BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F512647

ROBERT STEPHENSON, EMPLOYEE	**CLAIMANT**
MEYER ROOFING & SHEET METAL, INC., EMPLOYER	**RESPONDENT NO. 1**
COMMERCE & INDUSTRY INS. CO., C/O CHARTIS CLAIMS, INC., CARRIER/TPA	**RESPONDENT NO. 1**
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	**RESPONDENT NO. 2**

OPINION FILED MAY 7, 2013

Hearing before Administrative Law Judge O. Milton Fine II on February 6, 2013, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas, excused from participation.

STATEMENT OF THE CASE

On February 6, 2013, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on November 5, 2012. A prehearing order entered on that date 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. Sixth and seventh stipulations were added, resulting in the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employment/employer/carrier relationship existed on or about November 17, 2005, when Claimant sustained compensable thoracic vertebral injuries as the result of a fall.
3. Claimant's average weekly wage was $352.00, which entitled him to compensation rates of $235.00/$176.00.
4. Claimant reached maximum medical improvement and the end of his healing period on May 30, 2006.
5. Claimant was assigned a four percent (4%) anatomical impairment rating to the body as a whole, which was accepted and paid by Respondents No. 1.
6. Respondents No. 1 have controverted Claimant's entitlement to permanent and total and/or wage loss disability benefits.
7. If called to testify, William Stephenson would corroborate the testimony of Kim Stephenson that he has to come to Claimant's household and perform any type of heavy lifting or yard work that is needed there.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. After an amendment of the second issue, the following were litigated:

1. Whether the Arkansas Workers' Compensation Act is constitutional.

2. Whether Claimant is entitled to additional treatment in the form of pain management.

3. Whether Claimant is entitled to additional treatment by Dr. Rolland Bailey.

4. Whether Claimant is permanently and totally disabled.

5. Whether Claimant is entitled to a controverted attorney's fee.

Contentions

The respective contentions of the parties read:

Claimant:

1. Claimant contends that he has been rendered permanently and totally disabled as a result of his compensable work-related injuries and is entitled to permanent and total disability benefits

2. In the alternative, Claimant contends that if the Commission does not find that he is permanent and totally disabled, he is entitled to an award of wage loss.

3. Claimant contends that he is still in need of medical care and pain management.

Respondents No. 1:

1. Respondents No. 1 contend that Claimant is not permanently and totally disabled.

2. Claimant is not entitled to an award of wage loss disability benefits in excess of benefits for his permanent physical impairment.

3. Claimant reached maximum medical improvement for his compensable thoracic injuries as of May 30, 2006.

4. Even if Claimant had not reached maximum medical improvement as of May 30, 2006, he was not totally disabled as of this date, his functional capacity evaluation having shown the ability to do heavy work.
5. Respondents No. 1 deny liability for additional medical care for Claimant's compensable thoracic injuries.
6. Respondents No. 1 controvert any claim for a cervical injury and deny liability for any benefits attributable to a claimed cervical injury.
7. Benefits for a four percent (4%) permanent physical impairment rating to the body as a whole for Claimant's thoracic injury have been paid.
8. Respondents No. 1 deny liability for benefits for depression.
9. Respondents No. 1 ask leave to make additional contentions as discovery proceeds.
10. Claimant is not entitled to medical care provided by Dr. Shazie Siddiqui, such care not being reasonably necessary in connection with his compensable injury.
11. Respondents No. 1 contend that additional treatment by Dr. Rolland Bailey is not reasonable or necessary.

Respondent No. 2:

1. If Claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502. Therefore, the Trust Fund has not controverted Claimant's entitlement to benefits.

2. The Death and Permanent Total Disability Trust Fund will state its remaining contentions upon completion of discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, deposition testimony, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the hearing 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 proven by a preponderance of the evidence that the pain management that is reflected in the medical records in evidence was reasonable and necessary for the treatment of his compensable thoracic spine injury.
4. Claimant has proven by a preponderance of the evidence that he is entitled to additional treatment of his compensable thoracic spine injury in the form of continued pain management.
5. Claimant has proven by a preponderance of the evidence that the treatment rendered him by Dr. Rolland Bailey for his compensable thoracic spine injury (including pain management) that is in evidence was reasonable and necessary.

6. Claimant has not proven by a preponderance of the evidence that he is entitled to additional treatment by Dr. Bailey.
7. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.
8. Claimant has proven by a preponderance of the evidence that he sustained wage loss of sixteen percent (16%).
9. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 2002).

CASE IN CHIEF

Summary of Evidence

______The witnesses at the hearing were Claimant; his wife, Kim Stephenson; and his mother, Judy Stephenson. As discussed above, the parties stipulated to the testimony of William Stephenson.

Along with the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Commission Exhibit 2, a letter from counsel for Respondent No. 2 to the Commission dated January 24, 2013, consisting of two numbered pages; Claimant's Exhibit 1, his June 7, 2012 motion to recuse, brief in support thereof, and attached documentation, consisting of 394 pages(per Commission policy, this exhibit, separately bound, has been retained in the Commission's files); Claimant's Exhibit 2, correspondence pertaining to his constitutional issue, consisting of one index page and seven numbered pages thereafter; Claimant's Exhibit 3, a compilation of his medical records, consisting of one index page and 28 numbered pages thereafter; Claimant's

Exhibit 4, his December 19, 2011 vocational evaluation by Sarah Moore, MS, CRC, CLCP, consisting of one index page and seven numbered pages thereafter; Claimant's Exhibit 5,[1] the transcript of the deposition of Rick Byrd taken July 24, 2012, consisting of 44 transcribed pages plus 149 pages of exhibits; Respondents No. 1 Exhibit 1, another compilation of Claimant's medical records, consisting of a 35-page abstract, a six-page index, and 182 pages thereafter;[2] Respondents No. 1 Exhibit 2, additional medical records, consisting of a 12-page abstract, a one-page index, and 11 numbered pages thereafter; Respondents No. 1 Exhibit 3, additional medical records, consisting of a three-page abstract, a two-page index, and 37 numbered pages thereafter; Respondents No. 1 Exhibit 4, additional medical records, consisting of two index pages and 29 numbered pages thereafter; Joint Exhibit 1, the transcript of the deposition of Claimant taken August 14, 2007, consisting of 34 numbered pages; Joint Exhibit 2, the transcript of the deposition of Claimant taken February 17, 2009, consisting of 32 numbered pages; and Joint Exhibit 3, the transcript of the deposition of Claimant taken June 9, 2011, consisting of 40 numbered pages.

Testimony-Hearing

Kim Stephenson. Mrs. Stephenson, Claimant's wife, testified that he is 31 years old. They have been together since before his work-related injury on November 17, 2005. She was at the hospital that day when he arrived by ambulance. According to her, "his head was swollen, he was in a brace, had a neck brace on, there was blood all over, he was

---

[1]This exhibit, along with the other depositions transcripts, were separately bound and, per Commission policy, have been retained in the Commission's file.

[2]The exhibit is incorrectly numbered in places.

disoriented; he didn't know who I was." Mrs. Stephenson testified that prior to his injury, Claimant was self-sufficient. After the injury, she initially had to obtain 24-hour care for him. He was unable to get in and out of the bed and a chair, and could not go to the restroom, without help.

While he has undergone extensive treatment since then, Mrs. Stephenson maintained that he has never returned to 100 percent. He is never pain-free, despite his use of OxyContin and other high-powered painkillers. His sleep is only in two-hour stretches. While he used to be physically active, this is no longer the case. She described him at present as "a different, a stressful person" who "makes his decisions on what he does with his life based on what his pain is going to be." Claimant's medication causes short-term memory loss. Mrs. Stephenson added that he now presents as someone who is depressed and "slower" mentally. Based upon his limitations caused by the accident, she did not believe he could do anything eight hours a day, five days a week. He only drives occasionally, and reclines any chair he is in to help relieve the pressure on his back. Regardless, he is only able to sit for short stretches of time. He has gained 60 pounds and has lost a lot of muscle tone.

Mrs. Stephenson stated that Claimant worked for Respondent Meyer Roofing & Sheet Metal, Inc. ("Meyer") for less than two years. Before then, he was employed at a tire shop for about 15 months. His previous job was in landscaping. Her testimony was that he was always employed in positions requiring hard manual labor.

According to Mrs. Stephenson, Claimant's neck has worsened recently. She was no aware that he testified in his 2011 deposition that his neck no longer bothered him. He still fishes and goes deer hunting. However, he does not wade into the river to fish as

much as he did previously. Even when he still engages in such activities, he has to sit in a chair or lie down in order to recuperate. Claimant rode in a golf cart with his father and tried to golf; but when he did so, he came home with his pain elevated.

Judy Stephenson. Mrs. Stephenson, Claimant's mother, testified that prior to his work-related fall, he was "very athletic" and industrious. While he was not an exceptional student, he was diligent and attentive. Because of his landscaping skills, he took care of his parents' property. He also entertained the children. Because of the injury, these things are no longer the case. She did not believe that he could work at any job for eight hours a day, five days a week. Based on her observations, he can only do things for 15 to 30 minutes at a time. Whenever he sits, he has to recline the chair. She observes him to be in discomfort. He can only stand for 20 to 30 minutes at a time.

Robert Stephenson. Claimant testified that he is 31 years old, is a high school graduate, and attended one year of college. His work history includes stints in painting and carpentry, along with work on tires and brakes. Some tires he lifted weighed up to 100 pounds. While employed in landscaping, he had to lift very heavy items. Claimant worked in roofing for about two years. He described this work as "very heavy," and related: "We had to carry bundles of shingles, they were 90 pounds apiece, carry them two at a time up ladders." The following exchange took place:

Q. So what happened on November 17th of '05?

A. I was standing on the, it was like a flat part of the roof around the outside of the house, covered the outside porch. And I was getting the last little bit down by the edge and the next thing I knew–

Q. What do you mean by getting the last little bit?

A. We were taking the shingles off the roof at that point. And there was just a little patch of that.

Q. How do you do that?

A. You have a tear-off tool and you stab it in there and pop the nails and move it and bend over. And this point, you had to get down like underneath the overhang of the house and stuff. And the next thing I know is I'm laying on the ground on top of shingle bars and shingles and nails with a hole in my neck and my back hurt really bad.

Q. How far did you fall

A. We measured it at 18 feet, but I was standing up and did a complete turn.

Q. Did a flip?

A. Yes, sir.

Q. Did you fall on your head?

A. Yes, sir, on my left side.

Q. You're point to the left forehead, the left jaw, the left side?

A. Yes, sir. That's where I would say 90 percent of all the pain's on my left side.

Q. And did you land head first?

A. That's what the witness said that was actually watched me fall. She said I landed on my head.

Q. Did it knock you out?

A. I think so. I mean, I was on the ground. I was like, what the heck? So evidently I got knocked out, but before anybody got there I was awake.

Q. Were you experiencing pain at that point?

A. Yes, sir.

Q. Where?

A. In my back. I didn't, I couldn't feel anything else.

Q. What do you mean?

A. Like my face, it was, I guess, I saw pictures of it; it was all swollen. And I had a, I guess, a nail in my neck and I didn't feel any of that stuff, it was overshadowed by the pain in my back.

After his discharge from the hospital, according to Claimant, "[e]very move was excruciating." This required that he have full-time assistance for six weeks. He testified that his pain was initially between his shoulder blades, but it has lessened and is now "overshadowed" by pain in his ribs and lower back. His back is "starting to go out a lot more." Because of his pain, which he stated is always on his left side, he has to use a recliner extensively. He rated his rib pain as ranging from 5/10 to 9/10. Claimant stated that he has never been pain-free since the accident–even with the use of heavy narcotics such as Oxycodone. He has to take medication to help him sleep.

According to Claimant, he still tries to be somewhat active:

Q. Why do you have to get out if it's going to cause you pain?

A. Because it's going to hurt anyway. I mean, I might as well do something that I want to do. It's going to hurt anyway, so I might as well go do those things.

Q. Do you pay for it when you do it?

A. Of course.

Q. In what way?

A. I could be down for a day or two. It all depends on how it's doing to react that day. There's no telling what it's going to do.

While he tried to golf after the accident, "it hurt like hell." He admitted to trying other activities to see what could be tolerated. Claimant testified that if his back goes out, he can

be “down” as long as a week. When his back is out, he is unable to do anything. He related that this has been occurring more frequently; currently, his back goes out about once a month. Thus, the other three or so weeks each month, his pain is not as severe. Claimant confirmed that he has problems with his short-term memory, but does not know why. He is unable to lift things, and does not believe he could work at a job eight hours a day, five days a week. Claimant’s testimony was that because of his accident, he has lost one inch of height. He is five feet, ten inches tall, and weighs about 250 pounds.

He was treating with Dr. Meraj Siddiqui in Batesville for his pain, but switched to Dr. Tilley in Mountain Home because he was closer. The Stephensons are moving to Ozark, Missouri because Mrs. Stephenson has been promoted. For that reason, he will need a new pain management physician. He initially treated for pain with Dr. Greaser. But at a certain point, Greaser informed him that he should go to his family doctor. At that point, Claimant began seeing Dr. Rolland Bailey. When his pain worsened, he then went to Dr. Siddiqui and, eventually, to Dr. Tilley. He asked that the Commission find that all his treatment thus far has been reasonable and necessary, and that he is entitled to additional treatment. But on cross-examination, the following exchange occurred:

> Q. Actually, Dr. Bailey stopped treating you because you were asking for more and more narcotics and he got tired of it and said you need to go to somebody else, right?
>
> A. Yes, sir.

He admitted that on April 23, 2010, he tested positive for Oxycodone–although it was not being prescribed to him at that point–because he had gotten one from a “friend.” Claimant could not explain why he also tested positive for the use of Dilaudid. But Bailey did not terminate their relationship because he was abusing narcotics; he merely thought that

Claimant would be better served at a pain management clinic. And Claimant stated that it was at this point that he needed more medication but was running out.

Claimant's testimony was that around the beginning of hunting season in 2012, his condition worsened. Upon his return home from a hunting trip, his back "twinged" and his pain became more severe. Eventually, this subsided, and he went hunting again. But the same thing happened. He stated that "[i]t would just crack and pop and burn and then shoot pain down my leg and I was like that's not normal. It scared the heck of [sic] out of me. That's why I asked for an MRI." He has killed two deer in the past five years.

With respect to Claimant's two functional capacity evaluations ("FCEs"), the following exchange took place:

> Q. Tell us about that evaluation and what he did. He indicated the first time he though you could do heavy work.
>
> A. Uh-huh.
>
> Q. What was your condition like after doing what you did for Mr. Byrd?
>
> A. I was down for two or three days, five days. I don't remember it was so long ago. What I did for him I went all out and I did what I could do back then.
>
> Q. Okay. The second time you went for an evaluation, you told him about what it had done to him–to you, did you not?
>
> A. Yes, sir.
>
> Q. That you had been in the bed for days after that.
>
> A. Yes, sir.
>
> Q. And he asked you to do some things you didn't want to do, isn't that right?
>
> A. I never told him.

Q. Did you do them?

A. I, he told me to walk on the treadmill and I was like I'm hurting and he's like if you don't want [to] walk on the treadmill, we'll just go outside and walk. And I was like, okay, let's do that. That was the only, he never asked me to walk up any stairs or anything like that or I never told him no.

Q. You always tried?

A. I tried, yes.

Q. All right. Did he call you after that, either one of these incidents to find out what your condition was like?

A. No, sir.

Q. What was it like after doing it for him the second time?

A. I went to the car and laid down because I had to drive there. I went to the car and reclined it and laid down.

Q. How long did you have to lay before you could even drive home"

A. I laid there 15 minutes and then drove home.

Q. How far was home?

A. Maybe a mile.

Q. Did he come out to the car and know you were having this much pain?

A. I don't think so.

Q. He thought that your work was inconsistent. Did you read his report?

A. A little bit.

Q. Were you doing anything consistent? Were you trying to feign anything? Were you being absolutely open about your condition when you were talking to him?

A. Yes, sir.

He agreed that he did not attempt to find work–even of a sedentary variety–after either FCE. When asked about Dr. Bailey's February 2010 note that reflect that he was working, Claimant stated that he was helping his father at that time. But he disagreed with the portion of the record that reads that he told the doctor that working did not intensify his pain that much.

In his spare time, Claimant likes to use the compute and play video games. He has a pet dog and cat. He operates the washer and dryer, but has difficulty folding items because of his back. On occasion, Claimant drives.

Testimony-Deposition

Robert Stephenson. Claimant was deposed on August 14, 2007, February 17, 2009 and June 9, 2011. During the first deposition, he related, inter alia, that he dropped out of college because of his grades. He testified at that point that while his spine was not back to 100 percent, it was better and started improving at some point in the six-month period after the accident. But his pain in the left rib cage has remained, and is about 7/10. He also described having pain in his neck, radiating into his left arm, and lower back that averages 8/10 but can range from 0/10 to 10/10.

In his second deposition, Claimant related that Dr. Bailey was prescribing him Hydrocodone. He represented that he had experience operating a Bobcat, which is "like a miniature dozer." But he did not think he could operate heavy equipment any longer. When Dr. James Blankenship released him in May or June of 2006, he did not go back to roofing. Instead, he went to help his father with minor tasks such as picking up limbs. But bending over caused his back to "lock up." He saw Dr. Rebecca Barrett-Tuck, who performed tests on his ribs. She referred him to Dr. Greaser for pain management.

Greaser prescribed medication and administered injections. But the latter only lasted for six hours. Eventually, Dr. Greaser released Claimant because he could not do any more to help him. He never returned to Dr. Barrett-Tuck because Respondents No. 1 would not allow it. Claimant was approved for Social Security disability in May 2008. Medicare is paying for a portion of his treatment. As of the time of this deposition, Claimant had been suffering from headaches since the fall.

In his last deposition, Claimant stated that he takes Hydrocodone and Tramadol, which Dr. Bailey prescribes for him. He described his pain as being in the "[r]ib cage, left rib cage, the whole thing. My whole back. My spine. Lower back. Very little in my neck." Claimant related that his pain had generally worsened, and that activity aggravates it. Eating hurts his ribs. His lower back goes out at times. It occurred at his father's funeral, and was caused simply by his efforts to get into the car. Claimant only leaves his house three to four times a week. Because of his pain and his medication, he has to nap during the day. He is unable to type. Claimant stated that he has no plan to return to work. He has never worked in an office, and has no desire to do so. Claimant and his wife live comfortably on her salary plus his Social Security disability benefits; nonetheless, his mother helps them out financially at times. He does very little housework. While he still hunts deer, he does so in a ground-level stand in the presence of others. Claimant testified that as part of his work history, he was employed by a factory that made saws. His job was to place the saws in cases and load them on trucks.

Rick Byrd. Byrd, who was deposed on July 24, 2012, testified that he is an exercise physiologist and a certified functional capacity evaluator. He conducted two FCEs of Claimant. In the first one, which took place on May 30, 2006, Byrd found that Claimant

demonstrated the ability to work in the Heavy category, to lift up to 80 pounds. He did not recall if he was aware that Claimant had two herniated discs in his lower back at the time. As was also the case in the second FCE, which took place on June 12, 2012, Byrd did not follow up with Claimant afterwards to see if the evaluation caused his condition to worsen. His testimony was that the FCE is a snapshot of the individual's capabilities only during the period of the evaluation–which is three to four hours in length. He agreed that a longer evaluation would be better. The second FCE reflects that Claimant gave an unreliable result, with 32 of 54 consistency measures. Nonetheless, he demonstrated the ability to work in at least the Light to Sedentary categories. Byrd testified that Claimant would be expected to have limitations with regard to bending, stooping and crouching. He did not doubt that Claimant was experiencing pain.

Byrd pointed out that Claimant's pain levels in 2006 and 2012 were similar. Yet he had a reliable result on the FCE and an unreliable result on the second. He agreed that a period of inactivity will cause an individual to have less physical ability–to be "deconditioned." Claimant demonstrated the ability to walk only four minutes–which Byrd testified would place him in the bottom five percent (5%) of the individuals he has evaluated. He related that he saw "self-limiting" behavior by Claimant at his second evaluation, and that he did not have a "significant cardiovascular response" during the testing, which indicated that he was not putting forth his best effort.

Medical Exhibits

The medical records of Claimant that are in evidence, and which are contained in Claimant's Exhibit 1 and Respondents No. 1 Exhibits 1-4, reflect the following:

Claimant presented to Baxter Regional Center following his November 17, 2005 fall off the roof with pain all over his body, with the most serious being in his left back. X-rays showed decreased body height in the mid-thoracic spine, consistent with a possible compression fracture of T7-8. A thoracic MRI on November 18, 2005 showed edema in T7-10, consistent with microfractures, along with very minimal loss of height in T8-10. Dr. Philip Johnson on November 23, 2005 wrote that the MRI showed compression fractures of T8-10 and took him off work for three months. He was placed in a brace. On January 18, 2006, Claimant presented with "rib cage pain." Johnson wrote that he did not think Claimant would be able to return to work as a roof, and recommended vocational rehabilitation. Therapy was ordered.

He went to Dr. Blankenship on February 22, 2006, and presented with significant pain in his mid-thoracic spine. He cited pain in his chest as well. The doctor read the thoracic x-rays to show lateral compression and anterior wedging at T9 and possibly at T8 and T10 as well. He wrote that these findings are "most likely traumatic." The MRI showed increased edema in the vertebral bodies. Dr. Blankenship recommended a new MRI and a bone scan and added, "I think it is very unlikely he is going to get back in to roofing if these truly are documented fractures. He certainly could do some type of work, but we will need to get a little further down the road with his treatment before I can document exactly what I would or would not recommend." Claimant underwent another thoracic MRI on March 23, 2006. Dr. Blankenship wrote:

> His MRI does not show any acute process in the mid thoracic spine on the STIR sequencing. This does not rule out some minor compressions, but I really think that what we are seeing in the mid thoracic spine is more settling of the disc spaces than true wedge compression. Either way, without any acute inflammation, I would not recommend consideration of vertebroplasty

> or kyphoplasty in this individual. I also do not feel like a bone scan is necessary now. I think the majority of his pain is myofascial.

The doctor recommended an additional four to six weeks of physical therapy, along with an RS medical stimulator. On May 10, 2006, Dr. Blankenship released Claimant to light duty. On May 17, 2006, he recommended that Claimant undergo an FCE "to determine specific restrictions." As noted both supra and infra, the May 30, 2006 evaluation showed that Claimant could work in the Heavy classification. Blankenship reviewed the FCE and wrote:

> I find, however, no inconsistencies in this narrative and feel like it is an accurate assessment of Mr. Stephenson's abilities. It did show a reliable effort on Mr. Stephenson's part and did not show any concerning factors, as far as inappropriate illness behavior.
>
> Based on this, Mr. Stephenson is able to work at a heavy work classification over an eight hour day. I have placed a permanent weight lifting restriction of 75 lb. This weight lifting restriction is based on a review of the gentleman's chart and his Functional Capacity Evaluation. Once again, I agree completely with the findings of the Functional Capacity Evaluation.

Dr. Ronald Bruton was asked on June 14, 2006 to determine with Claimant's alleged rib pain was related to the November 17, 2005 fall. Bruton examined him on June 19, 2006 and noted some asymmetry elevation of the floating ribs on the left side. The doctor on June 22, 2006 wrote:

> He has some left sided rib pain from trauma. I think that is some sort of costochondritis syndrome. He does not have any rib fractures at this time. He does have pain there with palpation. A work hardening test showed him to be able to lift 65 pounds on that side.

Bruton gave him a work release with a 65-pound weight restriction. On July 14, 2006, he wrote:

> You have asked me to give my opinion on Mr. Stephenson as far as permanent partial disability. To the best of my knowledge, the patient has

> costochondritis which is a painful anterior rib and chest condition. In my experience and as best I can tell from the literature, this should not lead to a permanent disability. Four to six weeks of light duty should resolve his discomfort. I know his work in the roofing industry and lifting large roofing bundles probably puts him at increased risk for this being a repetitive [problem] and unfortunately, he may be a person who has occasional relapse of this condition. But I feel he could certainly benefit from a trial back to see if he could rehabilitate somewhat.

In turn, Dr. Blankenship on July 11, 2006 wrote the nurse case manager and stated:

> At your request, I have reviewed Mr. Stephenson's chart. As you know, Mr. Stephenson was seen last on April 4, 2006. My letter of June 13, 2006 is a MMI letter indicating what his Functional Capacity Evaluation revealed and what he is able to do. Concerning an impairment rating, there is going to be some confusion with this, which unfortunately, I don't think that I can really clear up. The main question would be whether the gentleman has a compression fracture of T7 and T8 or whether his back pain has been more myofascial in nature with degenerative changes noted in the midthoracic spine. His original MRI that I have reviewed once again, dated 11/18/05 indicated that the gentleman had some edema in T7, T8, T9 and T10. There was some mild anterior increase in height of T8, T9 and T10. This was diagnosed as consistent with contusion or micro fractures. Given the gentleman's extremely young age, I think it is unlikely in the midthoracic spine that he would have significant degree of degeneration at this early age. Also, other etiologies of this type of finding, such as neoplasm or infection would be ruled out by the fact that no further problems have arisen over the course of his treatment. Although subsequent films and MRI's that I have performed have been equivocal concerning fractures, I would state, based on a reasonable degree of medical certainty and based on this original MRI that given his age and clinical history and also based on his history of fall, when he fell through the roof that this would be consistent with micro fractures of three thoracic vertebral bodies. Based on the IV Edition AMA Guidelines, which are still the guidelines the Arkansas Workers' Compensation Commission is going by, under the subheading of fracture, compression of one vertebral body 0-25%, he would qualify for a 2% impairment to the body as a whole. He would qualify for 2% based on all three fractures and the Table 75 refers to the combined values chart, which would combine three different ratings of 2% per vertebral body with three vertebral bodies involved. Based on the combined values chart, this would give the gentleman a 4% impairment to the body as a whole for the micro fractures that were dictated out on his original MRI dictation. This rating, as well as his previous MMI statement and FCE evaluation are based on a reasonable degree of medical certainty.

Dr. Bruton on August 1, 2006 wrote that claimant could return to light duty with a 50-pound lifting restriction, and that maximum medical improvement was expected on September 1, 2006.

On December 18, 2006, Claimant went to Dr. Barrett-Tuck. He presented with pain in the rib area and in the thoracic spine, and reported that for the first time, he recently had severe lower back pain. She ordered a new thoracic MRI, a lumbar MRI, and a bone scan to assess the rib complaints. The thoracic MRI, conducted on January 9, 2007, showed Schmorl's nodes were seen on the end plates at T8, T9 and T10. Minimal anterior wedging was seen at T8 and T9, and adjudged to be old. Decreased disc space was seen at T8-9, T9-10 and T10-11. Dr. William Pollard read all of these findings to be degenerative in nature. The lumbar MRI, conducted on the same day, showed protrusions at L4-5 and L5-S1. The whole body bone scan, conducted on January 16, 2007, showed normal uptake on the lateral and anterolateral ribs, but increased uptake involving the thoracic spine in the upper and mid thoracic levels. Dr. John Phillips wrote that "Acute fractures are thought to be less likely. There is some diffused increased uptake within the thoracic region that could be due to the know previous trauma and/or degenerative disc disease." Notwithstanding Phillips' opinion, Dr. Barrett-Tuck wrote:

> His thoracic MRI showed some minor anterior wedging of several vertebrae in the mid to upper thoracic spine suggesting old mild compression fractures. There is a very slight thoracolumbar scoliosis. There are no disk herniations. No spinal canal compromise. No surgical intervention that will be required for the thoracic spine. The bone scan, however, demonstrated multiple areas of uptake at the junction of the rib with the spine, (the costovertebral junction). The patient's most significant pain is in the chest in a radicular fashion in the area that the uptake is noted. I, therefore, believe that this gentleman suffered multiple posterior rib fractures at the time of his fall through the roof in November of 2005. I am hopeful that Dr. Greaser with pain management can offer intervention that may relieve him of thoracic area

> pain be it through stimulation, nerve root blocks, or rhizotomy. As far as the lumbar spine is concerned, the MRI shows significant degenerative disk changes at both L4-L5 and L5-S1. There is a left-sided disk protrusion or focal herniation at L4-L5; however, Mr. Stephenson does not really have any radicular pain radiating down the left leg. His pain is intermittent, primarily located in the low back and most consistent with muscle spasm most likely related to the degenerative disk. At L5-S1, there is a central disk rupture that appears to be old most likely related to the degenerative disk. At L5-S1, there is a central disk rupture that appears to be old most likely occurred at the time of his fall in November of 2005. In summary, it is apparent that Mr. Stephenson indeed suffered multiple rib fractures at the time of the fall in November of 2005 and that he has persistent radicular thoracic pain related to these fractures. In the lumbar spine, it is apparent that he suffered two disk ruptures at the time of the fall, one at L4-L5 and one at L5-S1. Since that time, the disks have shown degenerative changes. He is not having a lot of radicular pain at this time. Therefore, I have recommended that he treat his intermittent low back with stretching exercises, strengthening exercises, a regular walking program, that he avoid extremely heavy lifting, and that he is careful to lift with good posture avoiding bending and stooping. It may be that diskectomy will be required in the future or even that a fusion would be required in the future depending on the progression or regression of Mr. Stephenson's symptoms.

On August 14, 2007, Dr. Bailey wrote:

> Robert Stephenson is a patient of mine and it is my belief within a reasonable degree of medical certainty (50% or greater) that Robert did sustain a fracture to his neck and may need a fusion in the near future. He definitely needs pain management to be able to function in his daily life. The potential for a fusion to his cervical spine and his current need for pain management are as a result of his workers' compensation injury of November 11, 2005 [sic] when the roof he was working on caved in and caused him to fall 21 feet and land on [h]is head.

On October 25, 2008, the counsel for Respondents No. 1 asked Bailey to identify the level of the fracture, and copies of x-rays documenting such. The doctor responded on November 11, 2008, stating:

> My letter of "To Whom It May Concern" was based on materials that Mr. Stephenson brought with him. Unfortunately he kept them and I did not get a copy of them and I cannot identify that fracture in his neck. He has those records and x-rays in his possession. No x-rays were taken in this office.

Claimant underwent pain management, which included the prescription of Neurontin.

Claimant underwent another thoracic MRI on July 28, 2008. This showed scoliosis of the thoracic spine convex to the right side; multilevel mild anterior compression deformities in the lower thoracic spine that were unchanged; no edema to suggest an acute compression fracture; and disc space narrowing at multiple levels with Schmorl's node formation at several levels.

In a statement dated December 17, 2008, but, curiously bearing the handwritten notation "8/14/2007," Bailey again signed a typewritten opinion in the this. In this instance, it reads:

> Robert Stephenson is a patient of mine and it is my belief within a reasonable degree of medical certainty (50% or greater) that Robert did sustain a fracture to his neck and may need a fusion in the near future. He definitely needs pain management to be able to function in his daily life. The potential for a fusion to his cervical spine and his current need for pain management are as a result of his workers' compensation injury of November 11, 2005 [sic] when the roof he was working on caved in and caused him to fall 21 feet and land on [h]is head. It is my belief that as a result of his injuries, he will be permanently and totally disabled from any substantial employment.

On February 27, 2009, Claimant underwent a neuropsychological examination by Dr. Vann Smith. As a result, he was diagnosed as having

- Cognitive Dysfunction, Non-psychotic, Secondary to General Medical Condition(s) (294.10)
- TBI [traumatic brain injury] with Grade III Concussion, Secondary to Fall (850.9) per patient history

Claimant treated with Dr. Bailey from April 2009 to May 2011 for his pain. He was prescribed, inter alia, Flexeril, Lorcet, Hydrocodone, Tramadol, and Meloxicam. The February 6, 2010 note by Bailey reads: "Working has not intensified pain that much[.]" In

April 2011, Claimant requested a higher dosage of Hydrocodone and Tramadol, but Bailey refused and stated that his x-rays did not justify it. He was referred to Dr. Siddiqui for pain management.

Dr. Meraj Siddiqui began seeing Claimant on July 27, 2011 for pain management. He was prescribed Lyrica and Oxycodone. Siddiqui performed a series of intercostal nerve blocks on Claimant at T8, T9, T10, T11 and T12 to treat his chest wall pain. After the first, which took place on October 11, 2011, Claimant stated that they helped him somewhat. Injections also took place on October 25, 2011. He reported on December 22, 2011 that his chest wall pain had not improved and was barely manageable with medication. He was prescribed Oxycodone and Lyrica.

Claimant saw Dr. Ronald Tilley on September 12, 2012 and presented with low back, mid back, and rib pain that was gradual in onset. He was assessed as having "[l]ikely multiple injuries including thoracic and cervical radiculopathy as well as what could be intercostal neuritis due to previous rib fractures." Medication was prescribed. On October 10, 2012, he related that his pain averages 6/10, but ranges from 4/10 to 8/10. He related that epidural steroid injections, facet injections, and nerve blocks had been tried in the past. On December 5, 2012, Dr. Tilley wrote:

> Claimant presents today for a follow up. He states his pain has been really bad this past month. He stated hunting season is his most active time and his back "went out" twice this month, which has never happened before. He took more of his medications than he was supposed to, therefore he is out 5 days early. When [h]is back "goes out" he has numbness/tingling down both legs to his feet.

He prescribed Nortriptyline, Oxycodone and Tizanidine, and recommended cervical and lumbar MRIs.

Nonmedical Exhibits

The nonmedical items of evidence reflect the following:

On May 30, 2006, Claimant underwent an FCE. The evaluation reflects that he gave a reliable effort, with 51 of 51 consistency measures within expected limits, and demonstrated the ability to work in the Heavy category, with an occasional lift/carry of up to 80 pounds.

On June 12, 2012, Claimant underwent a second FCE. The evaluation reflects that he gave an unreliable effort, with only 32 of 54 consistency measures within expected limits. Nonetheless, he demonstrated the ability to work in **at least** the Light category, with an occasional lift/carry of up to 20 pounds and occasional carry of up to 10 pounds. Byrd wrote:

> Analysis of the data collected during this evaluation indicates that he did not put forth consistent effort. Mr. Stephenson initially produced normal grip strength test results but as testing progressed, he then produced low and inconsistent grip and pinch strength with each hand with C.V.'s that indicate great variance with repeated trial testing. He also demonstrated significantly higher and significantly lower forces with both the right and left handed rapid grip testing, which further validates that less than full effort was being put forth with standard grip testing. He also participated in horizontal strength change tests with isometric testing, which are designed to determine if he was putting forth full and consistent effort. He failed all horizontal strength change tests given. He also produced low and inconsistent strength results with isometric strength trials that also indicate inconsistent effort on his behalf. The client also failed to produce a significant cardiovascular response to physical testing that would indicate that a significant degree of effort was being put forth. He demonstrated self limiting behaviors such as that noted with his reaching patterns. When formally tested for reaching, his movements were slow and guarded yet when performing a similar task during other aspects of testing, he exhibited normal reaching patterns.

Claimant's Exhibit 4 contains a vocational evaluation of Claimant that was performed by Sarah Moore, Certified Rehabilitation Counselor, on December 19, 2011. The report reads in pertinent part:

> **Vocational Analysis:** As noted above, a previous FCE indicated that Mr. Stephenson can perform work activities in the heavy exertion level. However, the results of the FCE do not factor in the exacerbations of pain and the cumulative effects of pain on sustained employment. He may have performed well for 3-4 hours on the day of testing, but was in severe pain and had to lie down the rest of the day and spent much of the following days in a reclined position due to increased pain.
>
> Mr. Stephenson's self-reported limitations in daily activities and leisure interests indicate that he is not capable of performing competitive employment on a sustained basis. Based on these limitations it is likely that he would require frequent unscheduled work breaks to lie down, have difficulty maintaining attention and concentration on the task at hand, and have frequent absences due to exacerbations of pain.
>
> **Conclusions:** Although pain is considered subjective, Mr. Stephenson's treating physicians are confident that he suffers severe pain based upon current prescriptions and recommendations for spinal cord stimulator implantation. Mr. Stephenson is also a potential candidate for future lumbar discectomy and/or fusion.
>
> It is my opinion that Mr. Stephenson is unable to sustain competitive employment based on the limitations and factors described above. This opinion is stated within a reasonable degree of vocational rehabilitation certainty based on information available to date.

Respondents' Exhibit contains a vocational evaluation by Dale Thomas, Vocational Consultant, dated January 11, 2012. It reads in pertinent part:

> Mr. Stephenson's complaints of pain, which have been attributed to his work related injury, are well documented throughout the record. They are also reported by the claimant at the time of my interview with him. I do not doubt that Mr. Stephenson has some level of pain. He does, however, manage to stay somewhat active. Per his account, activity increases his levels of pain. He, therefore, maintains that his pain prevents him from working in any capacity. If Mr. Stephenson's subjective report is found to be accurate, then he would not be employable at the present time.

If Dr. Bailey's evaluation of Mr. Stephenson's vocational profile is accurate, then the claimant is not employable at least as of late 2007 or early 2008 (depending on how the dates on Dr. Bailey's report are interpreted) when the doctor stated that Mr. Stephenson was permanently and totally disabled. However, as discussed above, the doctor's notes do not appear to give the basis for his opinion other than to discuss that the patient was in pain, which was attributable to his work related injury. In February 2010 the doctor states that the patient was back to working and working had not intensified pain. In June 2010 Mr. Stephenson reported very little neck pain. Apparently no recent clarification has bee obtained from the doctor as to whether or not the cervical pain still prevents Mr. Stephenson from working.

The medical record supports the conclusion that Mr. Stephenson is not physically able to return to past work as a Roofer, Landscape Laborer or Tire Servicer because those occupations are performed at greater physical demand levels than he is capable of.

Dr. Blankenship initially opined that Mr. Stephenson could return to work at the Light physical demand level. After reviewing the FCE results of May 2006 he changed his opinion to reflect that Mr. Stephenson could return to work with a 75 lb. weight restriction. Therefore, Mr. Stephenson could have returned to past work as a Tool Assembler or to any number of other occupations at an Unskilled level which are performed at the Sedentary, Light, Medium and to a limited degree Heavy Strength demand levels. Skills from his past work do not transfer to lighter work. The doctor found that Mr. Stephenson reached maximum medical improvement (MMI) on 6/14/06. At that point Mr. Stephenson was employable at a wide range of occupations that would have existed, and still do, in substantial numbers. Based on my experience, I believe that those occupations would have had at least typical entry level wages in the range of Mr. Stephenson's wage at Meyer Roofing and Sheet Metal.

. . .

Dr. Burton's evaluation of Mr. Stephenson's ability to return to work was similar to Dr. Blankenship's opinion. On 6/22/06 he released Mr. Stephenson to work with a 65 lb. weight restriction. The doctor noted on 7/14/06 that the condition, "should not lead to a permanent disability."

Doctors Tuck and Siddiqui do not address return to work issues.

<u>Adjudication</u>

A. <u>Whether the Arkansas Workers' Compensation Act is constitutional</u>.

As stated above, Claimant filed on June 7, 2012 a "Motion to Recuse and Notice of Intent to Introduce Evidence at Hearing," along with correspondence and numerous attachments. Therein, he argued, *inter alia*, that the provisions of the Arkansas Workers' Compensation Act (the "Act") that provide for the establishment of administrative law judges are unconstitutional.

The points raised in Claimant's motion are identical to those considered and rejected by the Arkansas Court of Appeals in *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), *pet. for rev. denied*, No. O7-268 (Ark. May 3, 2007), and its ever-increasing progeny. Claimant has not sought to distinguish *Long* or to argue that it should be modified or overruled. Hence, the Act is constitutional, and Claimant's motion is denied.

B. <u>Whether Claimant is entitled to additional medical treatment</u>.

Claimant has alleged that he is entitled to additional medical treatment in the forms of (1) pain management and (2) treatment by Dr. Bailey. Respondents No. 1 dispute that additional treatment is warranted.

As discussed above, the parties have stipulated that on November 17, 2005, "Claimant sustained compensable **thoracic vertebral injuries** as the result of a fall." (Emphasis added) In his testimony, Claimant referred to other physical problems that he tied to the work-related fall. He stated that he has pain not only in his mid-back, but in his ribs, neck and lower back. These complaints are reflected in his medical records, cited above. But the parties have not stipulated that these other alleged conditions are

compensable; nor have they asked that I address compensability. Such an issue cannot, and will not, be addressed *sua sponte*. *See Carthan v. School Apparel, Inc.*, 2006 AWCC 182, Claim No. F410921 (Full Commission Opinion filed November 28, 2006); *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006), *rev'd on other grounds*, No. CA06-398 (Dec. 6, 2006) (unpublished). Consequently, in addressing the issues at bar, I am compelled to do so only insofar as they related to Claimant's compensable thoracic spine injury. I cannot take these other conditions into account here.

Arkansas Code Annotated Section 11-9-508(a) (Repl. 2002) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, *supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The standard "preponderance of the evidence" means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after (as here) the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex*, *supra*.

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id*. In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id*.

With regard to Claimant's request that he be awarded pain management, I credit his testimony that he is still suffering from thoracic, or mid-back, pain. While he related at the hearing that his chest and lower back pain has "overshadowed" this thoracic pain, the latter is nonetheless present. This is corroborated by his medical records. Although his pain management has also acted on the physical problems that are not before me, I find that his pain treatment has addressed the compensable injuries to his thoracic spine. Claimant has thus proven by a preponderance of the evidence that the pain management that he has undergone thus far–and which is reflected in the evidence–was reasonable and

necessary. Moreover, he has established that he is entitled to additional treatment of his compensable thoracic spine injury in the form of continued pain management.

Claimant has also argued that he is entitled to additional treatment by Dr. Bailey. The record reflects, however, that he has not seen Bailey since May 2011 because other physicians subsequently took over his pain management. The doctor opined that Claimant suffered a cervical fracture and might need a fusion in the near future. But again, such a condition is not before me. In sum, nothing in the evidence shows that Respondents No. 1 should be liable for any future treatment rendered by Dr. Bailey. However, concerning the treatment that he rendered Claimant for his compensable thoracic spine injury that is in evidence (again, including pain management), I find that Claimant has proven by a preponderance of the evidence that such was reasonable and necessary.

C. Whether Claimant is permanently and totally disabled.

Claimant has argued that as a result of the injuries that he sustained in the fall from the roof, he is permanently and totally disabled. In the alternative, he has posited that he is entitled to wage loss disability benefits.

As the parties stipulated, and the record reflects, Claimant sustained compensable injuries to his thoracic vertebra on April 30, 2006. Again, those are the only injuries I can consider in addressing this issue. These injuries are unscheduled. *Cf*. Ark. Code Ann. § 11-9-521 (Repl. 2002). 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) (Repl. 2002).

Claimant's entitlement to wage loss disability benefits is controlled by § 11-9-522(b)(1) (Repl. 2002), 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). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, ___ S.W.3d ___, "there is no exact formula for determining wage loss . . . ." 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).

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). 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) (Supp. 2011) 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 fo the evidence. Ark. Code Ann. § 11-9-102(14) (Supp. 2011). "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).

The evidence that was adduced at the hearing reflects the following: Claimant is 31 years old, a high school graduate, and dropped out of college after one year because of poor grades. His work history includes stints as a painter, carpenter, tool assembler, tire installer, brake repairman, landscaper, roofer, and driver of a Bobcat–a miniature bulldozer. The landscaping and roofing jobs required a substantial amount of heavy lifting; in the latter position, he had to carry 90-pound bundles of shingles up a ladder.

As the parties have stipulated, Claimant suffered thoracic spine injuries on November 17, 2005. On that day, he fell over 18 feet and landed on the left side of his face and body. His medical records document that he suffered microfractures of T8, T9 and T10, along with compression deformities in this area. He related that at first, the pain was between his shoulder blades, but was now "overshadowed" by the pain in his ribs and

lower back–which, again, are not before me. Claimant stated that his mid-back began to improve about six months after his injury. Nonetheless, he still suffers from thoracic pain and undergoes pain management treatment. This treatment includes the prescription of narcotics. He testified that he has problems with short-term memory, but was unsure of the source of this problem. Claimant has problems with sleeping also. He stated that the impact of the fall caused him to lose one inch of height; he is five feet, ten inches tall. Because of his inactivity, he has gained a substantial amount of weight since the accident, and now weighs approximately 250 pounds.

His testimony, corroborated by his wife and mother, was that his daily activities are now curtailed. He only drives on occasion. While Claimant helps with the laundry, he has problems folding items because of his back. But he still hunts and fishes, albeit less than he did prior to his fall. He does not believe that he could drive a Bobcat anymore because of his physical condition.

Claimant has undergone two FCEs since his accident. The first, dated May 30, 2006, showed that he demonstrated the ability to work in the Heavy category and lift up to 80 pounds. The second, which occurred on June 12, 2012, reflects that Claimant gave an unreliable effort, with only 32 of 54 consistency measures. Regardless, he demonstrated the ability to work in at least the Light category. Byrd, who conducted both FCEs, testified that Claimant exhibited "self-limiting" behavior in the second one. He agreed that a period of inactivity will cause a person to become "deconditioned." I credit this testimony. Claimant admitted that he made no effort to find work, regardless of the activity level required, after either evaluation. In May 2008, he was approved to receive Social Security disability benefits.

Dr. Blankenship found that it would be "very unlikely" that Claimant could return to roofing because of the vertebral fractures. But the doctor added that Claimant "certainly could do some type of work." Based on the results of the first FCE, he released Claimant with a 75-pound lifting restriction. I credit this. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). Dr. Blankenship assigned Claimant a four percent (4%) impairment rating to the body as a whole because of the fractures, and Respondents No. 1 accepted the rating.

In her vocational evaluation, Moore opined that Claimant is unable to return to work. But her report reflects that in rendering this opinion, she considered not only his compensable thoracic spine injuries, but his neck, ribs and lumbar spine–which, once again, I cannot consider in this proceeding in determining whether he is permanently and totally disabled. I am thus unable to credit her opinion. Thomas, on the other hand, concluded that based on Claimant's 2006 FCE results, he "could have returned to past work as a Tool Assembler or to any number of other occupations at an Unskilled level which are performed at the Sedentary, Light, Medium and to a limited degree Heavy Strength demand levels. He added that such jobs "would have had at least entry level wages in the range of [Claimant's] wage at [Meyer]." I credit this.

The evidence is clear that Claimant is not motivated to return to work. By his own admission, he has not tried to do so, even after his 2006 FCE showed that he could work in the Heavy category, and after Dr. Blankenship's release. The evidence preponderates that he could be returned to his former occupation of Tool Assembler. The 2012 FCE,

taken after years of lesser activity, showed that he gave an unreliable effort and exhibited "self-limiting" behavior, but still demonstrated that he could work in at least the Light category. In his last deposition, he frankly admitted that he has no plans to return to the workforce.

Based on the foregoing, I cannot find that Claimant has proven that he is permanently and totally disabled. However, I do find that after considering Claimant's age, education, work experience, the nature and extent of his compensable injury, his permanent restriction, and all other relevant factors, he has sustained a sixteen percent (16%) impairment to his wage earning capacity in excess of the four percent (4%) anatomical impairment to the body as a whole in connection with his compensable thoracic spine injury that occurred on November 17, 2005. In so doing, I find that this injury is the major cause of his wage-loss disability.

D. Whether Claimant is entitled to a controverted attorney's fee.

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). I find that Respondents have controverted Claimant's 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 herein to Claimant, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

CONCLUSION

Respondents are directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law 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 (Repl. 2002). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney, the Hon. Frederick S. "Rick" Spencer, is entitled to attorney's fees as set forth in the findings of fact and conclusions of law above and pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

____
Hon. O. Milton Fine II
Administrative Law Judge