

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311695

DEXTER GARY, EMPLOYEE	CLAIMANT
MAVERICK TRANSPORTATION, INC, EMPLOYER	RESPONDENT NO. 1
LIBERTY MUTUAL FIRE INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MARCH 15, 2006

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney  
at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE ERIC NEWKIRK,  
Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by the HONORABLE JUDY W. RUDD,  
Attorney at Law, Little Rock, Arkansas.

Decision of the administrative law judge: Affirmed as  
modified.

OPINION AND ORDER

Respondent No. 1 appeals from an administrative law  
judge's opinion that was filed on June 7, 2005. The

administrative law judge found, in pertinent part, "Claimant has sustained a 64 percent wage loss disability over and above the 6 percent impairment rating accepted herein by Respondent No. 1. The record failed to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or impairment to yield greater disability than that arising from the back injury sustained on October 23, 2003, alone; therefore, the Second Injury fund bears no liability in this case."

After reviewing the entire record *de novo*, the Full Commission affirms as modified the opinion of the administrative law judge. The Full Commission finds that the claimant proved he is entitled to wage loss disability in the amount of 12% over and above the 6% anatomical impairment rating, which has already been accepted and paid by Respondent No. 1. We also find that the Second Injury Fund has no liability in this case.

#### I. HISTORY

The claimant, age 56 (12-08-49), worked for the respondent as a truck driver. On October 23, 2003, the

claimant sustained an admittedly compensable injury to his lumbar spine, while working for Respondent No. 1. As a result of his compensable injury, Respondent No. 1 has paid medical benefits, temporary total disability compensation, and a 6% impairment rating to the body as a whole.

A review of the medical evidence of record shows that the claimant sought treatment for his compensable injury from Dr. Jodi Fox due to severe persistent low back pain, which was mostly on the left side that had resulted from him working beneath his truck with a pin. The claimant reported that when he tried to stand up, he was unable to straighten his back due to pain. Although the claimant reported a history of back problems with C5 fusion and L5 "dissolved" in 1987 after falling 18 feet, the claimant reported that he had experienced no problems from that injury prior to this incident. Dr. Fox assessed the claimant as having "lumbosacral (joint) (ligament) sprain, overexertion and strenuous movements, and other urinary incontinence," for which she prescribed medication and ordered a cane for assistance in ambulating. She also directed the claimant to

refrain from working until further notice and ordered an MRI.

An MRI of the lumbar spine was performed on October 28, 2003, which showed an anterior disc herniation at L2-L3 to the right of midline, along with areas of stenosis at L3-L4 and L4-L5 levels due to facet degeneration and ligamentous hypertrophy.

The claimant underwent evaluation with Dr. Harold C. Cannon, on December 1, 2003 pursuant to a referral from Dr. Fox due to continued complaints of back pain. After physically examining the claimant and reviewing his MRI, Dr. Cannon's impression was, "Probable musculoskeletal probable sprain/strain in a patient with some degenerative disc disease and arthritic changes of the lumbar spine. He may be having some radicular irritation, as well, given his lateral recess stenoses at multiple levels." As a result, Dr. Cannon recommended "weight loss and physical therapy."

On December 23, 2003, the claimant was seen for follow-up care with Dr. Fox due to urinary incontinence and continued complaints of back pain. At that time, Dr. Fox noted that although the claimant had been compliant with

physical therapy treatment, there was not any significant improvement in his symptoms. Therefore, Dr. Fox sent the claimant back to Dr. Cannon.

On December 30, 2003, the claimant was seen again by Dr. Cannon. He reported that the claimant's physical examination remained unchanged. Dr. Cannon wrote:

RADIOGRAPHIC REVIEW: MRI does demonstrate some lateral recess stenosis at multiple levels but nothing that I think would affect him urologically.

RECOMMENDATION: I am going to recommend a urologic work-up and referral will be made. Other recommendations with regard to his back pain remained unchanged.

Despite physical therapy treatment and various medications, the claimant continued with back pain and related symptoms. Therefore, on January 2, 2004, the claimant requested that Dr. Fox refer him for a second neurosurgical opinion, which was done.

A review of the medical evidence of record shows that the claimant underwent initial evaluation with Dr. McComis on January 15, 2004. After reviewing x-rays, an MRI of lumbar spine, and physically examining the claimant, Dr. McComis's impression was "osteoarthritis right hip and mild

spinal stenosis L3-4 and moderate at L4-5," for which he recommended that the claimant undergo a lumbar epidural steroid injection. He also prescribed Relafen for the claimant and directed him to return to see him in three weeks.

The claimant underwent a caudal epidural steroid injection, on January 19, 2004, which was performed by Dr. Michael McFadden. On January 29, 2004, the claimant returned for a follow-up visit with Dr. McComis, who reported the claimant was doing better following his epidural.

On February 16, 2004, the claimant returned for follow-up care with Dr. McComis. His impression at that time was, "patient with degenerative disc disease lumbar spine." In addition, Dr. McComis wrote:

Plan: At this time I do not feel that there is anything else that I have to offer him. I am going to place him at maximum medical improvement. His PPI is based on DRE level 1 which will be 6% whole body. He has current restrictions of lifting only 10 pounds and discharged from our practice.

Respondent No. 1 accepted this 6% impairment rating and paid indemnity benefits accordingly.

On February 27, 2004, Dr. Fox wrote:

Dexter Gary has been recently injured causing sufficient disability that he is no longer able to work. During this time, he has been battling depression due to this stress and psychological challenge of adjusting to different lifestyle. Because of this change, Dexter has been increased on his Celexa to 40 mg a day. I strongly believe that this is due to his injury.

The claimant presented to Dr. Richard George on May 25, 2004 with complaints of pain in the chest, neck, right thigh, left thigh, right groin, left upper back, right upper back, right mid back, left mid back, left lower back, right buttock, right lower back, left buttock, left leg, right shoulder and left shoulder. According to Dr. George's medical notes, the claimant reported the following concerning the duration of his symptoms: "Condition has existed for one year. The pain has recently become a major issue in my life for/since 10/25/2003." After physically examining the claimant and reviewing the claimant's October 2003 MRI, Dr. George's impression was "cervical and lumbar degenerative disc disease, lumbar radiculitits with no clear

dermatomal pattern of distribution, lumbar facet degeneration, and lumbar spinal stenosis," for which he recommended diagnostic facet injection at L3-4. Dr. George wrote: "Based on the claimant's presentation and lack of a clear dermatomal distribution of his radiculitis, we elected to pursue the central low back pain which probably is related to his facet degeneration as evidenced on MRI."

On June 16, 2004, the claimant underwent diagnostic lumbar facet joint injection at L4-L5 and L5-S1 with Dr. Paul Juergens. The claimant underwent a lumbar epidural injection with Dr. Richard George on June 30, 2004 due to a preoperative diagnosis of "low back pain, lumbar degenerative disc and lumbar radiculitis." On July 7, 2004, the claimant was seen by Dr. Scott Petersen for post-op follow-up of his lumbar epidural injection. At that time, the claimant had no reports of any operative-related complications. Dr. Petersen assessed the claimant as having "facet hypertrophy, lumbar degenerative disc disease, lumbar radiculopathy and lumbar spinal stenosis."

The claimant underwent another lumbar epidural steroid injection on July 12, 2004 with Dr. George due to a

preoperative diagnosis of "low back pain, lumbar facet syndrome, lumbar radiculitis and lumbar spinal stenosis."

The claimant underwent a psychological assessment on July 21, 2004 with Melanie Walker, a licensed social worker. Her assessment was: "pain disorder associated with both psychological factors and a general medical condition, chronic."

On September 29, 2004, the claimant underwent re-evaluation with Drs. Peterson and Juergens. They assessed the claimant with "lumbar degenerative disc disease, lumbar spinal stenosis, lumbar disc herniation, lumbar radiculopathy," for which physical therapy treatment was recommended.

The claimant was seen by Dr. George again on December 30, 2004, at which time he assessed the claimant with lumbar degenerative disk disease, depression -- improved.

A hearing was held in this matter on March 9, 2005. During the hearing, the claimant's wife, Susan Gary, gave testimony. Mrs. Gary testified that she has been married to the claimant for approximately 12 years. According to Mrs. Gary, prior to October 23, 2003, the claimant was physically

able to do most anything, such as mow the yard, cook, help out around the house, and do things with their children. Mrs. Gary testified that they have four children at home. According to Mrs. Gary, they have a 21-month old baby, a five-year old daughter, an eight-year old boy, and a nine-and-a-half year old boy. She also testified that they live on 53 acres of land, although only five requires mowing with a riding lawn mower. According to Mrs. Gary, prior to his injury, the claimant was able to mow the lawn and do maintenance on her van and things in the house.

Mrs. Gary testified that the claimant now uses a cane, but prior to October 23, 2003 he never used anything (any type of assistive device). Mrs. Gary essentially testified that the claimant is in constant pain and has been diagnosed as having a major depressive disorder. According to Mrs. Gary, the claimant complains about being in pain all the time and she does not leave the baby with him unless it is an emergency.

On cross-examination, Mrs. Gary admitted that the claimant suffers from diabetes, high blood pressure and cholesterol, for which he takes a number of medications.

According to Mrs. Gary, the claimant had been diagnosed with high blood pressure before his accident, but had just started taking the diabetes medication after the accident. Mrs. Gary also testified that these conditions do not affect the claimant's employability.

According to Mrs. Gary, the claimant worked as a farm hand in 1993 wherein he was required to drive a tractor, pick up grain sacks and perform various other laborious duties. She also testified that the claimant has worked as a welder and an inspector of pipelines. Mrs. Gary testified that since 1992 she has not known her husband to receive any medical treatment from a doctor for his neck or low back. She also denied that he had missed work because of his neck or low back.

On redirect examination, Mrs. Gary admitted that the claimant was diagnosed with diabetes before his October 23, 2003 accident. She further admitted that the claimant was diagnosed with high blood pressure around that same time. However, she testified that the claimant's cholesterol problem is a recent circumstance that has required medication, but is controlled by this medication.

The claimant also gave testimony during the hearing. The claimant testified that he began working for the respondent in 2000 and worked for them until October 23, 2003, when he sustained an injury to his low back. The claimant testified that he worked for the respondent as a flatbed truck driver in a division called long haul wherein the primary commodities were steel for the automotive industry and lumber. According to the claimant, truck driving entails more than just sitting down and turning a steering wheel. The claimant testified that he was required to assist with the loading of his truck, as he was physically required to chain and bind the loads as well as put pad tarp on them. According to the claimant, he was required to lift a steel tarp that weighed up to 132 pounds.

The claimant essentially testified that on October 23, 2003, he injured his back after getting underneath a trailer to place a kingpin lock in a semi-tractor trailer hookup. According to the claimant, since this time, he has had problems with his back. The claimant testified that he graduated from Kaplan High School, which is located in Louisiana.

According to the claimant, he previously worked as a welding inspector and owned his own welding truck wherein he was required to find jobs. The claimant testified: "I was a welder, well, I went to be a pipe welder. By twenty-one I was a pipelining or working pipe shops. Well, I still wasn't happy. By twenty-five I was a superintendent and foreman of jobs and so on. I wanted to stay in the business, but my goal was to be like a welding inspector." The claimant also testified that he has worked as a truck driver and for a farmer.

Upon being asked to summarize his work history, the claimant essentially testified that he has primarily worked performing welding-type work and driving a truck. Specifically, the claimant testified that he has worked as a welder inspector wherein he was required to do everything concerning the pipeline maintenance, which included, but was not limited to, duties such as clearing the right-of-way, clearing an existing right-of-way, and contacting landowners.

The claimant testified that he was working for Acadian Contractors as a pipe fitter/welder when he injured his

neck. According to the claimant, as a result of this injury he underwent surgery to his neck, but some time after that returned to employment. The claimant admitted to returning to work as a truck driver and having performed welding activities, which were done in '95 through '97. According to the claimant, prior to his work with the respondent, he worked for TBI Steel as a truck driver of a "flatbed." The claimant further testified that he was required to make several deliveries a day (up to 20 stops), which was a Nashville route.

As to his employment with Respondent No. 1, the claimant testified that his annual salary was \$44,000.00. The claimant testified that he experiences constant aching dull pain every day as a result of his injury. The claimant maintains that he is depressed as a result of not being able to work. He also testified that prior to his injury, his diabetes was controlled with diet and exercise, and his blood pressure and cholesterol were also controlled with medication.

The claimant denied having received an offer to return to work in any capacity or being offered vocational

rehabilitation by Respondent No. 1. Instead, according to the claimant, Respondent No. 1 discharged him effective January 27, 2004. The claimant testified that he is unable to lift more than 10 pounds and has difficulty cooking a meal without having to sit down in a chair to finish it.

On cross-examination, the claimant was asked to describe his prior neck injury from November of 1986. The claimant testified: "I was walking through on the grating on a skid, and the grating I stepped on fell through. It went approximately eighteen inches and stopped, and then I fell to my left." The claimant admitted to having sustained herniations in his neck and back regions as a result of this fall, as the claimant sustained a herniated disc at L4-L5, and another herniated disc at C6-C7. The claimant also admitted to having treated with Dr. Roland Miller over the course of a two-year period due to this injury, for which he was off work during the entire time and received a sizable settlement. The claimant admitted to having received a 10% rating for his neck and a 10% rating for his low back. After his injury, the claimant denied having experienced any significant problems with his neck or back which would cause

him to seek treatment or make mention of to a doctor. As of the date of the hearing, the claimant denied having any problems with his neck. The claimant testified that he is currently under a 10-pound lifting restriction, but has been told to do whatever he can do. The claimant also admitted that his neck is not keeping him from performing any job. According to the claimant, his diabetes and high blood pressure do not prevent him from working. The claimant essentially testified that he could pass a DOT physical, but for his back.

A prehearing conference was held in this matter on December 6, 2005, from which a Prehearing Order was filed on that same date. The parties stipulated to the following:

1. The claimant sustained a compensable injury on October 23, 2003.
2. The claimant earned sufficient wages to entitle him to compensation at the weekly rates of \$440.00 for temporary total disability benefits and \$330.00 for permanent partial disability benefits.
3. That claimant reached the end of his healing period having reached maximum medical improvement on February 16, 2004, with a 6% impairment rating to the body as a whole, which was accepted and has been paid by respondent No. 1.

By agreement of the parties, the issues to be litigated at the hearing were limited to the following:

1. Wage loss disability.
2. Permanent total disability.
3. Second Injury Fund liability.
4. Death and Permanent Total disability Trust Fund liability.
5. Controverted attorney's fees.

The claimant contended that he sustained admittedly compensable injuries to the spine on or about October 23, 2003. The claimant received workers' compensation benefits for a 6% to the body as a whole impairment. Apparently, those benefits were last paid on August 8, 2004. The claimant contends that he has been rendered permanently and totally disabled and, in the alternative, is entitled to a determination with respect to the extent of wage loss disability experienced over and above the admitted compensable impairment. The claimant contended that he has undergone previous surgeries, including a neck fusion, and that therefore the Second Injury Fund liability needs to be

determined. The claimant contended that these matters have been controverted for purposes of attorney's fees.

Respondent No. 1 contended that the claimant sustained an admittedly compensable injury on October 23, 2003, for which all related medical and indemnity benefits have been paid. Respondent No. 1 contended that, in fact, the claimant was assessed a 6% anatomical impairment rating on February 16, 2004, which respondent No. 1 has accepted and paid. Respondent No. 1 contended that to the extent the claimant is entitled to any wage loss disability benefits, the liability for such wage loss disability would be the exclusive liability of the Second Injury Fund in lieu of the claimant's earlier cervical fusion and lumbar herniation, both of which are ratable conditions pursuant to the Fourth Edition of the AMA guidelines. Respondent No. 1 contended that the Second Injury Fund would be liable for any wage loss disability benefits as those prior lumbar and cervical problems have combined with the claimant's most recent injury of October 23, 2003, to the point that the combined disabilities are greater than that which would have resulted from the October 23, 2003 compensable injury alone; thus,

pursuant to Ark. Code Ann. §11-9-525 and Commission Rule 24, respondent No. 1 contended that the Second Injury Fund would be exclusively liable for a wage loss disability.

Alternatively, respondent No. 1 contended that in the event the Second Injury Fund is not held liable, but the claimant deemed to be permanently and totally disabled, respondent No. 1 asserts that the 6% anatomical impairment rating payment in the amount of \$8,910.00 would count toward the \$75,000.00 maximum.

Respondent No. 2, Second Injury Fund, contended that based upon the answers to interrogatories they have received from the claimant, there is no proof of any combination of disabilities or impairment in order to raise Second Injury Fund liability.

After a hearing before the Commission, the administrative law judge found, in pertinent part, "Claimant has sustained a 64 percent wage loss disability over and above the 6 percent impairment rating accepted herein by "Respondent No. 1. The record failed to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or

impairment to yield greater disability than that arising from the back injury sustained on October 23, 2003, alone; therefore, the Second Injury fund bears no liability in this case."

Respondent No. 1 appeals to the Full Commission. Specifically, Respondent No. 1 appeals contending that the administrative law judge erred in awarding the claimant a 64% wage-loss impairment and in determining that the Second Injury Fund has no liability in this matter. Although the administrative law judge found that the claimant is not totally and permanently disabled, the claimant did not appeal this conclusion.

## II. ADJUDICATION

### A. Wage-loss disability

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining such disability based upon a consideration of the medical evidence and other matters, including age, education, and work experience. See, Ark. Code Ann. § 11-9-522(b)(1); Cross v. Crawford County Mem. Hosp., 54 Ark.

App. 130, 923 S.W.2d 886 (1996). In the present matter, the Full Commission finds that the claimant sustained wage-loss disability in the amount of 12%. We note that the claimant is 56 years old. He is a high school graduate. The medical evidence of record demonstrates that the claimant suffered from pre-existing degenerative lumbar problems. He has prior work experience primarily as a truck driver and in welding-type positions. When the claimant sustained his compensable back injury on or about October 23, 2003, he was employed as a truck driver for Respondent No. 1. The Full Commission finds that the medical evidence of record clearly demonstrates the claimant suffered only minor injuries during this incident in the form of an aggravation of his pre-existing degenerative problems and a L2-L3 herniation, for which he underwent extensive conservative treatment (various medications, physical therapy treatment, and an epidural steroid injection). However, surgical intervention was never prescribed by any of the claimant's many treating physicians. On February 16, 2004, Dr. McComis opined that the claimant was suffering from degenerative disc disease of the lumbar spine. As such, Dr. McComis pronounced maximum

medical improvement, as the claimant had reached the end of his healing period for his compensable injury. In addition, Dr. McComis assessed the claimant with a 6% anatomical impairment rating to the body as a whole (which Respondent No. 1 accepted and paid). He further opined that the claimant is capable of lifting 10 pounds and discharged him from care. Given these restrictions, the Full Commission finds that the claimant is capable of performing light to sedentary work, which would include work as a truck driver, considering that no treating physician has directed the claimant to refrain from driving a truck and there being no probative evidence before the Commission to suggest the claimant is unable to return to his prior work. While the Full Commission recognizes that Dr. Fox and Ms. Walker have essentially opined that the claimant suffers from depression as a result of his compensable injury, we do not attach any weight to these opinions considering that the claimant had reached the end of his healing period for his compensable injury when these opinions were rendered. In fact, on June 30, 2004, Dr. George reported that the claimant was undergoing a lumbar epidural injection pursuant to a

preoperative diagnosis of "low back pain, lumbar degenerative disc and lumbar radiculitis." On September 29, 2004, Drs. Petersen and Juergens attributed the claimant's need for physical therapy treatment primarily to his pre-existing lumbar degenerative disc disease. In light of all the foregoing, we find that the claimant's continued complaints of back pain and depressive symptoms result from his pre-existing degenerative problems rather than his compensable injury.

The Full Commission finds that the administrative law judge's award of a 64% wage-loss disability was excessive and should be reduced. Based on the claimant's anatomical impairment rating, age, education, work experience, and compensable injury, we find that the claimant sustained wage-loss disability in the amount of 12%, which is in addition to the 6% anatomical impairment that has already been accepted and paid by Respondent No. 1.

B. Second Injury Fund liability

Liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of

employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988).

The administrative law judge found in the present matter, "The record failed to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or impairment to yield greater disability than that arising from the back injury sustained on October 23, 2003, alone; therefore, the Second Injury fund bears no liability in this case." We affirm this finding.

It is undisputed that the claimant suffered previous injuries in 1986 to his cervical spine and lumbar spine, which resulted in a herniated disc at L4-L5, and a herniated disc at C6-C7, (for which he ultimately received a 10% impairment rating for each, thereby totaling a 20% impairment to the body as a whole). However, the administrative law judge found that the record fails to show

that the claimant's previous injuries combined with his work injury of October 23, 2003, to produce his current disability status. As pointed out by the administrative law judge: "None of the claimant's treating physicians opined that his previous injuries were combined with his 2003 injury to produce his current disability status; the claimant himself testified that prior to his October 23, 2003, injury, he missed no work because of his previous injuries after 1988 and received no further treatment for his previous injuries; he testified that after 1988, he was at full wage-earning capacity; and he opined on cross-examination that but for his October 23, 2003, back injury, he could pass a DOT physical and would be working his old job."

Moreover, the Full Commission notes that the claimant admitted that his prior neck injury did not affect his ability to work either before or after his compensable injury of October 23, 2003. We further note that the claimant's most recent back injury is at a different level than his prior injury, and it was the new injury alone that was producing his current disability status.

While the Full Commission recognizes that the claimant suffered from diabetes and high blood pressure prior to his compensable injury; nevertheless, the record does not demonstrate that the claimant suffered a permanent disability or impairment as a result of his diabetes and high blood pressure conditions. But even if the claimant had suffered a diabetes or high blood pressure-related disability or impairment, which we do not find, none of the claimant's treating physicians referred to either condition in assessing the claimant's current disability status. In addition to this, by the claimant's own admission, he testified that neither of these conditions affected his ability to work either before or after his compensable injury of October 23, 2003.

The Full Commission hereby affirms the administrative law judge's finding that Respondent No. 2, Second Injury Fund, is not liable in this claim. As a result, Respondent No. 1 is liable for all said benefits awarded herein.

### III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant is entitled to wage-

loss disability in the amount of 12% over and above the claimant's 6% anatomical impairment rating, which has already been accepted and paid by Respondent No. 1. We further find that the Second Injury Fund has no liability in this case.

The claimant's attorney is entitled to maximum fees for legal services as provided by Ark. Code § 11-9-715 (Repl. 2002).

For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500.00), pursuant to Ark. Code Ann. §11-9-715 (Rep. 2002).

\_\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority decision. In my opinion, the evidence shows that the Second

Injury Fund should bear liability in the present claim. Additionally, in my opinion, the portion of the decision of the Administrative Law Judge, which awarded the claimant wage-loss benefits in the amount of 64% in excess of his previously accepted 6% impairment rating should have been affirmed.

The medical records indicate that the claimant suffered from a back injury in 1987 after falling 18 feet. As a result of the injury the claimant underwent fusion of the spine at level C6-7 and suffered a disc herniation at level L4-5. As early as August 20, 1987, the claimant was diagnosed with having degenerative changes to his lumbar spine. Specifically, an x-ray report from that date indicated the claimant suffered from degenerative arthritis in the mid and lower lumbar spine. The claimant continued to exhibit degenerative problems in his diagnostic tests. On June 9, 1988, Dr. Roland C. Miller indicated that the claimant might have degenerative changes in the future. On July 5, 1988, the claimant was assigned a 10% impairment rating to his neck and a 10% impairment rating to his back.

The claimant was given work restrictions and told to limit 10 pounds or less. The claimant defied the work restrictions and was able to continue working as a truck driver until 2003. At that time he sustained another admittedly compensable injury. On October 28, 2003, an MRI of the claimant's back revealed that the claimant had osteophytes at levels L2 and L3. The report further provided the claimant had a disc herniation at level L2-L3. Finally, the report indicated, "I do identify areas of bilateral lateral recess stenosis and mild lateral central canal stenosis at L3-L4 and L4-L5 levels due to facet degeneration and ligamentous hypertrophy."

Respondent No. 1 accepted the claim as compensable. On February 16, 2004, the claimant was assigned an impairment rating. The doctor's note from that date lists an impression of "patient with degenerative disc disease lumbar spine". It goes on to indicate that the claimant had sustained a 6% impairment rating to the body as a whole. The respondents accepted and paid the impairment rating.

The Majority now finds that the Second Injury Fund bears no liability because the claimant's prior condition did not combine with his current condition. However, they also find that the claimant suffered an aggravation to his pre-existing degenerative disc disease.

In my opinion, the Majority has erroneously concluded that the claimant's condition has not combined with his prior condition in order to produce a greater impairment or disability pursuant to the requirements of Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). Since the claimant suffered from a prior injury which was subsequently aggravated and for which he received an impairment rating, I find that his prior condition combined with the compensable injury in question. I further find that this combination resulted in a greater degree of disability to the claimant.

The evidence is clear that the claimant sustained an admittedly compensable injury to his spine in 1987. In fact, he underwent surgery on his cervical back and was assigned an impairment rating for that condition and due to having a herniated disc in his lumbar spine. Additionally,

the evidence shows that shortly after the incident in 1987, the claimant was diagnosed with having degenerative disc disease in his lumbar spine. At the time of the claimant's injury in 1987, his treating physician also opined that he could suffer from degenerative disc disease in the future. Likewise, as noted by Respondent No. 1, the claimant continued to complain of sporadic back pain throughout the years.

It is undisputed that the claimant sustained an additional compensable injury to his lumbar spine in 2003. The MRI dated October 28, 2003, reflects that the claimant suffered from degenerative disc disease in his lumbar spine and indicated the claimant had a herniated disc at level L2-L3. The report also specifically indicates that the claimant suffered from facet degeneration and ligamentous hypertrophy at level L4-L5. However, the doctor's note from February 16, 2004, does not mention the herniated disc at L2-L3. Instead it only indicates that the claimant suffers from degenerative disc disease to his lumbar spine. When considering the MRI and the doctor's note dated February 16, 2004, which both specifically indicate that the claimant

suffers from degenerative disc disease, in conjunction with the fact the claimant had previously been assessed a 10% impairment rating to level L5 and that he now has been assigned an additional 6% impairment rating, I find that the claimant's condition has combined with his prior injury.

The Majority asserts that the claimant was able to return to work and therefore his previous condition did not combine with his prior condition to produce his current disability or impairment. However, I note that a claimant's return to work does not necessarily absolve the Second Injury Fund from liability. See, Pom, Inc. v. Taylor, 325 Ark. 334; 925 S.W. 2d 790 (1996). Additionally, in an instance such as the present case, where the claimant had ongoing, sporadic complaints of back pain and was under a work restriction, I find that the record shows his prior condition did combine with the injury from 2003.

In making this finding, I note that the Majority concludes the claimant suffered from an aggravation. Presumably, this by definition would indicate the claimant already had a condition that was somehow worsened by the compensable injury in question. In fact, by definition a

compensable aggravation under Arkansas Workers' Compensation law occurs when a pre-existing condition is aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See, Jim Walter Homes v. Beard, 82 Ark. App. 607; 120 S. W. 3d 160 (2003). See also, Ark. Power & Light Co. v. Scroggins, 230 Ark. 939; 328 S.W. 2d 97 (1959); See also, St Vincent Infirmary Med. Ctr. v. Brown, 53 Ark. App. 30; 917 S.W. 2d 550 (1996). When considered in conjunction with the Majority's finding the claimant had no difficulty working before this aggravation, I conclude that the claimant's condition did combine with his pre-existing condition in order to produce a greater disability.

The Majority argues that the claimant's compensable injury from 2003 occurred at a different level of his back than his previous injury. However, I note that the claimant had previously been diagnosed with degeneration throughout his lumbar spine. Furthermore, the doctor's note from February 16, 2004 does not indicate that the claimant's rating was based off only his herniated disc at L2-L3. Rather, in my opinion, the note seems to indicate the rating

was given due to the claimant's degenerative disc disease. Regardless of the reason for the impairment rating, the claimant, at the minimum, sustained an aggravation to his lumbar spine for which he received an impairment rating. Since the claimant already had admitted defects in that area of his spine, I find that his condition worsened due to the injury in question.

I also note that in determining the claimant's entitlement to wage loss benefits, the Majority opines that the claimant has an ongoing need for treatment due to his degenerative disc disease. Yet, they also conclude that the claimant had never had problems working for any reason after his previous injuries. Accordingly, I find that his previous injury combined to an extent to provide greater disability.

I further find that the Majority errs in reducing the claimant's entitlement to wage loss benefits. The Majority opines that the claimant's compensable injury only amounted to a minor aggravation of a previous condition and asserts that the claimant's ongoing back problems are due to pre-existing conditions. Though not specifically stated, it

appears the Majority failed to consider the claimant's degenerative disc disease, his prior back problems, or his depression because of this finding.

In my opinion, the Majority should have considered the claimant's prior back conditions and his depression in awarding wage loss benefits. The purpose of determining Second Injury Fund liability, in my opinion, is to find out who should be liable for the payment of the claimant's benefits rather than to determine the amount of wage loss benefits. In this instance, the Majority on one hand says the Second Injury Fund is not liable, but then penalizes the claimant in determining his entitlement wage loss benefits because he suffered from a pre-existing condition which was aggravated. I find this to be particularly disturbing since the Majority admits the claimant was able to work with no difficulty prior to his injury in 2003.

It is undisputed that while the claimant had pre-existing degenerative disc disease his compensable injury aggravated the condition. In fact, Respondent No. 1 paid a six percent impairment rating based on the claimant's degenerative disc disease. Additionally, the Majority

specifically found that the claimant suffered from a compensable injury in the form of an aggravation to the claimant's pre-existing degenerative disc disease. In my opinion, to now find that the claimant's need for ongoing treatment to his pre-existing degenerative disc disease is not related to his compensable injury is illogical. Though the Majority opines that a September 29, 2002, doctor's note attributes the need for treatment to his "pre-existing lumbar degenerative disc disease", the note in no way indicates the need for treatment is solely based off of the claimant's pre-existing condition. In fact, since the claimant had already been given a permanent impairment rating for the same condition, I find that the claimant must have suffered a permanent injury to the same area. Accordingly, I do not see how the Majority concludes the claimant's need for treatment and inability to work is only due to his pre-existing condition.

Likewise, in my opinion, in considering the various factors for determining wage loss benefits, the claimant's entitlement should be based of a multitude of factors, including those conditions that would have been

pre-existing. Since the Majority admits the claimant has difficulty working, in part, due to his degenerative disc disease, I find that he should be entitled to wage loss benefits based on that condition.

In my opinion, the Majority greatly underestimated the claimant's entitlement to wage loss benefits. The record indicates that the claimant's only prior work experience required him to perform manual labor. The medical evidence shows that the claimant is restricted to lifting a maximum of 10 pounds. Additionally, the claimant's and his wife's testimony, both, in my opinion, clearly establish that the claimant will not be able to return to his prior careers. Accordingly, when considering the present claim, I find that the Administrative Law Judge's decision should have been affirmed.

\_\_\_\_\_ In reducing the claimant's entitlement to wage loss benefits, the Majority notes that the claimant had prior injuries to his back and concluded that the claimant would be able to perform light duty or sedentary work. Specifically, the Majority opined that the claimant would be able to work as a truck driver. In supporting this finding,

the Majority noted that no doctor had ever directed that the claimant would be unable to drive a truck. They also found that there was no evidence indicating that the claimant would be unable to return to his work with Respondent No. 1.

In my opinion, the Majority ignores medical evidence indicating that the claimant would be unable to return to his work with Respondent No. 1 or as a truck driver. The claimant testified that in the past his jobs required him to do tasks that required heavy lifting, such as loading and unloading his own truck. Additionally, the claimant testified that his job as a welder required him to stoop and squat and bend.

The medical records indicate that the claimant now has to use a cane when walking, indicating that he would have difficulty working as a driver or as a welder. I also note that both the claimant and his wife testified that the claimant now has difficulty in walking and that he is no longer able to perform simple activities such as shopping or doing household chores. As such, I find it extremely unlikely that the claimant would ever be able work in any capacity as a truck driver or as a welder.

Assuming that even if the claimant were physically able to perform the duties of a truck driver, the Majority fails to consider that his current medications would likely preclude him from being able to obtain employment. His testimony that he takes narcotic medication such as time-released morphine is unrefuted. In my opinion, it is unlikely that he will ever find employment driving a commercial vehicle in that taking that medication would almost certainly cause him to be rejected from driving pursuant to Department of Transportation guidelines. Furthermore, even if he were not required to submit to DOT testing, I find that it is unlikely a prospective employer would agree to allow him to handle heavy equipment while on such medication.

Additionally, the claimant is apparently depressed as a direct result of his compensable injury. On February 27, 2004, Dr. Jodi Fox, opined that the claimant, "has been recently injured causing sufficient disability that he is no longer able to work." She further indicated that the claimant suffered from depression due to his compensable injury. At the time of the hearing, the claimant was still

taking medication for his depression. As the claimant was currently battling depression at the time of his hearing, I find that to also be a deterrent in him finding additional work.

\_\_\_\_\_ Though the Majority opines that the claimant would be able to perform sedentary work, there is no explanation as to the type of sedentary work he could perform. When considering the claimant's age, education, and lack of work experience in anything other than manual labor, I find that it is unlikely that he would be hired for sedentary work. I further find that even if the claimant were to find sedentary work, it is unlikely he will be able to substantially replace his income. When considering his income of \$44,000 at the time of the injury, I find that an award of 12% in wage loss benefits fails to adequately compensate the claimant for the loss of income he sustained as a direct result from his admittedly compensable injury.

\_\_\_\_\_ In my opinion, the evidence clearly indicates that the claimant is entitled to wage loss benefits greatly in excess of those awarded by the Majority. The claimant has extensive limitations, exhibited by the fact that he has two

10% impairment ratings and a 6% impairment rating to his neck and back. The claimant's work history is that of a manual laborer which is required to walk and to lift weights in excess of 10 pounds. When considering the claimant's age, education, work experience, compensable injury, and other factors, I find that the claimant should be entitled to wage loss benefits in an amount much higher than that awarded by the Majority.

For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner