

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501461

WARREN BAKER, EMPLOYEE	CLAIMANT
JONES HEAVY HAULING, EMPLOYER	RESPONDENT NO. 1
ARK. TRUCKING ASSOCIATION SI FUND/RETENTION MANAGEMENT SERVICES, INC., INS. CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 28, 2007

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

Claimant represented by the HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed

OPINION AND ORDER

Respondent No. 1 appeals the September 25, 2006, Opinion of the Administrative Law Judge finding that the claimant sustained wage loss in the amount of 35% in excess of his previously accepted 18% impairment rating and finding that the Second Injury Fund does not bear liability for payment of those benefits. After reviewing the record, we

find that the opinion of the Administrative Law Judge is affirmed.

Prior to the hearing before the Administrative Law Judge, the parties stipulated that the claimant sustained an admittedly compensable injury to his right shoulder on January 27, 2005. The parties further stipulated that the healing period ended on July 20, 2005, and that Respondent No. 1 had accepted an 18% impairment rating to the body as a whole. Finally, they stipulated that the claimant's average weekly wage is \$657.

The claimant worked for the respondents driving a flat-bed trailer. On occasion, he had to use a plastic tarp weighing some 250 pounds. The claimant testified that he sustained his admittedly compensable injury when he was chaining a load down, reached to grab the tarp bar, and injured his shoulder.

The claimant was diagnosed with a complete tear of the rotator cuff. Surgery was performed on March 17, 2005; however, despite attempts to perform a complete repair, the surgeon was only able to perform a partial repair of the tear in the rotator cuff. On April 19, 2005, Dr. Wilson opined, "With the paltry amount of cuff he had to repair, his recovery will probably be prolonged." The claimant

continued with follow-up care and had pain that would "wax and wane." He was released to drive an escort vehicle with an automatic transmission or perform desk work on June 10, 2005.

On July 20, 2005, Dr. Wilson placed the claimant at MMI and assigned an impairment rating of, "30% to the body as a result of loss of both flexion and abduction, Table 34, page 65 of the AMA Guidelines and also Table 3, page 20, of the AMA Guidelines." He noted that the claimant had been released to perform sedentary activities such as office work or driving an escort vehicle. He also noted that the claimant was reporting increasing pain and had, "at least 40% loss of strength in full flexion and abduction."

On May 10, 2006, the claimant submitted to an FCE. The FCE noted the claimant had been referred by Dr. John Baker and that he continued to have ongoing pain in his right shoulder and arm that were attributable to his work-related accident. The examiner noted the claimant gave a reliable effort and that he did not appear to be magnifying his symptoms. The claimant reported that his pain was at a level of 5 out of a possible scale of 10. When reviewing various portions of the report, the claimant throughout the performance of the exercises, reported various symptoms,

including his right bicep cramping and stiffness in his shoulder and neck when reaching with his right arm. The claimant was noted to be able to carry up to 15 pounds, stoop, reach with five pounds on a constant basis. He was determined to be able to walk, carry up to 30 pounds, reach immediate and overhead, and push or pull a 45-pound cart on a frequent basis. He was determined to be able to carry up to 65 pounds and reach overhead on an occasional basis. He was noted to have functional limitations limiting his material handling capacity to no more than 65 pounds. He was also noted to have deficits in his right shoulder and to have poor tolerance to exerting over 20 pounds of force while working overhead with his right upper extremity. The examiner concluded the claimant could perform work in the Medium category.

On July 20, 2006, Tanya Owen completed a labor market analysis. She listed various jobs that she believed the claimant would be able to perform and some that he would not. She concluded the claimant would be able to work as a driver but noted the claimant would be precluded from performing some of the jobs due to lifting requirements. She also noted he might be precluded from some of the jobs due to having a pacemaker. However, she also acknowledged

that a doctor would make the decision if the claimant's pacemaker would preclude him from working and testified the claimant had passed such exams after having the pacemaker inserted.

The claimant, who is a native Australian, testified that he has education that is the equivalent of a four-year college degree. This degree is in automotive engineering and qualified him to repair engines. The claimant said that he worked as a mechanic for three years and then began driving a truck. He said that driving a truck required him to be able to lift from 10 to 150 pounds on a continual basis. Every position also required him to be able to use a manual transmission; therefore, he was required to shift gears frequently. He further described that, on occasion, he has done heavy hauling work where he would not have to load things onto the truck. The claimant said he had previously worked for a brief period of time in customer service while performing light-duty work and recovering from a prior injury. The claimant said he also has limited computer knowledge and that he can do word processing "very slowly" and using one finger. He also knows how to use e-mail and search engines on the Internet.

The claimant said that at his job with the respondents he was not required to load his own truck, but that he was required to climb onto the flatbed of the truck and help position loads to make sure they were distributed evenly. The loads consisted of steel beams that weighed tons. This required the claimant to push large steel beams that sometimes required two people to position. The claimant was also required to drag chains and secure the load. The chains that were used weighed some 100 to 200 pounds.

The claimant is currently working for Central Pharmacy Company as a courier driver who delivers medication to nursing homes. The job requires him to drive a Ford Windstar automatic and to be able to lift four to six paper bags containing pills. The claimant is working 28 hours a week and earning \$8.00 an hour. He testified that he could perform similar work on a full time basis if it were available. However, he does not believe he could go back to a job that required him to use a manual transmission because it would bother his shoulder.

The claimant testified that he can raise his arm to a certain point and that it clicks and grinds and causes

pain. The claimant also said that he could lift up to 40 or 50 pounds but could only do so four or five times. He also said that he can hold his arm outstretched, but only to a certain extent. He is also able to perform basic house duties such as washing dishes and using a riding lawn mower. He enjoyed playing golf before the accident; but cannot play now.

The claimant provided testimony that he suffered from various injuries in the past and present. The claimant testified that he had previously suffered from an ankle injury in 1996 and carpal tunnel syndrome in 1975. He also indicated that in 1980 he had chipped a piece of bone off of his knee and required surgery. Finally he testified that approximately 20 years ago he suffered a rotator cuff tear in his left shoulder and described he had suffered a left forearm injury for which he required surgery. The claimant said that he recovered fully from each of these injuries, and that he was able to return to work after each injury.

The claimant also indicated that he has had a pacemaker since 2000 and that on October 23, 2002, Dr. Van DeBruyn advised him that driving trucks was not necessarily the safest option because of shock possibility with a

pacemaker. The claimant also testified regarding various other conditions, but testified that he had recovered after each of the conditions and had no impairments prior to the incident in question. He further indicated that the pacemaker did not prohibit him from working for the respondent-employer.

Tanya Owen, Vocational Rehabilitation Counselor and Life Planner, also testified regarding a labor market analysis performed for the claimant. She indicated the report was only given to the claimant two days prior to the hearing; therefore, he had not had any opportunity to pursue any possibilities. She indicated that she had not met with the claimant prior to making recommendations, but did rely on the FCE and other medical reports. She testified that subjective complaints were not considered in determining whether the claimant could return to work and acknowledged that many of the jobs listed were ones that the claimant could not perform or that currently did not have available positions. Finally, Owens admitted that she did not have a pay scale available for all the positions.

The Administrative Law Judge found that the claimant was entitled to 35% wage loss in excess of the

previously accepted 18% anatomical impairment rating. Respondent No. 1 appeals and contends that the claimant is not entitled to any wage loss benefits and that if he is, then the Second Injury Fund should be liable. After reviewing the record, we find the claimant to be a highly motivated individual that, while able to return to work, has suffered a diminished ability to earn wages. Additionally, it appears that his previous injuries had no bearing on his current abilities. As such, we affirm the decision of the Administrative Law Judge.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's 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).

In the present instance, the claimant, who was almost 62 at the time of the hearing, has suffered a diminished capacity to work due to his injury. The claimant suffered a severe rotator cuff for which he was noted to have lost some 40% of strength in full flexion and abduction. Less than one month before the claimant's FCE was performed, his surgeon released him to perform sedentary work or escort vehicle work. The surgeon specifically indicated the claimant could operate an automatic transmission, indicating that the claimant was precluded from driving a standard transmission. The claimant credibly testified that every job he had ever performed required him to use a manual transmission on a continual basis. He said that he did not think he could fulfill such duties after his shoulder injury. We also note that the claimant's FCE explicitly indicated the claimant was limited to immediate reaching with his right hand to a frequent basis, which is some 34 to 66 percent of the time. Certainly using a manual transmission would require constant reaching with his right

hand. Therefore, we find that the claimant's testimony that he could not use a manual transmission is entirely consistent with the opinion of the surgeon and the FCE and shows that the claimant's job opportunities are severely diminished.

His FCE released him to perform only Medium level work on a full-time basis. Furthermore, the examiner noted that the claimant he has limited ability to use his right extremity. The claimant testified that he has lost range of motion in his arm and that if he moves his arm past a certain point, it causes pain. He indicated that he can only lift 45 to 50 pounds some four to five times and that he would be unable to work as an 18-wheeler driver because he would have to handle the loads and could not use a manual transmission on a continual basis. He further testified that, in his experience, every over the road position he had performed required heavy lifting, even when the drivers were not required to load their own trucks. Certainly, as the claimant's jobs had all previously required him to perform heavy lifting and to use a manual transmission, his restrictions impede his ability to replace his wages. Despite these restrictions, and the lack of assistance from

the respondents, the claimant, who is obviously highly motivated, has managed to secure work on his own accord. However, the claimant only earns some \$224 per week, whereas his average weekly wage from the respondent was \$657. Accordingly, when considering the claimant's work experience, relatively advanced age, and various other factors, we find that the wage loss awarded by the Administrative Law Judge is certainly reasonable and is therefore affirmed.

The respondents point to the claimant's testimony that he could work 40 hours as evidence that he should not receive wage loss. However, that should not bar the claimant from receiving wage-loss benefits. Rather, it simply shows the claimant is motivated to return to work and lends credence to his testimony regarding his abilities. Furthermore, the question is not whether the claimant can work full time. The claimant candidly admits he can return to work full time; however, that is not the question before the Commission. Rather, the question is if he can replace the wages he was earning at the time of his injury. As previously mentioned, the claimant is earning substantially less than he was previously and even if he were working some

40 hours per week for his current employer, he would still be earning less than 50% of what he earned while working for the respondent employer. Furthermore, we simply do not believe that the claimant would purposely take a job paying less money than he was previously making if he had another offer of employment for more money.

The respondents further rely on the testimony of Owen in arguing the claimant could fully replace his wages. We find the opinion of Owen to be lacking. In assessing Owen's testimony, we are struck by the fact that Owen did not bother to talk to the claimant to see what he would be able to do or to determine if his abilities would be consistent with the job contacts she made. Furthermore, we are disturbed by the multitude of jobs that were outside of the claimant's physical abilities or simply did not provide much detail in order to allow one to determine if the claimant could meet the job requirements. In particular, we note that the claimant's FCE explicitly indicated the claimant was limited to immediate reaching with his right hand to a frequent basis, which is some 34 to 66 percent of the time. This is entirely consistent with the fact that Dr. Wilson released the claimant to operate an automatic

transmission and with the claimant's testimony that he could not use a manual transmission eight hours per day. Yet, Owen does not acknowledge this as a limitation and many of the jobs listed appear to be for a 18-wheeler driver position, which would undoubtedly require the operation of a manual transmission. Furthermore, we note that Owen did not consider the claimant's reports of pain in performing various tasks. Since pain is a valid consideration in determining wage loss, we find the claimant would not be able to perform as many jobs as Owen indicates.

Furthermore, the remaining jobs largely do not indicate what type of vehicle the claimant would have to operate or whether they would accommodate his inability to drive a manual transmission. Likewise, many do not indicate how much lifting the claimant would have to perform. Additionally, many of the jobs were as a driving instructor or dispatcher, which are both areas that the claimant has absolutely no experience. Likewise, Owen admitted that many of the jobs were not available and that she did not have the pay scale on the jobs. Furthermore, on some of the jobs, she simply took an average of the market for pay, without consideration of whether the claimant, as an entry level

worker, would likely earn less. In fact, it is apparent that the Class A jobs were largely for truck drivers or over the road drivers and therefore outside the claimant's abilities. Likewise, even for the Class B jobs, it is apparent that the bulk of them require heavy lifting or likely required use of a manual transmission. Furthermore, they are significantly lower paying than what the claimant previously earned. With respect to the dispatcher jobs or jobs for a driving instructor, we note the claimant has no experience. Furthermore, there were few openings and little information is provided regarding the pay for each individual position. In fact, it is apparent that the claimant's condition is most consistent to being able to be a courier. We note that the pay ranges for those jobs are generally not provided, but appear to be in line with what the claimant is currently making. The positions for the courier positions also seem to largely have no openings, indicating the claimant showed initiative and motivation by locating such a position. Furthermore, this also seems to explain why the claimant was only able to locate part-time employment as a courier. Finally, we note that Owens admitted that she had not attempted to place the claimant in any of the listed positions.

In sum, we find the claimant to be motivated and credible, as evidenced by the fact that he has worked his entire life despite being injured on multiple occasions, the fact that he gave a reliable result on his FCE, and as evidenced by his return to work on his own initiative. We find that the claimant suffered a severe injury for which he received a high impairment rating and has significant restrictions. The only work the claimant has ever performed has required him to perform heavy lifting and to use a manual transmission. He is no longer able to perform either of those duties. Despite this, the claimant, on his own accord, managed to secure work that is within his restrictions. This is strong evidence of the claimant's desire to work, as is his testimony that he would be working full time if the employer had an opening. This work is consistent with the limitations set forth by the FCE and while the claimant is able to work full-time, even when considering what he would earn in a similar position with full-time wages, he is earning substantially less than he was previously. Though Owen provided various possible job opportunities for the claimant, many of those did not comport with his past work experience, physical abilities, or did not provide salary ranges. The remainder showed the

claimant's earning potential is less than he was earning before. Furthermore, Owen acknowledged that the claimant's subjective complaints and level of experience were not considered in the labor market analysis. Accordingly, when considering the claimant's age, work experience, motivation, education, and various other factors, we find that the wage-loss award given by the Administrative Law Judge was appropriate and is affirmed.

We further find that the Second Injury Fund bears no liability for payment of the claimant's wage-loss benefits. Specifically, the claimant testified that he had recovered from all his prior injuries and testified that he suffers no impairment due to having a pacemaker. As such, his prior conditions did not combine with the compensable injury to produce a greater disability.

In Mid-State Construction Co. v Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set forth the test for determining Second Injury Fund liability. The Court opined,

It is clear that liability for the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury in his present place of employment. Second, prior to that injury the employee must have had permanent partial disability or

impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

As the claimant's medical records for the prior injuries were largely not provided, the Commission has to rely on the claimant's testimony regarding his prior injuries. The claimant testified that he had recovered fully from each of his past conditions, and had, in fact, passed DOT tests and returned to work requiring him to perform heavy manual labor which required lifting. Furthermore, Owen said the claimant had passed a DOT exam since having his pacemaker inserted. She also testified that the pacemaker was only a potential barrier to employment and that the claimant's ability to work would be determined by a pre-employment physical for the prospective employer.

While the claimant clearly meets the first requirement set forth by Mid-State, his testimony was that he sustained no impairment due to his pre-existing conditions. There is no evidence to refute that testimony. Furthermore, the claimant's pacemaker has never precluded him from working and he has been able to pass all DOT exams in the past. Accordingly, while a pacemaker could potentially bar a person from working, it has not with

respect to the claimant. Additionally, the claimant returned to work without difficulty after each of his conditions were treated, indicating that the sole cause for his current wage-loss disability claim is due to the admittedly compensable injury. As such, we affirm the findings of the Administrative Law Judge regarding Second Injury Fund liability.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-8-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code. Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to wage loss disability benefits in the amount of 35% in excess of his 18% permanent anatomical impairment. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any loss in wage loss disability.

The claimant sustained an admittedly compensable injury to his right shoulder on January 27, 2005, when he was reaching up to get hold of the tarp bar to pull down to secure his load. The claimant sought medical treatment and eventually came under the treatment of Dr. John Wilson. Dr.

Wilson ultimately reattached a muscle in the claimant's shoulder. In July of 2005, the claimant reached maximum medical improvement and was released with an 18% permanent anatomical impairment rating. The claimant described his problems with the right shoulder now as difficulty reaching and stretching and inability to lift like he was able to before the injury. The claimant testified that shifting would be a problem with truck driving now and if he had to load and unload, the lifting part would be a problem. The claimant testified that most over-the-road trucks are standard transmission. According to the claimant, he has limited range of motion of his right arm and can lift 45 to 50 pounds a few times without pain. The claimant sought and found a part-time job as a courier driver for a pharmacy, delivering medications to nursing homes. The claimant drives a small van and works about 28 hours per week. The claimant verified that he only received the vocational rehabilitation report from Ms. Owen two days before the hearing and had not had an opportunity to pursue any of the possible jobs.

Under cross examination, the claimant verified he has had a pacemaker since 2000 and takes medication. The claimant verified that Dr. Van DeBruyn advised him on October 3, 2002, that driving trucks was not necessarily the

safest option because of shock possibility with a pacemaker. The claimant verified that for each of his previous injuries, he had recovered completely and had no impairments before his January 27, 2005, injury. The claimant also verified that he did not actually physically load and unload with the respondent employer; however, he did have to physically maneuver the steel beams on the flatbed to ensure proper distribution for transporting. The claimant also had to drag chains to strap down his load and the chains weighed from 100 to 200 pounds. The claimant verified the work was physical, required the use of both arms and was considered heavy work. Before the injury, the claimant verified that he played golf every chance he got but does not now. While the claimant has some computer skills, he contended he needed to improve his computer skills in order to secure a job requiring regular computer use.

As for the details of the claimant's current position, he testified that he works part time; when asked if he could do the job physically, he candidly replied, "oh, yeah":

Q. And it's my understanding that you, indeed, looked for and have found a job. Is that right?

A. That's correct.

Q. And where do you work now?

A. At CPC.

Q. What does that stand for?

A. Central Pharmacy Company.

Q. What do you do there?

A. I'm a courier driver, delivering medications to nursing homes.

Q. What type of vehicle do you have to drive in that job?

A. It's a little Ford Windstar automatic.

Q. Is that a little small van?

A. Yes.

Q. And what are the physical requirements of that job?

A. I carry four to six paper bags with pills in them.

Q. Do you take them to nursing homes?

A. Yes.

Q. And how many hours a week are you working at that job?

A. Twenty-eight.

Q. How long have you worked there?

A. Several weeks.

Q. And have you physically been able to do the requirements of that job?

A. Oh, yeah.

The Administrative Law Judge also asked the claimant to verify that he could actually work more than he is currently working, and he admitted that he could:

JUDGE: Let me ask you one question, Mr. Baker: You talked about the job that you have that's about 28 hours per week right now. Do you feel like you're able to work more hours per week with your shoulder, if that were available? If there was a job that was 40 hours per week, would you be able to do that?

WITNESS: Yeah, I believe I could.

JUDGE: If it was something similar to what you're doing?

WITNESS: That's correct. Yeah, I believe I could.

JUDGE: So, if your current employment, if they had need for 40 hours a week, you believe you could do that?

WITNESS: I do.

The claimant was very honest in his response that he could work more than he is working; he was also honest that his trouble with his shoulder is not even significant enough to take pain medication:

Q. You're not taking any pain medication at this time for your shoulder. Is that right?

A. No.

Q. In fact, you said in your deposition that the pain isn't that great that you can't bear it. Isn't that correct?

A. That's correct.

In fact, the claimant went to his family doctor, Dr. Hearne, on at least three occasions in 2006 with no complaints whatsoever of right shoulder problems. Dr. Hearne's office note on May 1, 2006, reflects:

UPPER EXTREMITIES RIGHT SHOULDERS:
Inspection/Palpation - no deformities,
no tenderness; Range of motion - normal,
non-painful range of motion;
Strength/Tone - 5/5 throughout.

The same report was made at the next visit:

UPPER EXTREMITIES RIGHT SHOULDERS:
Inspection/Palpation - no deformities,
no tenderness; Range of motion - normal,
non-painful range of motion;
Strength/Tone - 5/5 throughout.

In addition to the claimant's testimony, the respondents also provided the testimony of a vocational counselor showing that the claimant was capable of doing many jobs, including jobs where he would make as much as he was making at the time of his injury. Tanya Owen testified that she had been doing vocational work since the early 1990s. She submitted a labor market survey and described on direct examination the steps she took in preparing the same:

Q. I have submitted a copy of your report dated July 20, 2006. It starts on our page 13 of our Exhibit Number 2. Tell us basically what you did with your assignment.

A. Sure. I was asked to review records and conduct a labor market survey based upon Mr. Baker's current physical capacities and past relevant work, in addition to his educational background as I understood it.

Q. And you've included in your report what you're [sic] reviewed. Is that correct?

A. That's right.

Q. Does that include the functional capacity evaluation?

A. Yes, it does. The May 10th FCE I did review.

Q. Tell us your understanding of his restrictions from that FCE.

A. I've outlined it on page 2. Essentially, he could - - he was found to be able to constantly carry up to 15 pounds; reach with 5 pounds; reach with his left arm; finger; handle; sit; and stand.

He could frequently walk; carry up to 30 pounds; reach with both arms; reach overhead; push and pull 45 pounds; balance; couch; kneel; and climb. And, by "frequently," usually they mean one-third to two-thirds of the workday.

And then occasionally, which is up to one-third of the workday, he could lift and carry up to 65 pounds and reach overhead.

Ms. Owen went on to describe the different positions she identified, some of them positions the claimant could do physically and some he might not be able to do:

Q. Is it your understanding that Mr. Baker has a Class A CDL?

A. Yes.

Q. How many employers did you contact for Class A drivers?

A. Twenty-four for Class A.

Q. And you have broken down each contact you made. Is that right?

A. I have.

Q. Are you necessarily saying that he could do each and every one of those?

Q. Are you necessarily saying that he could do each and every one of those?

A. No. I included all the contacts that I made, for informational purposes, to demonstrate the requirements. There's some variability in the industry among employers, so I listed ones that both were, in my opinion, within the physical limitations outlined in the FCE and also ones that were not.

Q. And there are also some indications in here that there might be limitations because of the pacemaker. Is that right?

A. There were. That seemed to be one of the bigger barriers, in my opinion, to his return to work as a Class A. Many of the recruiters that I talked to, or hiring managers, actually didn't know

the answer to the question and had to research it and get back to me. So either it's not a common phenomenon for drivers to have a pacemaker, or somehow it's not disclosed to the people hiring them. I don't really know which it is.

Q. So you've noted in each one of these whether or not that was a barrier?

A. That's right. Or if the people I was talking to didn't know, I've also included that.

Q. Out of the Class A how many do you believe Mr. Baker could do within that category, based just on his physical restrictions from the FCE?

A. In my opinion, seventeen of the twenty-four.

In addition to possible Class A driving positions,

Ms. Owen looked at other categories as well:

Q. Tell us about this Class B Driver/Bus Driver category you have.

A. That was one of the jobs that I identified as jobs that he should be able to do. If you have a Class A, you can work as a Class B driver. If you have a B, that's not reciprocal. So he could qualify as a Class B driver.

Typically, people who are Class B drivers drive smaller vehicles, such as a bus. And I've listed a number of Class B license jobs on page 8 and page 9.

Q. How many employers did you contact in that category?

A. Eleven.

Q. How many do you feel Mr. Baker

could do of those eleven?

A. I believe he could do eleven.

Other categories were also examined:

A. Driving instructor starts on page 9.

Q. How many did you find in that category?

A. I contacted six employers.

Q. How many do you feel he could do of those six?

A. I believe that he could physically do all of them. I'm not sure that he's qualified to do one of them, so I'd say five.

Q. Why don't you point out to us which one he might not be qualified for.

A. On my page 10, the assistant driver's trainer for the Little Rock School District requires quite a bit of experience.

...

Q. And then on page 11, the dispatcher jobs, how many did you contact there?

A. Four.

Q. And how may do you feel he could do of those four?

A. Well, two of them had openings. Physically, I don't see why he wouldn't be able to do a job as a dispatcher, but only two of them had openings.

Q. And also on that same page you've got courier/delivery drivers.

A. I contacted twelve employers, five of which I believe he could do. A few of them just didn't have job openings.

Q. What about car rental delivery drivers on page 12, our page 24?

A. These, again, are light level jobs, so I'd see no reason that he couldn't physically do this. There were six employers that I contacted; four of them had openings. So I think he would be able to do all four of those.

Q. Is that pretty much the same for a limo driver - - on the next page?

A. That's right. It's the same type of work; it's light level work. I contacted six, and two of them had openings.

...

Q. You heard Mr. Baker testify that he does have a job now; right?

A. Yes.

Q. Do you know any reason, under his restrictions, why he couldn't work 40 hours?

A. No, I don't.

Q. Or more, even?

A. I don't. Based on the FCE, it appears he was released to full-time work, so I don't know of anything.

Q. What about making more than he is making per hour? Do you think there are jobs available within his restrictions where he could make more money?

A. I do.

Q. I think some of those are listed in your report. Is that correct?

A. They are.

On cross examination, Ms. Owen again clarified that she provided a complete report of the jobs she looked at, not just the ones the claimant would be able to perform. If the claimant was not able to perform a job, she explained why that was:

Q. And I think that you candidly mentioned in your direct examination that many of these jobs as a Class A driver he would be not able to do. Is that right?

A. Yes, sir, I think that's true.

Q. And why were they in your report?

A. Well, when I do a labor market survey, I don't just report something that's favorable. I report the findings.

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to any wage loss disability benefits. The claimant is 61 years old and has completed four years of college in automotive engineering. The claimant underwent a functional capacity evaluation in May of 2006 which revealed that he could handle medium duty work. In fact, at the time of the hearing the claimant had gone back to work as a courier driver. Although the claimant was only working 28 hours a week, the

evidence demonstrates that he is able to work more than that and he in fact testified that he would work more than that if the hours were available by his employer.

The evidence demonstrates that the claimant is currently working and is capable of working more hours a week and making more money. The claimant is not taking any pain medication for his shoulder and the functional capacity evaluation and the testimony of the vocational counselor clearly show that the claimant is capable is doing more than he is doing at the present time. Just because the claimant, on his own volition, took a job making less than what he was making before does not entitle him to any wage loss disability benefits. Accordingly, I would reverse the decision of the Administrative Law Judge.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner