove the presence of a healing period during this interval.

Therefore, I find that the claimant has failed to prove that he continued within his healing period from the effects of his admittedly compensable right shoulder injury from March 5, 2007 through April 7, 2007. As a result, he would not be entitled to additional temporary total disability benefits during this time for his admittedly compensable right shoulder injury.

III. PERMANENT PHYSICAL IMPAIRMENT

The next issue concerns the extent of permanent physical impairment that the claimant has experienced as a result of his compensable injuries. The stipulations reflect that the respondents have voluntarily accepted a permanent physical impairment of 7 percent to the body as a whole for the claimant's compensable cervical injury and 16 percent to the body as a whole for his compensable right shoulder injury. The burden rests upon the claimant to prove that he has experienced any permanent physical impairment in excess of these amounts.

Pursuant to Ark. Code Ann. §11-9-522(g)(1)(A), any assessment of permanent physical impairment must be calculated in a manner that conforms to the Commission's official rating guide, which in this case is the American Medical Association's Guides to the Evaluation of Physical Impairment, fourth edition. Ark. Code Ann. §11-9-704(c)(1)(B) requires that any assessment of permanent physical impairment must be supported by "objective and measurable" physical or mental findings. Ark. Code Ann. §11-9-102(16)(A) sets

out the various factors which can be considered as “objective findings” to support a determination of permanent physical impairment. Finally, the compensable injury must be the “major cause” of the degree of permanent physical impairment assessed, Ark. Code Ann. §11-9-102(4)(F)(ii).

Applicable case law provides that it is the duty of this Commission, rather than any particular medical expert to determine the existence and extent of permanent physical impairment in a manner that conforms to the Act. In essence, although expert medical evidence on the existence and degree of permanent physical impairment is relevant, it is not controlling. However, in order to be relevant, any expert medical opinion on this issue must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B).

In his report of October 30, 2000, Dr. Joseph Queeney assigned the claimant a permanent physical impairment of 7 percent to the body as a whole for his compensable cervical injury and resulting surgery. Although he stated that this assessment was made in conformance with the Guides of the Evaluation of Permanent Impairment, fourth edition, he does not describe the method used or the factors considered. No other medical opinion has been introduced in regard to the extent of permanent physical impairment for the claimant’s compensable cervical injury.

One of the difficulties with assessing permanent physical impairment in accordance with the methods provided by the American Medical Association’s Guides to the Evaluation of Permanent

Impairment, fourth edition, is that some of the methods provided by this Guide consider pain and other subjective factors, which would directly conflict with the express requirement of the Act. In assessing the degree of permanent physical impairment for spinal injuries, this Commission has traditionally used table 75 on page 113 of the Guides. This method not only yields more consistent results, but also gives no consideration to any subjective or otherwise prohibited factors. It is my opinion that, in the present case, the use of this table is the appropriate method to assess the degree of permanent physical impairment for the claimant's compensable cervical injury.

The medical evidence presented unquestionably shows that, as the result of his compensable cervical injury, the claimant underwent a cervical discectomy and single level spinal fusion at C5-6. Under Section IV. D, an injury with this accompanying surgical procedure would carry a permanent physical impairment of 10 percent to the body as a whole. I find this degree of permanent physical impairment to be the appropriate rating for the claimant's compensable cervical injury.

The medical records of Dr. Jeffrey Evans reflect that he performed three surgical procedures on the claimant's right shoulder, as a result of the compensable right shoulder injury. These surgical procedures consisted of a subacromial decompression (July 21, 1999), another subacromial decompression (September 28, 2004), and a third subacromial decompression with a rotator cuff repair (October 27, 2004). Initially, Dr. Evans appears to have

assessed a permanent physical impairment for the claimant's compensable right shoulder injury, on or about June 29, 2000. However, this impairment is not expressly set out until a handwritten notation on the June 29, 2000 report that is dated September 1, 2000. This permanent physical impairment was 7 percent to the upper extremity. Subsequently, on April 4, 2002, Dr. Evans increased his assessment of permanent physical impairment for the claimant's compensable right shoulder injury and resulting surgeries to 27 percent to the right upper extremity or 16 percent to the body as a whole. Although Dr. Evans stated that this last assessment was made by using the methods provided by the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, it would appear that this degree of permanent physical impairment was based upon measurements of loss of range of motion of the upper extremity and possibly a loss of strength. It is impossible to tell from the evidence presented whether any measured loss of range of motion would constitute an "objective finding", as required by the Act. No additional impairment was assessed by Dr. Evans, following the third surgical procedure on October 27, 2004.

The medical records of Dr. Jones reveal that he has performed two surgical procedures as the result of the compensable injury to the claimant's right shoulder. The first of these procedures was on February 2, 2006. This was an arthroscopic debridement of a SLAP tear, a revision acromioplasty with debridement, a bursectomy with CA ligament release, debridement of dorsal rotator cuff abrasions,

and an AC joint resection (a resection of the acromion). At the same time, Dr. Jones also performed open surgery on the claimant's right wrist, in the form of a carpal tunnel release. Subsequently, Dr. Jones performed an arthroscopic biceps tendonectomy on September 13, 2006.

In his report of July 9, 2007, Dr. Jones indicated that the physical changes occasioned by the additional surgical procedures for the claimant's compensable shoulder injury had yielded an additional permanent physical impairment (i.e. impairment in excess of the 16 percent previously assessed by Dr. Evans). It was Dr. Jones' conclusion that these procedures had produced an additional permanent physical impairment of 5 percent to the upper extremity or 3 percent to the body as a whole.

In his report of August 17, 2007, Dr. Jones explained that he assessed this degree of permanent physical impairment by using table 15 on page 54 of the fourth edition of the AMA Guides. However, he also recognized that this table was not expressly designated as appropriate for the assessment of the actual additional permanent damage occasioned by the claimant's compensable injury and required surgery.

The medical evidence presented clearly reveals that the claimant has experienced permanent damage to various structural components of his right shoulder. This evidence further shows that during the five surgical procedures performed to correct or stabilize this damage, the claimant's right shoulder joint has been substantially altered or reconstructed. It is my further opinion

that the medical evidence presented is sufficient to show that these surgical reconstructions of the claimant's right shoulder would represent a "total shoulder arthroplasty, without an implant", as those terms are used in the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, page 61.

Under table 27, on page 61 of the Guides, this total arthroplasty (without implant), would entitle the claimant to a permanent physical impairment rating of 24 percent to the upper extremity. In turn, this would convert to a 14 percent permanent physical impairment to the body as a whole, table 3 on page 20 of the Guides.

After consideration of all the evidence presented, it is my opinion that the more appropriate method for accurately assessing the percentage of permanent physical impairment produced by the claimant's compensable right shoulder injury, would be the use of table 27 on page 61 of the Guides. This method clearly does not give any consideration to any subjective findings, including pain and loss of range of motion or strength. This method would be based solely upon the objectively documented permanent changes to the claimant's right shoulder joint, which have occurred as a result of his compensable injury. On the other hand, the assessment made by Dr. Evans may or may not be based upon objective findings. The additional permanent physical impairment assessed by Dr. Jones was obviously not calculated in a manner that would conform to the Guides.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he has sustained a 10 percent permanent physical impairment to the body as a whole, as a result of his admittedly compensable cervical injury. It is my further opinion that the claimant has proven by the greater weight of the credible evidence that he has sustained a permanent physical impairment of 14 percent to the body as a whole as a result of his admittedly compensable right shoulder injury. Thus, he would have a total permanent physical impairment of 24 percent to the body as a whole, as a result of his compensable injuries.

IV. EXTENT OF PERMANENT DISABILITY, INCLUDING PERMANENT AND TOTAL DISABILITY

_____The next issue to be addressed is the extent of permanent functional disability, or loss of wage earning capacity, which the claimant has sustained as a result of his compensable injuries. This disability would be in addition to or in conjunction with any permanent disability attributable to the claimant's permanent physical impairment from his compensable injuries. Included in this issue is the matter of whether the claimant has been rendered permanently totally disabled by his compensable injuries. The burden again rests upon the claimant to prove the existence and extent of permanent functional disability or loss of wage earning capacity, including permanent total disability.

In the present case, the claimant's compensable injuries involve portions of his body that are not "scheduled" under the Act. Thus, his entitlement to permanent disability benefits for

permanent functional disability or loss of wage earning capacity (including permanent total disability) is controlled by the provisions of Ark. Code Ann. §11-9-522.

The first portion of this section to consider is found in subsection (b)(2) and subsection (c)(1-2). These portions of this subsection provide that the claimant is not entitled to permanent disability benefits for permanent functional disability or loss of wage earning capacity, where he has, subsequent to his injury, returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of his accident. The stated purpose of these various subsections is to allow a respondent to reduce or diminish its liability for permanent functional disability, where such disability no longer exists or is caused by the claimant's discharge for misconduct in connection with the work, or his voluntary cessation of work without good cause. Under these subsections, the burden rests upon the respondents to prove the factors necessary to invoke these provisions.

The evidence presented shows that, subsequent to the claimant's compensable injuries, he did return to employment with this respondent on several occasions. However, on each of these occasions, the claimant returned to only a limited or light duty employment position, oftentimes restricted to one-handed work only. Following each of these periods of re-employment, the claimant required additional medical services for his compensable right

shoulder injury, and would again be medically restricted from performing any type of employment. Each of these subsequent periods of active treatment involved further surgical reconstruction of his injured right shoulder.

The claimant's testimony, which I find to be credible, shows that he resigned his employment with the respondent in September of 2006 (shortly after his last surgery). This resignation was necessary in order to preserve his retirement benefits from the respondent. He further stated that, since that time, he has not worked in any capacity and knows of no employment that he is physically capable of performing, due to the physical limitations and restrictions resulting from his compensable injuries.

After consideration of all the evidence presented, it is my opinion that the respondents have failed to present sufficient evidence to establish the factors necessary to invoke the provisions of Ark. Code Ann. §11-9-522(b)(2). Clearly, the claimant is not currently employed by the respondent or any other employer. The termination of his employment with this respondent was not the result of a discharge for misconduct or a voluntary resignation of employment by the claimant without good cause connected with the work. There is also no evidence presented to show that the claimant currently has a bona fide or reasonably obtainable offer of employment at wages equal to or greater than his wage at the time of his accident. Therefore, the claimant would not be barred from receiving benefits, at this time, for

permanent functional disability or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-521(b)(2).

In determining the extent of permanent functional disability or loss of wage earning capacity, Ark. Code Ann. §11-9-522(b)(1) expressly mandates that this Commission consider the percentage of permanent physical impairment, the claimant's age, education, and work experience. It also requires this Commission to consider any other matters reasonably expected to affect the claimant's future wage earning capacity. Clearly, two of these "other factors" would be the actual limitations or restrictions on the claimant's potential employment activities, as a result of his compensable injuries, and the claimant's motivation to return to employment.

As previously noted, the evidence shows that the claimant has experienced a 24 percent permanent physical impairment to the body as a whole, as the result of his compensable cervical and right shoulder injuries. He is relatively young, at 46 years of age. He completed 12 years of schooling but did not graduate from high school nor has a GED. He has also completed some courses through Westark Community College. At the hearing, he appeared to be intellectually at his stated age and educational level. He does not appear to have any particular vocational training or skills. His employment history consists primarily of an 18 year period of employment with the present respondent in a factory labor position.

He testified that he has not looked for employment, since his resignation from the respondent and is not aware of any type of employment for which he would otherwise be qualified that he could

physically perform. There is no indication that the respondents have offered the claimant, nor does it appear that the claimant has expressly requested, any re-employment assistance or rehabilitation services.

The greater weight of the evidence presented, particularly the medical evidence, shows that the claimant is experiencing some degree of continuous discomfort that involves his neck, right shoulder, and upper extremities (primarily the right). The greater weight of the evidence presented shows that this constant discomfort is the result of the permanent damage from his compensable injuries.

A Functional Capacity Evaluation has been performed on the claimant at the River Valley Rehab Center. This evaluation occurred on April 12, 2007. Although the examiner noted that the claimant gave "overall poor effort" on testing, this poor effort was attributed by both Dr. Jones and the FCE examiner to the claimant's chronic pain. The FCE examiner specifically noted that the claimant's "pain behaviors" remained consistent through the testing. The reports of Dr. Jones and Dr. Blankenship reveal that it is their expert opinion that the claimant's chronic pain complaints are bona fide and are the result of permanent physical damage from his compensable injuries. Based upon the FCE evaluation, the examiner was of the opinion that the claimant could at least perform employment positions that would fall within the "sedentary work" category, as defined by the U. S. Department of Labor.

As established by the medical evidence, the claimant has significant limitations involving his upper extremities, particularly his right upper extremity. These limitations include a substantial reduction in mobility and strength of the right shoulder. The claimant would be unable to frequently or repetitively lift or manipulate objects at any level with his right upper extremity or to lift or manipulate objects even occasionally, at or above shoulder level. He would only be physically capable of occasionally lifting, carrying, or manipulating objects of 10 pounds or less with his right upper extremities only then below shoulder level. Clearly, he would also be unable to frequently bend or twist his head maintain his head in a bent or twisted position for any significant period of time. The permanent neurogenic damage from his compensable cervical injury, as noted by Dr. Blankenship, would prevent the use of his hands for fine manipulations, particularly his right hand. All of these restrictions are consistent with the type and nature of the claimant's compensable injuries and the permanent damage these injuries would reasonably be expected to produce.

I would also note that the FCE also shows apparent limitations on the claimant's potential physical activities, as the result of a neuropathy involving his lower extremities. However, there is no evidence presented to show that this neuropathy, if it exists, is in any way related to the claimant's compensable injuries. In fact, the greater weight of the evidence fails to establish the existence of such a neuropathy. Except for the FCE, the medical record

presented in no way establishes that the claimant is actually experiencing any neuropathy that involves his lower extremities. I have given no consideration to such limitations in the determination of the extent of permanent functional disability.

I would also note that the record does show that the claimant is diabetic, has hypertension, has had prostate cancer, and has had MRSA. However, the evidence presented does not show that these conditions are currently producing any degree of permanent "disability" or loss of wage earning capacity. Rather, the greater weight of the evidence shows that the permanent "disability" or loss of wage earning capacity, which the claimant is currently experiencing, is solely the result of the permanent damage caused by his compensable injuries. Thus, these compensable injuries are the "major cause" of his current degree or percentage of permanent functional disability or loss of wage earning capacity.

Clearly, the permanent restrictions imposed by the claimant's compensable injuries would prevent him from returning to his pre-injury employment position with this respondent. These restrictions would also prevent the claimant from performing any employment positions involving heavy manual labor. Further, these restrictions would prevent him from performing the vast majority of assembly line or factory type employment positions. Specifically, those employment positions required either strenuous or repetitious use of his hands and arms. The foregoing potential employment positions would represent the vast majority of employment positions for which this claimant would otherwise be qualified. Thus, the claimant has

undoubtedly experienced a significant degree or percentage of permanent functional disability or loss of wage earning capacity, as a result of his admittedly compensable injuries.

However, as previously noted, the claimant is relatively young, being only 46 years of age. He is also of at least average intelligence and possesses educational skills approximating those of a high school graduate. These factors would increase the potential for his re-employment in a new or different type of work. Unfortunately, he does not appear to be particularly interested in any type of retraining or motivated to returning to employment in some new capacity.

It is my opinion that the claimant is honestly convinced that he is totally disabled from ever again being gainfully employed and has simply given up on the prospect of re-employment. However, the fact that he is sincere in this belief does not relieve this Commission from its duty to consider all potential areas of employment reasonably available to the claimant.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that his admittedly compensable cervical and right shoulder injury have rendered him permanently and totally disabled. The evidence shows that the claimant would still retain the physical capacity to perform sedentary employments. These would include positions in sales, clerical work, light delivery, and some factory or assembly line positions. Although the claimant has not been shown to have any particular prior experience in these areas, such experience is not

generally a necessary pre-requisite for many of these positions. Clearly, the claimant has the intellect and education to perform many of these employments. These employment positions exist in sufficient number, in the area of the claimant's residence to provide him with a reasonable expectation of regular employment.

However, as previously stated, it is my opinion that the greater weight of the credible evidence does prove that the claimant has experienced a substantial degree or percentage of permanent functional disability or loss of wage earning capacity as a result of his compensable injuries. First, the number of potential employment positions that remain available to the claimant have been greatly reduced by his compensable injuries. Secondly, the wages he would be reasonably expected to receive from these remaining positions would be greatly less than the wages he could reasonably expected to receive and was actually receiving at the time of his compensable injuries. After consideration of all the relevant factors, as outlined in Ark. Code Ann. §11-9-522(b), I find that the claimant has proven by the greater weight of the credible evidence that he has sustained a permanent functional disability or loss of wage earning capacity, as a result of the effects of his admittedly compensable injuries, equivalent to a permanent partial disability of 50 percent to the body as a whole. The claimant would be entitled to permanent partial disability benefits for this permanent functional disability or loss of wage earning capacity. This permanent partial disability is in addition

to the permanent partial disability to which he is entitled for permanent physical impairment.

V. BENEFITS SUBJECT TO THE \$75,000.00 LIMIT

The final issue raised by the parties concern what benefits are subject to the \$75,000.00 limit that is found in Ark. Code Ann. §11-9-502(b). Clearly, this limit applies only to permanent total disability benefits. As I have found that the claimant has failed to prove his entitlement to permanent total disability, this section would be inapplicable to the present claim.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including January 22, 1999, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, including January 22, 1999, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$303.00 for total disability and \$227.00 for permanent partial disability.

4. On January 22, 1999, the claimant sustained compensable injuries to his cervical spine and right shoulder.

5. The claimant has failed to prove by the greater weight of the credible evidence that he also sustained a compensable injury to his "back" (i.e. any portion of his spine other than his cervical spine) in the employment related accident of January 22, 1999. Specifically, the claimant has failed to establish by

medical evidence, which is supported by medical findings, the actual existence of any physical injury to his back or spine other than his cervical spine. Further, the claimant has failed to prove that he sustained any physical injury to his back or spine other than his cervical spine, on January 22, 1999, that arose out of and occurred in the course of his employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal or external physical harm to his body, and that required medical services or resulted in disability.

6. The claimant would not be entitled to any benefits under the Act for his alleged "back" injury, including medical services, temporary disability benefits, permanent disability benefits, etcetera.

7. There is no dispute, at present, over the claimant's entitlement to reasonable and necessary medical services for his compensable cervical and right shoulder injuries.

8. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to additional temporary total disability benefits for the period of March 5, 2007 through April 11, 2007. 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 either of his compensable injuries during this period.

9. The claimant's compensable and right cervical injuries are the major cause of a permanent physical impairment of 24 percent to the body as a whole, with the claimant's compensable cervical

injury being the major cause of a 10 percent permanent physical impairment to the body as a whole and his compensable right shoulder injury being the major cause of a 14 percent permanent physical impairment to the body as a whole.

10. The claimant has failed to prove by the greater weight of the credible evidence that his compensable and right shoulder injuries have rendered him permanently and totally disabled.

11. The greater weight of the credible evidence does establish that the claimant's compensable cervical and right shoulder injuries are the major cause of permanent functional disability or loss of wage earning capacity which would be equivalent to a permanent partial disability of 50 percent to the body as a whole. This would be in addition to the permanent partial disability for permanent physical impairment, in the amount of 24 percent to the body as a whole.

12. Ark. Code Ann. §11-9-502(b) is inapplicable to the present claim.

13. Respondents No. 1 have controverted the claimant's entitlement to additional temporary total disability benefits for the period of March 5, 2007 through April 11, 2007, the respondents' entitlement to benefits for the alleged compensable injury to his back (i.e. his spine other than his cervical spine), and his entitlement to permanent disability benefits in excess of a permanent partial disability of 23 percent to the body as a whole.

14. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded, which are in excess of 23 percent to the body as a whole.

ORDER

Respondents No. 1 shall pay to the claimant permanent partial disability benefits equivalent to a 74 percent permanent partial disability to the body as a whole and shall be entitled to credit for all such benefits previously paid.

Respondents No. 1 continue to remain liable for all reasonably necessary medical services required by the claimant for his compensable injuries.

Respondents No. 1 shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded, which are in excess of 23 percent to the body as a whole. One-half of this attorney's fee is the obligation of these respondents in addition to these benefits. The remaining one-half of this attorney's fee shall be withheld by these respondents from these benefits.

The claimant's request for additional temporary total disability benefits from March 5, 2007 through April 11, 2007 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