BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206791

JIMMY WALKER, EMPLOYEE	CLAIMANT
FORT SMITH RIM & BOW, EMPLOYER	RESPONDENT
NATIONAL TRUST INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 14, 2006

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

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE LEE MULDROW, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, in part; modified, in part; and reversed, in part.

OPINION AND ORDER

Respondent no 1. and respondent no. 2 appeal a decision by the Administrative Law Judge filed October 17,

2005, making the following findings of fact and conclusions of law:

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

2. On June 11, 2002, the relationship of employee-employer-carrier existed between the parties.

3. On June 11, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of $425.00 for total disability and $319.00 for permanent partial disability.

4. On June 11, 2002, the claimant sustained compensable injuries to his head, brain, and neck (cervical spine). He subsequently experienced a compensable cardiac consequence or complication, which included a myocardial infarction.

5. There is no dispute, at the present time, over the payment of medical expenses and all such expenses have or are being paid.

6. There is no dispute, at the present time, over the payment of temporary total disability benefits and all such benefits accruing to date have been paid.

7. The claimant's healing period ended by March 8, 2004.

8. Although the respondents commenced the payment of permanent partial disability benefits on January 11, 2005 and continued the payment of these benefits through the date of hearing, the respondents have previously controverted all permanent disability benefits.

9. The claimant has sustained a permanent physical impairment of 45% to the body as a whole, as a result of the effects of his compensable injuries and consequences of June 11, 2002. This includes a permanent physical impairment of 30% to the body as a whole for his compensable brain injury, a permanent physical impairment of 5% to the body as a whole for his compensable cervical injury, and a permanent physical impairment of 10% to the body as a whole for his compensable cardiac consequence (myocardial infarction).

10. At the time of the claimant's compensable injuries and consequences on June 11, 2002, he was experiencing a permanent physical impairment of 50% to the body as a whole. This pre-existing impairment was the result of his pre-existing atherosclerotic heart disease (coronary blockage), prior myocardial infarction, and prior episodes of unstable angina.

11. The provisions of Ark. Code Ann. §11-9-525 are applicable to the present claim. In that, the claimant had preexisting impairment at the time of his compensable injuries and

consequences. His compensable injuries and consequences resulted in additional permanent impairment and disability. The claimant’s combined impairments and disabilities have resulted in permanent total disability, which exceeds the impairment and disability resulting from the last injury considered alone and of itself. The claimant is entitled to benefits under the Act for these combined impairments and disabilities.

12. Under Ark. Code Ann. §11-9-525, the respondents are liable to the claimant for benefits equivalent to a permanent partial disability of 45% to the body as a whole. The Second Injury Fund of the State of Arkansas is liable for any remaining benefits due the claimant for permanent total disability.

13. Ark. Code Ann. §11-9-502(b)(2) is inapplicable to the present claim and the Death & Permanent Total Disability Trust Fund of the State of Arkansas has no liability in this case.

14. The respondent employer-carrier has controverted the claimant’s entitlement to any permanent disability benefits from said respondents.

15. The Second Injury Fund of the State of Arkansas has controverted the claimant’s entitlement to any benefits from said Fund.

16. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on all permanent

> disability benefits herein awarded. The respondents are liable for the maximum statutory attorney's fee on the permanent partial disability benefits herein found to be their obligation. The Second Injury Fund of the State of Arkansas is liable for the remaining maximum attorney's fee on the controverted permanent total disability benefits herein awarded.
>
> 17. The claimant was not made whole by the net proceeds of the third party settlement and the benefits herein found to be the respondents' liability. Therefore, the respondent employer-carrier is not entitled to enforce any statutory lien granted them by Ark. Code Ann. §11-9-410 against the net proceeds of this third party settlement. The claimant is entitled to the entire net amount of this third party settlement.

Specifically, respondent no. 1 appeals the decision of the Administrative Law Judge regarding the claimant's permanent anatomical impairment as well as the finding that the claimant was permanently and totally disabled and the finding that the respondent was not entitled to enforce a statutory lien against the proceeds from the third party settlement. Respondent no. 2 appeals the findings that the claimant is permanently and totally disabled and that the

Second Injury Fund has liability in this case. Based upon our de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part, reversed in part, and modified in part. Specifically, with respect to the findings of the Administrative Law Judge on the application of the made whole doctrine and the finding that the claimant has not been made whole, we find that the claimant in this case has not been made whole and affirm the Administrative Law Judge. We reverse the finding that the claimant was permanently and totally disabled. We find that the claimant sustained a 25% wage loss disability benefit in addition to his permanent anatomical impairment rating. We also reverse the finding of the Administrative Law Judge finding that the Second Injury Fund had liability in this case. We hereby modify the findings of the Administrative Law Judge with respect to the permanent anatomical impairment ratings to which the claimant has proven entitlement. We find that the claimant is entitled to a 5% permanent anatomical impairment.

The claimant was employed by the respondent employer as a supervisor. The claimant had been employed by the respondent employer for approximately 16 years when he sustained his admittedly compensable injuries. The claimant was attacked by a temporary employee with a pipe wrench on June 11, 2002. The claimant was struck in the head and suffered fractures to his skull and orbital bone. At the time of the attack, the claimant was rendered unconscious, regained consciousness long enough to call 911, and then was taken to the emergency room. While the claimant was awaiting treatment, he suffered a generalized tonic chronic seizure that lasted approximately one minute. He also suffered two grand mal seizures. The claimant also complained of chest pain and suffered a mild heart attack.

The claimant was seen by Dr. John K. Mehl, who summarized the claimant’s prior cardiac treatment. In 1999, the claimant was hospitalized with unstable angina and after testing, received placement of two stints in the left circumflex. According to the records, he had a good angiographic result. Diagnostic testing performed in August

of 1999, following the stint implants, revealed no acute cardiopulmonary disease and no pulmonary emboli. Testing also revealed no obstructive coronary artery disease to account for the claimant’s chest pain. Following the testing, the claimant’s treating cardiologist, Dr. Timothy C. Waack, opined that the claimant’s complaints of chest pain were likely due to chest wall discomfort and that he found no evidence of angina or recurrent coronary disease. The claimant again presented to Dr. Waack in February 2000 with complaints of burning or tingling in his left chest that was not related to exercise or stress. Dr. Waack felt that the claimant’s prognosis was good, based on his coronary anatomy and exercise capacity. Additionally, Dr. Waack felt that the claimant’s pain was atypical for angina, but Dr. Waack could not determine the etiology of claimant’s chest pain

Dr. Mehl opined that the majority of the claimant’s chest pain post-injury was not cardiac in origin. Chest x-rays performed both prior to and following the claimant’s compensable injury revealed a hiatal hernia.

Dr. Mehl released the claimant to return to work "from a cardiac viewpoint" on July 30, 2002.

The claimant came under the care of Dr. Anthony Capocelli for treatment of his facial fractures and was referred to Dr. Cole Goodman for consultation of the claimant's facial contusions and blurred vision.
Dr. Capocelli released the claimant to return to work with no restrictions on September 9, 2002. Subsequent to that date, Dr. Goodman performed surgery to repair and reconstruct the claimant's facial fractures. We note that the claimant was given a general anesthetic prior to Dr. Goodman's procedures. The claimant recovered well, and was released to return as needed on November 12, 2002. Dr. Goodman's note of that date reflects that the claimant's blurred vision was very slight, only on extreme upper gaze, and was otherwise completely corrected.

The claimant returned to Dr. Goodman on September 23, 2003 with complaints of enophthalmos, or sunken eyeball. On October 13, 2003, Dr. Goodman performed another surgery to correct this condition. Again, the

claimant was given general anesthesia. Dr. Goodman released the claimant to return to work on November 3, 2003. In a letter to Concentra Integrated Services dated January 23, 2004, Dr. Goodman indicated that the claimant's blurred vision had resolved. On February 10, 2004, the claimant saw Dr. Goodman who reported that the claimant "is having no problems from my standpoint". The claimant was complaining of headaches and he was referred to a neurologist.

The claimant was seen by Dr. John Kareus, a doctor of Osteopath in the Department of Neurology at the Cooper Clinic, on February 25, 2004, who prescribed nortriptyline, and opined that the claimant might require Botox injections for his complaints of neck pain. The claimant again made complaints of blurred vision in both eyes and was examined by Dr. Kathryn Reed in March of 2004. Dr. Reed found that the claimant's corrected visual activity to be 20/25 in both eyes. Dr. Reed also felt that the claimant's complaints were subjective in nature, and she found no occular cause for any visual disturbance. She described the claimant's vision in both eyes as "excellent".

On March 1, 2004, the claimant was seen by Dr. Gary Moffitt for an independent medical examination. At this visit, the claimant complained of headaches and that he felt wore out and hurt. After examination, Dr. Moffitt opined that the claimant's cardiac condition was not made worse as a result of the 2002 injury, and he felt there was no impairment associated with the claimant's heart condition. Dr. Moffitt felt the claimant had suffered a 5% anatomical impairment to his neck as a result of the injury and that the claimant had not reached maximum medical improvement with regard to his mental functioning and mood.

The clamant was seen by Bettye Back-Morse, Ph.D., now retired, who performed psychological testing on the claimant in April 2004. She found the claimant's profile consistent with a brain injury to the left hemisphere. She opined that the claimant had suffered 30% permanent impairment based on her finding of the claimant's mental and behavioral impairments. She based her ratings, which she combined, on the information set out in the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993)(the

Guides), and not The Diagnostic and Statistical Manual of Mental Disorders. The majority of her rating was based on her finding of memory and concentration deficits.

The claimant was next seen by Dr. David Davis, a Diplomat of the American Board of Neurology and Psychiatry. At this time, the claimant was complaining of head and neck pain. Dr. Davis felt that the claimant's headaches were post-concussive and vascular in nature, and began the claimant on a trial of prophylactic migraine medication. He ordered an MRI of the claimant's brain and cervical spine. Neither of these tests revealed any abnormalities to account for the claimant's complaints. Dr. Davis estimated that the claimant had suffered 5% permanent impairment attributable to the claimant's headaches, and recommended that the claimant enroll in a program of vocational training. It was noted by Dr. Davis in his July 9, 2004 examination that the claimant was awake, alert and oriented, that he demonstrated normal language comprehension and fluency, and that the claimant had good recall of recent and remote events.

On September 23, 2004, Dr. Goodman, the claimant's plastic surgeon, assigned the claimant a 15% permanent anatomical impairment based on impairment to the claimant's fifth nerve, first and second division. He assigned a 5% permanent impairment for the claimant's double vision, and 2% permanent impairment "based on Table 12-10 on page 298" of the *5th Edition* of the AMA Guides to the Evaluation of Permanent Impairment. This table addresses visual system impairment; it contains several separate criteria for ratings, including the estimated ability to perform activities of daily living. Dr. Goodman failed to specify what the claimant's precise impairment was that he was assigning the 2% rating for.

On February 10, 2005, the claimant returned to Dr. Davis for consideration of the claimant's impairment rating. Prior to this visit, Dr. Davis was provided with the records of Drs. Goodman, Reed, Kareus, and Back-Morse, as well as Dr. Michael Marsh, a neuro-otologist, who examined the claimant regarding complaints of hearing loss. Dr. Davis

did not assign impairment for hearing loss. His report stated:

> It is interesting that today (claimant) responded to conversational speech without difficulty. I was careful to look down where my lips would not be read, and there was not an obvious hearing impairment which would interfere with normal daily activities.

Dr. Davis disagreed with Dr. Goodman’s rating regarding impairment to the left fifth nerve on two bases: (1) the claimant denied numbness other than in his arms, and (2) Dr. Kareus found that the claimant had normal corneal reflexes “which specifically address cranial nerve V, first division function”. Finally, Dr. Davis could not affirm the 30% rating offered by Dr. Back-Morse for difficulty with mentation. Dr. Davis found, as he conversed with him, that the claimant had good recall of recent and remote events in his life, and normal language function.

On March 28, 2005, the claimant underwent an additional neuropsychological testing performed by Gary Souheaver, Ph.D. Testing revealed that the claimant’s speech was normal, verbalization was logical and coherent, and that

the claimant made no complaints of pain or fatigue during testing. However, Dr. Souheaver noted that the claimant failed all of his tests of effort and therefore, the findings had to be interpreted as reflecting less than optimal effort. Dr. Souheaver felt that the claimant's low scores were artificially low and did not reflect the claimant's actual abilities.

In particular, Dr. Souheaver found that the claimant's test results were worse than those reflected in testing performed by Dr. Back-Morse. Dr. Souheaver felt the decrease in scores did not match what the expected recovery was from a traumatic brain injury, because the testing was performed more than two years after the injury.
Dr. Souheaver's testing revealed no sensory errors of either side of the body; Dr. Back-Morse's tests reflected right body-side sensory errors. According to Dr. Souheaver:

> Frankly, the IQ scores are simply not plausible given the history and previous neuropsychological test results.

The claimant's verbal IQ score in March 2005 was measured at 75, in April 2004 it was 82. His performance IQ

score in March 2005 was 85, it was 102 in 2004. The claimant's full scale IQ was 78 in 2005 versus 90 in 2004. Dr. Souheaver opined these test results were "strongly influenced by a negative test taking attitude".

Dr. Souheaver found the claimant's MMPI-2 profile to be abnormal, reflecting a tendency to focus on and blame medical and physical issues for all the claimant's problems in daily living. He noted the findings were rare, occurring in less than 2% of normative male population, but 16% of male medical patients.

Dr. Souheaver opined that the claimant's symptoms could be attributable to pain, vascular disease, medication effects, attitudes, secondary gain, depression, or a combination of these factors. He opined that the claimant had fully recovered from the head injury, and that other factors accounted for the claimant's continuing symptoms. In a follow-up report, Dr. Souheaver noted that the claimant's word memory test results were worse than individuals with documented brain tissue damage per CT scan with prolonged comas. He reiterated that based on the claimant's failure on

all formal tests for effort, he concluded that the claimant could have performed at a higher level on neurocognitive measures.

SECOND INJURY FUND LIABILITY

Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988) sets forth the requirements that must be met in order for the Second Injury Fund to have liability. These are as follows:

> First, the employee must have suffered a compensable injury at the 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.

The last injury "combines" when it, considered with the previous injury, causes a greater disability than the disability produced by the last injury considered alone. See Hawkins Constr. v. Maxell, 52 Ark. App. 116, 915 S.W.2d 302 (1996), *rev'd on other grounds*, 325 Ark. 133, 924 S.W.2d 789 (1996). In other words, if the more recent injury alone would have caused the claimant's current disability status,

the Second Injury Fund has no liability. In addition, "where there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of [Second Injury Fund's] liability." POM, Inc. v. Taylor, 325 Ark. 334, 337, 925 S.W.2d 790, 791 (1996). Further, an employee's ability to return to the same work following a prior injury is simply not determinative of the Second Injury Fund's liability. POM, Inc. v. Taylor, 325 Ark. 334, 925 S.W.2d 790 (1996).

Before the Second Injury Fund can be liable to pay for an injury, "the claimant's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause of the impairment." See Midstate, 295 Ark. at 6, 746 S.W.2d at 542. As the court in Midstate explained, "[i]t is the substantial nature of the impairment which is emphasized..." Id.

The respondent employer argues that the Second Injury Fund has liability for any anatomical impairment or for any wage loss that the claimant might have sustained. The Administrative Law Judge found that the claimant was permanent and totally disabled. We find that the claimant sustained a 25% loss in his wage earning capacity. However, we find that there is no Second Injury Fund liability.

The first issue to be addressed is the Administrative Law Judge’s assignment of 50% impairment regarding claimant’s cardiac condition before the 2002 injury. He relied solely on the opinion of Dr. Fitzgerald in assigning this degree of impairment prior to the June 2002 incident. Dr. Fitzgerald never examined the claimant either prior to or after his compensable injury; he only reviewed selected medical records. On the other hand, the claimant’s treating cardiologist prior to his injury never rendered an opinion regarding impairment. Dr. Waack never placed restrictions on the claimant’s work activity, never advised the claimant to cease working 50 to 60 hours per week, never advised the claimant to give up his ranching activities, and

never advised the claimant to stop rodeoing. In fact, Dr. Waack was not convinced that the claimant's complaints of chest pain following the July 1999 angioplasty were caused by coronary factors. This is evident by reviewing Dr. Waack's records, and the fact he ordered an abdominal ultrasound in August of 1999. Dr. Waack's August 24, 1999 report makes it clear he found no evidence that the claimant was experiencing angina or recurrent coronary disease problems; he felt that the claimant's pain was occurring in the chest wall area of the claimant's left chest. The claimant was complaining of severe esophageal reflux in January 2000, and Dr. Waack felt that the claimant's chest pain was atypical of angina. In July 2001, the claimant presented to Dr. Waack who indicated the claimant's problems were post myocardial infarction, hiatal hernia with reflux esophagitis, chest wall pain, and hyperlipidemia. Again, Dr. Waack described the claimant's chest pain complaints as atypical for angina. In our opinion the opinion of Dr. Waack, the claimant's treating physician is entitled to greater weight than the opinion of Dr. Fitzgerald. The

Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to

corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). The finding of 50% cardiac impairment is not supported by the medical evidence, the claimant's testimony, or the claimant's wife's testimony. Accordingly, we find that the claimant has failed to prove that he had permanent impairment prior to his compensable injury.

The Administrative Law Judge also erred in assigning a 10% impairment to claimant's heart following the June 2002 compensable injury. In our opinion, this finding is not supported by the findings and opinions of the claimant's treating cardiologist. Following the injury, the claimant was followed by cardiologist Dr. John Mehl, who interpreted an echocardiogram as demonstrating normal left ventricular size, no evidence of valvular abnormality, and findings consistent with a history of heart disease.
Dr. Mehl opined that the claimant's reduction in blood pressure in the emergency room was "likely multi-factorial". The claimant returned to Dr. Mehl on July 12, 2002, where the claimant reported to Dr. Mehl that he had experienced

symptoms of indigestion prior to the injury, but no angina since his angioplasty. Upon examination, Dr. Mehl opined the majority of the claimant’s chest pain was not cardiac in origin. Chest x-rays revealed the hiatal hernia, but no cardiopulmonary disease. Coronary anteriography demonstrated heart disease manifested by chronic total occlusion of the left circumflex artery; this is the same finding made by arteriogram performed February 4, 2000. The post-injury arteriogram also showed preserved left ventral systolic performance and no mitral regurgitation, indicating no valvular dysfunction. On July 30, 2002, Dr. Mehl allowed the claimant to return to work with no restrictions from a cardiac viewpoint. Dr. Mehl did not assign any permanent anatomical impairment as a result of the claimant’s cardiac event following his injury.

The claimant was seen by Dr. Gary Moffitt for an independent medical evaluation on March 1, 2004. Dr. Moffitt examined the claimant and reviewed the records regarding the claimant’s cardiac treatment before and after the injury. Dr. Moffitt opined that the claimant had reached maximum

improvement regarding his cardiac condition. Dr. Moffitt also said there was no impairment associated with the claimant's cardiac condition. The Administrative Law Judge rejected Dr. Moffitt's opinion regarding cardiac impairment after the injury, and assigned 10% impairment based on the recommendations of the Guides and based on elements not borne out by the records. It is interesting to note that the Administrative Law Judge found Dr. Moffitt's assignment of impairment to the claimant's cervical region "accurate and persuasive," but could not agree with Dr. Moffitt's opinion regarding impairment involving the claimant's cardiac condition. No medical provider has opined, within a reasonable degree of medical certainty, the claimant experienced any cardiac impairment as a result of his June 2002 injury. In fact, the records reflect that the claimant's cardiac condition was not affected by and remained stable after the injury. Further testing following the injury reflected some results that were better than pre-injury. For instance, a myocardial spect perfusion scan performed July 2000 revealed an ejection fraction of 52% of

the left anterior descending artery; the July 22, 2002 arteriogram revealed an ejection fraction of 55% to 60% visually, and 79% as calculated by computer. The remaining post-injury findings are virtually identical to those identified prior to the injury.

The record contains no evidence the claimant’s cardiac condition resulted in a permanent partial disability or impairment prior to his compensable injury, and this factor requires a finding of no Second Injury Fund liability. Chamberlain Group v. Rios, 45 Ark. App. 144, 817 S.W.2d 595 (1994). The claimant’s physical abilities prior to his head injury clearly reflect he was not operating with a disability or impairment before he was struck with a wrench. While the Administrative Law Judge accepted fully the claimant’s testimony regarding the performance of job duties after the compensable injury, he completely disregarded the claimant’s testimony and his wife’s testimony regarding his physical capabilities before the injury. Simply put, we cannot find that the Second Injury

Fund has liability. Accordingly, we reverse the finding of the Administrative Law Judge.

PERMANENT ANATOMICAL PHYSICAL IMPAIRMENT

We hereby affirm, in part, and reverse in part, the findings of the Administrative Law Judge with respect to the claimant’s permanent anatomical impairment. Although the respondents have actually paid permanent partial disability benefits, beginning on January 11, 2005, and continuing through at least the date of the hearing, the respondents have not accepted liability for any specific percentage or degree of permanent anatomical impairment or permanent partial disability. The parties stipulated that the respondents have controverted the claimant’s entitlement to any and all benefits for permanent disability. Thus, it becomes necessary to determine the existence and extent of permanent physical impairment and permanent functional disability or loss of wage-earning capacity, including permanent total disability.

The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He

must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. §11-9- 704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the Guides. The claimant must also show that the compensable injury or injuries was the "major cause" of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a). The term "major cause" is defined as more than 50% of the cause, Ark. Code Ann. §11-9-102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act. In order for expert medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B). In

determining the existence or extent of permanent physical impairment neither any medical expert nor this Commission may consider complaints of pain. In regard to the claimant's compensable cervical injury, no consideration can be given in determining the existence or extent of permanent physical impairment to loss of range of motion, Ark. Code Ann. §11-9-102(16)(A)(ii).

The medical evidence contains various medical opinions concerning the existence and extent of permanent physical impairment from the claimant's compensable injury. One of these opinions is expressed by Dr. R. Cole Goodman, a plastic surgeon and one of the claimant's primary treating physicians. Dr. Goodman performed two reconstructive surgeries on the claimant's various facial fractures, particularly those involving the orbit of his left eye. In his report of September 23, 2004, Dr. Goodman assessed a 14% permanent anatomical impairment to the body as a whole for permanent damage to the first and second division of the fifth cranial nerve on the left. He further assessed an additional 5% permanent anatomical impairment to the body as

a whole for loss of visual acuity from residual diplopia (double vision) which he attributed to the severe facial fractures involving the orbit of the claimant's left eye. Finally, he assessed an additional 2% impairment to the body as a whole for other reasons, arriving at a total permanent physical impairment of 16% to the body as a whole. He stated in his report, that these impairments were all assessed in the manner recommended by the 5th Edition of the Guides. In a subsequent report, dated June 13, 2005, Dr. Goodman again assessed a 16% permanent physical impairment to the body as a whole, but attributed this impairment to "moderately severe uncontrolled facial neuralgic pain" involving the trigeminal or fifth cranial nerve. In this report, he stated that he has arrived at this assessment by employing the 4th Edition of the Guides.

After considering all of the evidence, we cannot place any weight and credit on the impairment rating made by Dr. Goodman. Contrary to Dr. Goodman's statements in his report of June 13, 2005, this Commission has not adopted the 5th Edition as the official rating guide. The original

assessment of impairment made by Dr. Goodman cannot be considered, as it was calculated based upon the 5th edition of the Guides which employees the consideration of pain as well as assigns a rating of 5% for diplopia that does not exist in the Guides. The second impairment rating assessed by Dr. Goodman, in his report of June 13, 2005, does conform to the Commission's official rating guide, however, the method used (table 9 on page 145) is based solely upon complaints of pain. Assessments of permanent physical impairment based upon complaints of pain are prohibited pursuant to Arkansas law. It must also be noted that the evidence presented shows no objective findings of any physical damage or impairment to the claimant's trigeminal or fifth cranial nerve. The reports and records of Dr. John Kareus and Dr. David Davis, noted no evidence of objective abnormalities that would indicate permanent damage to the claimant's trigeminal or fifth cranial nerve. It is also of note that Dr. Catherine Reed, an ophthalmologist, thoroughly evaluated the claimant and could find no objective or organic basis for his subjective complaints of diplopia or

blurred vision. Her evaluation indicated that the claimant's visual acuity and fields of vision were within normal limits. Although the claimant has consistently complained of chronic and severe "headaches" none of the other various medical experts have found these complaints to be consistent with or in any way indicated the presence of "uncontrolled facial neuralgic pain" of the trigeminal or fifth cranial nerve.

The claimant has also been assessed a permanent physical impairment of 5% to the body as a whole for his post-concussive headaches by Dr. David Davis. In his report of August 13, 2004, Dr. Davis recognized that his assessment of permanent physical impairment did not specifically conform to the Guides. He stated that the 4th Edition of the Guides provided no "discrete rating" for post-concussive headaches. After consideration of the evidence presented, we find that we cannot give any weight and credit to the assessment of impairment by Dr. Davis. Clearly, it was not made in a manner that would conform to the Guides, as required by law. It is further apparent that the rating

assessed by Dr. Davis was based upon consideration of pain, which is also expressly prohibited by the Act.

The next assessment of permanent physical impairment is that made by Dr. Back-Morse, a neuropsychologist. Following her evaluation and testing of the claimant, she opined in her report of May 14, 2004, that the claimant had experienced a permanent anatomical impairment of 30% to the body as a whole. In this report, Dr. Back-Morse stated that this percentage of permanent impairment was calculated in a manner that conformed to the Guides, 4th Edition. The basis for this impairment was abnormal findings revealed on a battery of neuropsychological testing performed by Dr. Back-Morse. She concluded that these findings were consistent with a moderate brain injury involving diffuse damage but was maximized in the left hemisphere. Dr. Back-Morse also noted that the testing she performed revealed no inconsistencies or indications that the claimant was giving less than maximal effort or was in any way exaggerating or magnifying his deficits.

We find that the 30% permanent anatomical impairment as assigned by Dr. Back-Morse, as a result of the compensable injury, was in error. In awarding this rating, the Administrative Law Judge disregarded the findings of a neuropsychologist and a diplomat of the American Board of Neurology and Psychiatry. The claimant was examined by Drs. Bettye Back-Morse, Gary Souheaver, and David Davis regarding his complaints of memory loss, hearing and vision problems, and headaches. The conclusions drawn by Drs. Back-Morse and Souheaver are virtually polar opposite. Dr. Back-Morse assigned her impairment rating based upon the claimant’s subjective complaints of difficulty with sexual function, sleep, social and recreational activities, difficulty with communication, memory and concentration deficits. The first of these “criteria” are the subjective offerings of the claimant. There was no evidence that Dr. Back-Morse ascertained whether the claimant experienced any memory or concentration difficulties prior to the injury. And, it appears she rated the claimant twice for the same conditions.

The findings of Dr. Souheaver, in contrast, demonstrated that the claimant did not offer his optimal effort on virtually the same tests administered by Dr. Back-Morse. The claimant demonstrated a drop in his IQ, memory, and reading scores that did not match what is expected in traumatic brain injury patients. Dr. Souheaver also found the claimant's MMPI profile abnormal. These findings, plus the findings noted by neurologist Dr. David Davis and Dr. Back-Morse's response to Dr. Souheaver's findings, in our opinion, requires a reversal of the award of 30% permanent cerebral impairment.

Dr. Davis performed an MRI on the claimant's brain, which was found to be normal. His initial examination revealed that the claimant was awake, alert, and oriented with normal language comprehension and fluency. The claimant had good recall of recent and remote events - no demonstrated memory loss. Cranial nerves II through XII were intact. Reflexes were normal, and cerebellar exam showed normal finger-nose-finger and heel-knee-shin tandem gait.

In a report authored February 10, 2005, Dr. Davis summarized the reports of the various medical specialists that treated the claimant after his injury. He noted that the claimant's hearing loss could be due to the injury; it could also be noise created or familial. Certainly any rating assigned for this condition could not be attributed to the injury within a reasonable degree of medical certainty. Dr. Davis noted that the claimant's subjective visual disturbance could not be attributed to any ocular cause. Dr. Davis further noted that the claimant was able to hear the doctor without difficulty even while unable to see his lips. Dr. Davis disagreed with Dr. Goodman's ratings for impairment to the claimant's left fifth trigeminal nerve based on the claimant's denial of numbness, and the fact Dr. Kareus found normal corneal reflexes upon examination. Dr. Davis also could not agree with Dr. Back-Morse's impairment for mentation, as the claimant demonstrated good recall of recent and remote events and normal language function. Dr. Davis' February 10, 2005 report reflected that various medical doctors found no basis for the impairments

assigned by Dr. Back-Morse, a neuropsychologist. This alone should be enough to cast doubt on Back-Morse's assessments. However, it is Dr. Back-Morse's lack of objectivity and blatant advocacy which renders, in our opinion, her medical opinions without worth and lacking credibility. In her letter of April 26, 2005, to the claimant's counsel, not only did she question the opinions of Dr. Souheaver, she openly acted as advocate in suggesting specific questions to be asked of Dr. Souheaver on cross-examination. This behavior casts doubt on the objectivity of her findings, and appears to demonstrate her desire for a specific outcome of the claim. It is also noted she did not refute any findings or opinions of Dr. Davis.

The claimant's testimony also refutes the finding of memory and concentration deficit made by Dr. Back-Morse. He was able to accurately describe the wrench that caused his skull fracture. He was able to describe all of the job duties he said he performed after the injury. He remembered when he was hired to work for the respondent employer. He remembered how long he was at lunch on the day he was tested

by Dr. Souheaver. He remembered where he worked prior to 1987. He was able to describe his ranching and rodeo activities. At no time did the claimant state he did not understand the questioning. He also recalled meeting with Dale Thomas regarding job placement, and that two jobs identified within his restrictions were managing a flower shop and selling greeting cards. The claimant testified he has no interest in trying to perform these jobs because the only thing he would be interested in was ranching. Therefore, after considering the evidence, we find that the 30% permanent impairment awarded by the Administrative Law Judge is hereby reversed.

The next area of permanent anatomical impairment is for the compensable injury to the claimant's neck or cervical spine. The only rating the claimant has received for this compensable injury was not made by any of his various treating physicians. The only permanent physical impairment rating contained in the medical evidence was made by Dr. Gary Moffitt. This rating was made by Dr. Moffitt following his examination of the claimant at the

respondents’ request. In his report of March 5, 2004, Dr. Moffitt opined that the claimant’s compensable injury to his neck or cervical spine was in the form of a chronic strain. On his physical examination he noted “quite a bit of straightening of the neck”, which he felt to be compatible with chronic spasm. Dr. Moffitt further opined that the claimant had achieved maximum medical improvement in regard to his neck or cervical spine injury and had a 5% permanent anatomical impairment for a DRE cervicothoracic Category II, as contained in the Guides, 4th Edition.

The medical records indicate that the claimant continued to experience objective symptoms involving his neck or cervical spine, primarily in the form of hypertonicity or muscle spasms. These objective defects were noted by both Dr. John Kareus and Dr. David Davis in May, June, and July of 2004. Although Dr. Kareus had indicated that an MRI of the claimant’s cervical spine showed “no significant lesion,” Dr. Davis interpreted this study as showing “small disc protrusions at C5-6 and C6-7,” but with no neural impingement. Nerve conduction studies, performed

by Dr. Davis in August of 2004, established only the presence of bilateral ulnar neuropathies, involving the claimant's upper extremities. No cause or etiology for these peripheral neuropathies has been given by any of the claimant's numerous physicians. In his report of August 13, 2004, Dr. Davis opined that the claimant will be at maximum medical improvement (MMI) in approximately six weeks, but assigned no permanent anatomical impairment for the claimant's neck or cervical injury.

The Guides, 4th Edition, provide for a method of assessing permanent physical impairment based upon a diagnosis related estimate model (DRE). This is the method that was employed by Dr. Moffitt. A patient falls under the DRE Category II for cervicothoracic impairment, if the patient's history and findings are compatible with a specific injury and include intermittent or continuous muscle guarding, tightness, or spasm observed by a physician, non uniform loss of range of motion, or non verifiable radicular complaints. In order to fall under the category, there can be no objective evidence of

radiculopathy or loss of structural integrity. The claimant clearly satisfies the requirements for this DRE category. While some of these requirements are subjective in nature and one consideration even includes loss of range of motion, which is specifically excluded from consideration under the Act, objective factors are also included in placing the claimant in this category, specifically muscle rigidity and spasm.

The Fourth Edition of the Guides also provide another method for rating cervical injuries such as those sustained by the claimant and this method is found in table 75 on page 113 of the Guides. Based upon the medical evidence presented, the claimant could qualify for a rating under either Section IIB or IIC. Section IIB classifies injuries that involve intervertebral disc or other soft tissue lesions which are unoperated on, stable, with medically documented injury, pain, and rigidity associated with none to minimal degenerative changes on structural tests, such as those involving roentgenography or MRI. A 4% permanent physical impairment is assigned for this category

of injury. Table 75 Section IIC applies to intervertebral discs or other soft tissue lesions which are unoperated on, stable, with medically documented injury, pain, and rigidity associated with moderate to severe degenerative changes on structural tests including unoperated on herniated nucleus pulposus with or without radiculopathy. A 6% permanent physical impairment is assigned to this category of injury. An additional 1% is to be assigned for each additional level.

In our opinion, Dr. Moffitt's assessment of the permanent anatomical impairment attributable to the claimant's compensable cervical injury is accurate and persuasive. This opinion is consistent with the other evidence presented. Dr. Moffitt has used a method espoused by the official rating guide adopted by this Commission. The evidence presented further reveals that Dr. Moffitt's assessment of permanent anatomical impairment is supported by "objective findings." The greater weight of the evidence further establishes that the claimant's compensable cervical injury was the "major cause" of this degree of permanent

impairment. Therefore, the claimant has proven by the greater weight of the credible evidence that he sustained a 5% permanent anatomical impairment to the body as a whole, as a result of his compensable cervical injury of June 11, 2002.

The medical evidence further reveals that the claimant is experiencing a mild to severe bilateral sensorineural hearing loss. However, no permanent impairment has been assigned by any physician for this loss. It is also impossible from the evidence presented to calculate the specific percentage or degree of permanent anatomical impairment that would correspond with this loss, following the methods espoused by the Commission’s official rating guide. More importantly, the evidence presented fails to attribute this bilateral hearing loss to the trauma that the claimant sustained to the left side of his head. In his report of March 30, 2004, Dr. Michael Marsh noted that the claimant’s hearing loss is greater in the right ear than in the left. Although he indicated that the claimant’s hearing loss could be consistent with head trauma, he also noted

that it could be consistent with noise trauma, or even a natural genetic related progressive deterioration. The fact that the claimant’s hearing loss is greater in the ear opposite the area of trauma from the claimant’s job related injury would make it more likely or probable that the employment related trauma was not the cause of the claimant’s bilateral hearing loss.

After consideration of all the evidence presented, it is our opinion that the claimant has failed to prove his entitlement to any permanent benefits for permanent anatomical impairment for his bilateral hearing loss. He has not only failed to present sufficient evidence to allow a determination of the percentage or degree of impairment that would correspond with this loss, but has more importantly failed to prove that his compensable injuries were the “major cause” of this loss of impairment.

The final impairment to be addressed are the claimant’s cardiac difficulties that were brought on by the assault and resulting compensable injuries to his head, brain, and neck on June 11, 2002. The medical records

contain no assessment of any permanent anatomical impairment as a result of the claimant's cardiac complications or consequences. In fact, the only medical evidence dealing with this subject is the report of Dr. Moffitt, dated March 8, 2004. In this report, Dr. Moffitt indicated that the claimant had reached maximum medical improvement in regard to his cardiac difficulties and has experienced no "increase" in permanent anatomical impairment as the result of his compensable cardiac complications or consequences in June of 2002.

We agree with Dr. Moffitt's conclusion that the cardiac difficulties in June of 2002, did not produce any permanent physical impairment. Therefore, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a 10% permanent anatomical impairment to the body as a whole as the result of his compensable cardiac consequence or complication of June of 2002.

In summary, we find that the claimant has proven by a preponderance of the evidence that he sustained a total

permanent anatomical impairment in the amount of 5% to the body as a whole, as a result of his June 11, 2002, compensable injuries. Therefore, the Administrative Law Judge is affirmed in this regard. We also find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent anatomical impairment for his brain injury and his cardiac difficulties and the award of the Administrative Law Judge in this regard is reversed. Furthermore, we affirm the findings of the Administrative Law Judge that the claimant has failed to prove by a preponderance of the evidence that he has permanent anatomical impairment for damage to his first and second division of the fifth cranial nerve on the left as well as the finding that the claimant has no permanent anatomical impairment for hearing loss.

PERMANENT AND TOTAL DISABILITY

The Arkansas Workers’ Compensation Law provides that when an injured worker’s disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled

to any wage loss disability in excess of permanent anatomical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she 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 Commission is charged with the duty of determining

disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. Emerson Electric v. Gaston, supra.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with his employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be

employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2)(Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1). In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, *supra*. 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).

Under the Arkansas Workers' Compensation Law that existed prior to the passage of Act 796, an injured worker could also be classified as permanently and totally disabled under the "odd lot" doctrine even though the injured worker was not altogether incapacitated from work. An injured worker was said to fall into the "odd lot" category where the obvious severity of his injury combined with other factors such that the services he could perform were so limited in quality, dependability, or quantity that a reasonably stable market did not exist for those services even though the claimant was not completely incapacitated from work. See, Lewis v. Camelot, 35 Ark. App. 212, 816 S.W.2d 632 (1991). However, Act 796 eliminated the "odd-lot" doctrine as a consideration in a claim for permanent disability benefits under the Arkansas Workers' Compensation Commission. See, Ark. Code Ann. § 11-9-522(e) (Repl. 2002).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) 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 defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "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." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the

compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In our opinion, there's contradictory evidence about the claimant's ability to work. The claimant worked for approximately 2 years for the respondent employer after his admittedly compensable head injury. However, the claimant has been evaluated by several neuro-psychologists as well as Mr. Dale Thomas, a vocational consultant. Mr. Thomas, in a letter to the claimant's attorney, stated that he did not identify any appropriate employment for the claimant. However, the claimant is able to work on his farm. The claimant is 53 years old, has a high school diploma and has taken college course. The claimant has a steady employment history. But for the respondent employer going out of business the claimant would still be employed.

The medical records are inconsistent with regard to whether the claimant's skull fracture and alleged brain injury having significantly impaired his cognitive and

learning abilities. We have found that the claimant has failed to prove a physical impairment for this injury.

The claimant has chronic cervical difficulties which interfere with his ability to perform heavy manual labor. The claimant is unable to repeatedly bend or move his neck or maintain it for extended periods of time in a fixed position. However, these limitations aside, the claimant is still able to perform some job duties. There is no dispute that the claimant returned to the employment of the respondent employer as the mill room supervisor and he functioned in this capacity for two years until the company went out of business in March of 2004. However, the claimant's testimony demonstrates that the respondent employer allowed the claimant to limit his duties and activities from those that were previously expected of him. Accordingly, based upon all the evidence of record, we find that the claimant was not permanently and totally disabled; however, we find the claimant sustained a 25% loss in wage earning capacity in addition to his permanent anatomical impairment.

The last issue that must be addressed is the application of the made whole doctrine to the proceeds of the third party settlement the claimant received. The respondents have argued that they were not given notice of the settlement that the claimant entered into with the third party tortfeasor. The claimant received approximately thirty-five thousand dollars as a result of that settlement. It would appear from statements of counsel that the gross amount of the settlement between the claimant and the third party tort feasors was $35,000.00. Apparently, attorney's fees and costs of collection consisted of one-third of the gross recovery, or $11,666.67. This would mean that the balance or net recovery, which could be subject to lien under Ark. Code Ann. §11-9-410, would be in the amount of $23,333.33. Under the provisions of Ark. Code Ann. §11-9-410, the claimant would be entitled to one-third of this net settlement, outright and free of any lien by the respondents. In the present case, this would total $7,777.78. The remaining balance of $15,555.56 could be subject to a lien by the respondents. It would appear from

statements of counsel that this amount of the third party settlement has been retained in a trust fund pending the Commission's orders on its disposition.

The question is whether the respondents have a right to exercise or enforce a lien against all or a portion of the escrowed amounts. The respondents argue that the claimant's failure to notify the respondents of the third party proceeding and the claimant's failure to provide the respondents with the three days notice of the settlement prior to entering into the settlement would somehow estop the claimant from raising the "made whole doctrine."

The Court of Appeals noted in Liberty Mutual Insurance Company v. Whitaker, 83 Ark. App. 412, 128 S.W.3d 473 (2003), that Ark. Code Ann. §11-9-410 gives the respondents a right to notice and the opportunity to join in any third party action. It also gives the respondents the right to prior notice of any settlement. However, it provides no specific penalty should this notice not be given. As the Courts have recognized, Ark. Code Ann. §11-9-410 requires that the settlement of third party claims

must be approved by a Court of competent jurisdiction or by this Commission after affording the respondents an opportunity to be heard. It specifically provides that the "distribution of that portion of the settlement which represents the compensation payable under this chapter must have the approval" of this Commission. Although the respondents have the right to be "heard" before approval of the settlement, they do not have the right to veto any settlement or the right to exclude themselves from the finality of the settlement of the third party action.

Assuming that the respondents were not given appropriate notice of the third party proceeding or of the third party settlement, the respondents have still been afforded their opportunity to be heard. The current proceeding before the Commission gave them this opportunity. Although the settlement was not previously "approved" by a Court of competent jurisdiction, such approval can also be made by this Commission. In fact, the statute requires the approval of this Commission where the distribution of any

portion of the settlement represents compensation payable under the Workers' Compensation Act.

This Commission also has the authority and, in fact, the obligation to consider and appropriately apply the made whole doctrine when considering the approval and distribution of third party settlements. Such a fact was clearly recognized by the Court of Appeals in Phillip Morris USA v. James, 79 Ark. App. 72, 83 S.W.3d 441 (2002).

We note that the purpose, as stated by the legislature, of Ark. Code Ann. §11-9-410 "is to prevent double payment to the employee." Clearly, this purpose would not be destroyed by considering the "made whole doctrine" in determining if the respondents are entitled to enforce their subrogation rights granted them by Ark. Code Ann. §11-9-410. To estop the claimant from raising the made whole doctrine could only "unjustly enrich" the respondents by taking from the claimant this fundamental principle of subrogation that has been expressly extended to this subsection by the Supreme Court in James. Therefore, it is our finding that the claimant is not estopped from raising the made whole

doctrine in determining, at the present time, whether the respondents are entitled to any or all of the $15,555.56 of the third party settlement being held in escrow.

The record in this case demonstrates that the claimant's compensable injuries involved a significant displaced skull fracture along with various facial fractures. As a result of the claimant's cardiac and respiratory difficulties, the contemplated surgical reconstruction of the displaced skull fracture was never performed. However, the claimant has undergone two extensive surgeries for reconstruction of his facial fractures. The record does not contain any evidence concerning the extent of the claimant's medical expenses, so we can only assume that the expenses are significant based on the extent of the claimant's injuries.

The record reveals that the claimant has suffered permanent anatomical impairment of 5% to the body as a whole for his cervical spine and a 25% decrease in his wage earning capacity.

After consideration of the evidence presented, we find that the claimant has not been made whole by the sum of the net amount of his third party settlement and the amounts to be paid by the respondents under the Act. Therefore, the respondents are not entitled to enforce their statutory lien against any of the proceeds of this settlement. The entire proceeds of the net amount of this settlement should be distributed to the claimant. The decision of the Administrative Law Judge in this regard is affirmed.

Therefore, we find that the decision of the Administrative Law Judge is hereby affirmed, in part, reversed, in part, and modified, in part.

IT IS SO ORDERED.

____
OLAN W. REEVES, Chairman

____
KAREN H. McKINNEY, Commissioner

Commissioner Turner concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent in part from the Majority's decision. I concur with the Majority's decision affirming the Administrative Law Judge's finding that the claimant has not been made whole by the third party settlement. I respectfully dissent from the Majority's decision reversing the Administrative Law Judge's finding that Claimant was permanently and totally disabled and the liability of the Second Injury Fund. Based upon my de novo review of the record in it's entirety, it is my opinion that the Administrative Law Judge's October 17, 2005 opinion is correct and should be affirmed and adopted.

On June 11, 2002, Claimant sustained a skull fracture when a co-worker hit him in the head with an 18" dropped forged steel crescent wrench weighing approximately 20 pounds. The Claimant's injuries are described in the Emergency Room Report as follows:

> A CT Scan of the brain and left orbit reveals depressed skull fractures of the left temple region approximately eight (8) millimeters depressed. The patient

> also has a left orbital blow-out fracture with a tripod fracture and blood in his left maxillary sinus. His globe of the left side appears intact. While in the Emergency Room the patient did suffer a generalized tonic clonic seizure which lasted approximately one (1) minute. He was postictal afterwards. His family tells me that he has never had seizures before. In light of the seizure activity the patient has been given Mannitol intravenously. He has also been given Ativan intravenously. He is given Zemuron, paralyzed and intubated and hypoventilated. I have spoken with Dr. Tony Capocelli who will assume the patient's care.

The Claimant was hospitalized from June 11, 2002 until June 26, 2002 and the Discharge Summary Report indicates:

> Initially, the patient was stable post extubation, but shortly thereafter, the patient began to complain of chest pain and soon after, began to demonstrate hypotension and he was subsequently reintubated. Subsequent work up revealed the patient had an acute MI.

Under Final Diagnosis the Discharge Summary indicates:

1. Closed head injury.

2. Acute myocardial infarction.

After missing several weeks of work, the Claimant returned to work for the respondent employer and he described his post-injury employment as follows:

> Joe, the superintendent, he had come in and stayed in the mill room with me and he had another guy to help me; he drove the forklift and helped do the maintenance. I done very little maintenance; I mostly supervised. We called in people to do the maintenance work after that. And my job was very limited. Joe helped me a lot after that.

__________The Claimant continued his employment with respondent employer in the modified job capacity until the Plant closed in March of 2004.

The Claimant testified that his condition worsened between when he returned to work and when the Plant closed. He testified that he slowed down a lot and that his memory was real bad. The Claimant also testified that he did not feel like he was earning his pay and the respondent employer was just being good to him.

The burden rests upon the claimant to prove the existence and extent of permanent physical impairment.

He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. §11-9-704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this Commission, which is presently the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, Ark. Code Ann. §11-9-522(g). The claimant must also show that the compensable injury or injuries was the "major cause" of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a). The term "major cause" is defined as more than 50% of the cause, Ark. Code Ann. §11-9-102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act. In order for expert

medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B). In determining the existence or extent of permanent physical impairment neither any medical expert nor this Commission may consider complaints of pain. In regard to the claimant's compensable cervical injury, no consideration can be given in determining the existence or extent of permanent physical impairment to loss of range of motion, Ark. Code Ann. §11-9-102(16)(A)(ii).

The medical evidence contains various medical opinions concerning the existence and extent of permanent physical impairment from the claimant's various compensable injuries. An assessment of Claimant's permanent physical impairment was made by Dr. Bettye Back-Morse, a neuropsychologist. Following her evaluation and testing of the claimant, she opined (in her report of May 14, 2004), that the claimant had experienced a permanent physical impairment of 30% to the body as a whole. In this report, Dr. Back-Morse stated that this percentage of permanent

impairment was calculated in a manner that conformed to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. The basis for this impairment was abnormal findings revealed on a battery of neuropsychological testing performed by Dr. Back-Morse. She concluded that these findings were consistent with a moderate brain injury involving diffuse damage but was maximized in the left hemisphere. This was the very type of injury sustained by the claimant in the employment related assault on June 11, 2002. Dr. Back-Morse also noted that the testing she performed revealed no inconsistencies or indications that the claimant was giving less than maximal effort or was in any way exaggerating or magnifying his deficits.

The claimant was subsequently evaluated, at the respondents' request, by Dr. Gary Souheaver, another neuropsychologist. Dr. Souheaver found that on testing, which was similar to that performed by Dr. Back-Morse, the claimant did far worse than he did on the testing performed by Dr. Back-Morse. Dr. Souheaver further indicated that the

claimant failed all of the portions of the tests designed to determine if the patient was exhibiting maximum effort. It was Dr. Souheaver’s opinion that this worsening in the results of the claimant’s psychological testing would not be consistent with a physical injury or damage to the claimant’s brain.

Although Dr. Souheaver indicated that the result of his testing would not accurately affect the claimant’s true level of mental functioning, he in no way indicated that this conclusion would also extend to the test results derived by Dr. Back-Morse. Dr. Souheaver in no way opined that Dr. Back-Morse’s findings or conclusions were inaccurate or that the claimant had not experienced any permanent brain damage. It is also important to note that psychological testing performed by Dr. Souheaver, (an MMPI-II) did not indicate any intentional exaggeration of psychiatric symptoms but did indicate the existence of psychological or psychiatric disorders in the form of somatization with underlying chronic depression and anxiety.

After consideration of all the evidence presented, it is my opinion that the assessment of a 30% permanent physical impairment by Dr. Back-Morse for the compensable injury to the claimant's head or brain is stated within a reasonable degree of medical certainty and is supported by the greater weight of the other credible evidence presented. Dr. Back-Morse is a competent qualified neuropsychologist with extensive expertise in the area of medicine associated with brain injuries and their residual effects. Her assessment of a 30% permanent physical impairment is supported by objective neuropsychological testing and would be consistent with the initial physical injury to the claimant's head and brain that is objectively demonstrated by the other medical evidence presented. The evidence further shows that her assessment of permanent physical impairment was arrived at by employing the methods espoused by the Guides. I simply find her opinion on the existence of this degree of permanent physical impairment to be convincing. Thus, in my opinion, the claimant has proven that he sustained a permanent physical impairment of 30% to

the body as a whole, as a result of his compensable head or brain injury.

__________The next area to be addressed is the compensable injury to the claimant's neck or cervical spine. I concur with the Majority's finding that Claimant has proven by the greater weight of the credible evidence that he sustained a 5% permanent anatomical impairment to the body as a whole, as a result of his compensable cervical injury of June 11, 2002.

The final injury to be addressed is the Claimant's cardiac difficulties that were brought on by the assault and resulting compensable injuries to his head, brain, and neck on June 11, 2002. The medical evidence shows that these cardiac difficulties involved the occurrence of an acute subendocardial myocardial infarction and resulting respiratory failure.

The medical records contain no assessment of any permanent physical impairment as a result of the Claimant's compensable cardiac complications or consequences. In fact, the only medical evidence dealing with this subject is the

report of Dr. Moffitt, dated March 8, 2004. In this report, Dr. Moffitt indicated that the Claimant has reached maximum medical improvement in regard to his compensable cardiac difficulties and has experienced no "increase" in permanent physical impairment as the result of his compensable cardiac complications or consequences in June of 2002.

__________The medical records establish that the Claimant's compensable complications or consequences from his employment related injuries on June 11, 2002, were in the form of a myocardial infarction, with tachycardia and respiratory failure. Clearly, this myocardial infarction would result in additional permanent damage to the muscles comprising the wall of the Claimant's heart, apparently in the area of the lateral left ventricle.

There is no doubt that the claimant was experiencing significant pre-existing heart disease and damage at the time of his compensable myocardial infarction. The evidence shows that he had a prior myocardial infarction in 1991 and a subsequent episode of unstable angina. At the time of the onset of his unstable angina, he was noted to

have severe obstruction and stenosis of the circumflex coronary artery, moderate obstruction or stenosis of the mid to distal lateral descending artery and mild stenosis of the distal right coronary artery. A balloon angioplasty and stinting was performed in an attempt to open these obstructions. This attempt subsequently failed and in 2000 the claimant was noted to have a total occlusion of the circumflex artery, a 60% occlusion to the lateral descending artery, and a 30 to 40% occlusion of the proximal right coronary artery.

__________For these various pre-existing coronary defects, Dr. Charles Fitzgerald, a cardiologist, has opined that the claimant was experiencing a 50% permanent physical impairment for these preexisting cardiac defects at the time of his accident on June 11, 2002. Dr. Fitzgerald further stated that this degree of permanent impairment was calculated in a manner espoused by the Guides. A review of the Guides, confirms this fact. The 50% assessment made by Dr. Fitzgerald would be the lowest assessment recommended

for a Class IV classification of coronary artery disease (table 6, page 178 of the Guides).

However, I cannot concur with Dr. Moffitt's conclusion that the second and compensable myocardial infarction, in June of 2002, did not produce any increase in permanent physical impairment attributable to the claimant's various cardiac difficulties. The Guides recommends a minimum of a 10% permanent physical impairment to the body as a whole based solely on the occurrence of a myocardial infarction or permanent damage to the muscles of the claimant's heart (table 6, page 178, Classification II). Clearly, the claimant's compensable coronary complications or consequences would have produced at least an additional 10% permanent physical impairment, if the claimant had no pre-existing permanent cardiac impairment. The mere fact that he had extensive pre-existing permanent coronary damage or impairment should not relieve the respondents from liability for the impairment attributable solely to the compensable consequence.

Although Ark. Code Ann. §11-9-525 was intended by the legislature to relieve the respondents from liability for combined disability, it is obvious from the wording of this section that it was not intended to provide the respondent with any relief from liability for permanent impairment attributable solely to the compensable injury (or in this case, the compensable consequence or complication). Therefore, in my opinion, the Claimant has proven by the greater weight of the credible evidence that he has sustained a 10% permanent physical impairment to the body as a whole as the result of his compensable cardiac consequence or complication of June of 2002.

In summary, it is my opinion that the Claimant has proven by the greater weight of the credible evidence that he has sustained a total permanent physical impairment of 45% to the body as a whole, as a result of the permanent effects of his various compensable injuries of June 11, 2002, and their compensable consequences. This includes a 30% permanent physical impairment for his compensable cerebral or brain injury, a 5% permanent physical impairment

for his compensable cervical injury, and a 10% permanent physical impairment for his compensable cardiac difficulties. In my opinion, Respondents No. 1 would be liable for permanent partial disability benefits attributable to this degree or percentage of permanent physical impairment.

The issue of the extent of permanent functional disability or loss of wage-earning capacity is intertwined with the issue of applicability of Ark. Code Ann. §11-9-525 and Second Injury Fund liability. If the threshold requirements of Ark. Code Ann. §11-9-525 are met, then a determination must be made of the extent of the Claimant's "combined" functional disability or loss of wage-earning capacity and liability for permanent benefits attributable thereto are controlled by the provisions of this subsection. On the other hand, if the provisions of Ark. Code Ann. §11-9-525 are inapplicable to the present claim, then the issue of the existence and extent of permanent functional disability or loss of wage earning capacity and liability

for benefits attributable thereto are controlled by the provisions of Ark. Code Ann. §11-9-522(b) and §11-9-519.

__________The provisions for Ark. Code Ann. §11-9-525 provide that this subsection is applicable when the following criteria are met:

1. The claimant must be experiencing permanent disability or impairment at the time of the compensable injury giving rise to the present claim.

2. The compensable injury giving rise to the present claim must result in additional permanent disability or impairment.

3. The percentage of disability or impairment caused by the combined disabilities or impairments must be greater than that which would have resulted from the last injury considered alone and of itself.

4. The claimant must be entitled to receive compensation for the combined disabilities or impairments.

At the time of the Claimant's employment related accident and resulting compensable injuries, on June 11, 2002, he was clearly experiencing a significant amount of permanent physical impairment. He had permanent damage to

his heart muscle caused by the prior myocardial infarction in 1991 and had extensive stenosis or blockage of several major coronary arteries with episodes of uncontrolled angina. The respondents' expert, Dr. Fitzgerald assessed a permanent physical impairment of 50% to the body as a whole, as a result of these pre-existing coronary difficulties. This assessment of anatomical impairment is supported by the evidence presented, based upon objective findings, and was calculated in a manner that conforms to the Commission's official rating guide.

Clearly, the claimant had not yet experienced any actual functional disability or loss of wage-earning capacity as a result of these pre-existing cardiac or coronary difficulties. However, these pre-existing difficulties would have resulted in some physical limitations of the Claimant's potential employment activities (albeit not sufficient to prevent him from performing the position he had with the respondent at that time). Thus, he had only potential functional disability or loss of wage-earning capacity that was based upon his

exclusion from a significant number of potential employments for which he would otherwise be qualified, should he have lost his job with the respondent.

However, in determining applicability of Ark. Code Ann. §11-9-525, I have only considered the claimant's pre-existing permanent physical impairment from his previous cardiac or coronary difficulties and not any potential pre-existing functional disability or loss of wage-earning capacity. Ark. Code Ann. §11-9-525 uses the terms "disability" and "impairment" in the alternative. Thus, the existence of either pre-existing disability or impairment is sufficient to invoke application of this subsection. Thus, as the evidence presented unquestionably shows the first requirement of Ark. Code Ann. §11-9-525 has been met.

As stated above, it is my opinion that the compensable injuries of June 11, 2002, and their compensable consequence has resulted in additional permanent physical impairment. This permanent physical impairment is separate and distinct from that which the claimant was previously experiencing from his pre-existing cardiac or coronary

difficulties. These include the 30% permanent physical impairment for his compensable brain injury, the 5% permanent physical impairment for his compensable cervical injury, and the additional 10% permanent physical impairment for his compensable coronary consequence. Again, the evidence shows that the claimant did not, initially, experience any actual permanent functional disability or loss of wage-earning capacity, he returned to his employment at the same or greater wage. This continued until his employer went out of business some months later.

However, Ark. Code Ann. §11-9-525 uses the term disability or impairment in the alternative. Clearly, the Claimant has experienced permanent physical impairment as the result of his compensable injuries and compensable consequences which is in addition to and in excess of that which was caused by his preexisting coronary or cardiac difficulties. This additional permanent physical impairment is sufficient to satisfy the second requirement for the application of Ark. Code Ann. §11-9-525.

Next, the greater weight of the credible evidence establishes that the claimant’s combined disabilities and impairments clearly exceed the disability or impairment which would have resulted from the last injury considered alone and of itself. From a purely mathematical standpoint, the combined impairments of the Claimant’s pre-existing cardiac or coronary difficulties and his subsequent compensable injuries and consequences would total 95% to the body as a whole (50% plus 30% plus 5% plus 10%). This would clearly exceed the permanent physical impairment resulting from his compensable injuries and consequences of June 11, 2002, considered alone and of themselves, of 45% to the body as a whole (30% plus 5% plus 10%).

The evidence further establishes that the Claimant’s preexisting cardiac or coronary difficulties, specifically his excessive coronary artery stenosis or blockage, not only independently produced permanent physical impairment both before and after his compensable injuries of June 11, 2002, but would also independently have a significant impact upon the Claimant’s potential physical

activities and potential employment positions. Such extensive arterial blockage would make it dangerous if not impossible for the Claimant to engage in any relatively strenuous physical activities or stressful situations. This in turn would limit the Claimant's availability for various employment positions for which he would otherwise be qualified. Therefore, in my opinion, the greater weight of the credible evidence satisfies the third requirement for the application of Ark. Code Ann. §11-9-525 to the present claim.

The final consideration is whether the Claimant "is entitled to receive compensation on the basis of combined disabilities or impairments." The evidence presented fails to reflect any reason why the Claimant would not be entitled to receive compensation for these combined disabilities or impairments. Clearly, the Claimant would be entitled to receive compensation for the impairments attributable to the compensable injuries and consequences of June 11, 2002. There is no indication that the statute of limitations has run on the Claimant's entitlement to these

benefits and no one so contends. There is also no evidence or contention of any other bar to his entitlement to compensation for permanent impairment.

The only arguable bar would be the Claimant's entitlement to benefits for permanent disability or loss of wage earning capacity under the provisions of Ark. Code Ann. §11-9-522(b)(2). The evidence presented shows that the claimant returned to employment for the respondent in July of 2002, as a mill room foreman over 30 to 50 employees. He continued in this position, at wages equal to or greater than those he was receiving on June 11, 2002, until the respondent went out of business in March of 2004. However, the evidence shows that this was only possible because the respondent modified his position to accommodate his restrictions and limitations, and he was not required to perform many of the activities previously required of him in this position. The Claimant's ability to maintain productive employment with the respondent was due to experience gained in his 17 years of employment with the respondent.

There is no evidence presented to indicate that the termination of the Claimant’s employment in March of 2004, was in any way the result of his misconduct in connection with the work or the result of his leaving this employment voluntarily and without good cause connected with the work. There is also no evidence that the Claimant has obtained or has had a bona fide offer of employment by any other employer, at wages equal to or greater than those he was receiving at the time of his accident.

Applicable case law has held, in light of the provisions of Ark. Code Ann. §11-9-522(d), that a claimant’s return to employment does not forever bar him or her from being entitled to benefits for permanent functional disability or loss of wage-earning capacity. These decisions have construed the provisions of Ark. Code Ann. §11-9-522(b)(2) to only prevent the claimant from being entitled to benefits for permanent functional disability or loss of wage earning capacity during the period of continued employment at wages equal to or greater than those being received at the time of the accident and compensable injury,

if the employment is terminated for reasons beyond the claimant's control and unassociated with any misconduct on the part of the claimant.

At the time of the hearing and for some time prior thereto, the Claimant had not been employed at wages equal to or greater than those he was receiving at the time of his accident and resulting compensable injuries, nor did he have a bona fide offer of employment at the same or greater wage. The loss of his previous employment was in no way due to his misconduct or voluntary abandonment of the position. Thus, at the time of the hearing and at the present time, Ark. Code Ann. §11-9-522(b)(2) would not bar the Claimant from entitlement to benefits for functional disability or loss of wage-earning capacity.

In summary, it is my opinion that Ark. Code Ann. §11-9-525 is applicable to the present claim. Thus, it becomes necessary to determine the respective liability of the respondent employer-carrier and the Second Injury Fund of the State of Arkansas. In order to arrive at the

respective liability of these parties, a determination must be made of the claimant's current combined "disability."

The record shows that the Claimant is 53 years old. He has a high school diploma and has taken several "supervisor" courses, at Westark Community College (now UAFS). The evidence further shows that, except for some prior work as a ranch hand, the Claimant's employment has primarily involved working in the milling of wood products. The Claimant had a lengthy period of employment for Ayers Furniture (approximately 10 years), where he worked his way up to a supervisory position. He also had a 5 year period of employment at Tucker Duck & Rubber, where he held a supervisory position in the mill room. Finally, he had a 17 year period of employment with this respondent, where he held a position of mill room supervisor at the time the respondent went out of business.

The evidence presented shows that the claimant has had two previous myocardial infarctions (including one at the time of the compensable injury). He has also had a previous stinting of various coronary arteries which was

unsuccessful. Repeated studies have shown extensive atherosclerosis of his coronary arteries, including one which is totally occluded. All of these conditions have resulted in a susceptibility to angina upon anything more than the lightest of physical activities. No specific restrictions have been placed on the claimant's physical activities or potential employment activities, as a result of these coronary difficulties. The Claimant has been instructed only to perform activity "as tolerated." Based upon the Claimant's testimony, his cardiac difficulties make him susceptible to fatigue and prevent him from engaging in any but the lightest or most sedentary activities.

The Claimant's skull fracture and resulting brain injury has significantly impaired his cognitive and learning abilities. These limitations would prevent the claimant from performing complicated tasks. These deficits would also interfere with his ability to adapt to new employment environments. This would make the potential of retraining or the "transfer of skills" to another type of management position extremely low.

The Claimant’s chronic cervical difficulties would concurrently interfere with his ability to perform heavy manual labor. These difficulties would also prevent the Claimant from performing any employment positions requiring him to repeatedly bend or move his neck or to maintain it for extended periods in a fixed position.

There is no dispute that the Claimant returned to employment with this respondent in July of 2002, as the mill room supervisor and functioned in this capacity until the company went out of business in March of 2004. However, the Claimant’s testimony indicates that the respondents allowed the Claimant to limit his duties or activities from those previously expected of him, as the mill room supervisor, to accommodate his physical limitations and restrictions. Most likely, this was the result of his long time employment with the respondent. It is highly doubtful that a new employer would be as accommodating. The number of mill room positions, especially in a supervisory capacity, have become extremely limited in the local area. The once numerous

furniture factories and wood working operations have gone the way of the respondent.

The Claimant’s ability to obtain employment in the open job market, with the limitations allowed by the respondent, is highly doubtful. His current difficulties with his level of mental functioning and ability would make it highly unlikely that he could transfer any of his managerial skills to a new and different setting. I am inclined to agree with the expert opinion of the vocational specialist retained in this case, Dale Thomas. It would be unlikely that the Claimant could obtain any regular full-time employment in the open job market.

After consideration of all the evidence presented, it is my opinion that the Claimant has proven that he has been rendered permanently totally disabled as the result of the disabling effects of his pre-existing cardiac damage combined with the permanent damage occasioned by his various compensable injuries. Therefore, under Ark. Code Ann. §11-9-525(b)(5),the respondents No. 1 would be liable to the Claimant for permanent partial disability benefits

attributable to a permanent physical impairment of 45% to the body as a whole, and the Second Injury Fund of the State of Arkansas would be liable to the claimant for the difference between this amount and permanent total disability.

For the foregoing reasons, I concur, in part, and respectfully dissent, in part, from the Majority’s decision.

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SHELBY W. TURNER, Commissioner