

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401752

SYLVESTER DISMUKE,
EMPLOYEE

CLAIMANT

CONAGRA POULTRY COMPANY,
EMPLOYER

RESPONDENT

GALLAGHER BASSETT SERVICES, INC.,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 27, 2007

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

Claimant represented by the HONORABLE JEFFERY KEARNEY,
Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE NORWOOD PHILLIPS,
Attorney at Law, El Dorado, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals an administrative law judge's opinion filed May 15, 2006. The administrative law judge found that the claimant proved he was entitled to additional temporary total disability compensation from November 1, 2004 through March 1, 2005. The administrative law judge found that the claimant proved additional medical treatment was reasonably necessary. The administrative law judge found that the claimant proved he was permanently totally

disabled. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge.

I. HISTORY

Sylvester Dismuke, age 53, testified that he left school after about grade seven and that he can neither read nor write. Mr. Dismuke testified that he worked on a hog farm before becoming employed with the respondent-employer in January 1972.

The parties stipulated that the claimant sustained a compensable injury to his left ankle in July 2003. The claimant testified that a pallet jack "ran up between my legs and hit the inside of my left leg and ankle and drove it over against another pallet, the pallet the ice was setting on."

The claimant presented to his family physician, Dr. Larry D. Ezell, on July 28, 2003:

Comes in complaining of pain and swelling in his left ankle. He states that he was at work at his job at Conagra on the early hours of 07/25/03. He states that his left ankle was caught between a pallet and a dolly fork....P.E. shows marked edema of the soft tissues of both medial and lateral aspect of the left ankle. Edema extends onto the mid foot. Patient does walk however with a faint limp favoring the left lower extremity. X-rays show no fracture, subluxation or dislocation. There is abundant soft tissue swelling.

Dr. Ezell assessed "Contusion to medial and lateral malleoli."

The claimant testified that he attempted to return to normal work duty after about a week and a half after the accident. The claimant testified, "When I went back, it was just like going back - Hadn't been injured or nothing, and I tried to do the job by me standing in one spot waiting on tubs to get ready to be moved. And before the end of the shift, my leg had done swelled up so big it was causing me to just hop around trying to do the job. And it got so bad that I tried to make two weeks out of it, but I didn't make it. And I just went back to the doctor and he took me off and I have been off ever since."

The impression of Dr. Gregg L. Massanelli on August 4, 2003 was "Contusion with persistent swelling of the left lower extremity....I am going to put him in a boot walker to immobilize it. I have recommended ice, strict elevation, and minimal weightbearing. I am going to keep him off work."

Dr. Ezell assessed "Ankle sprain with contusion" in August 2003.

The following conclusion resulted from a CT of the left ankle and distal tibia on August 18, 2003: "Evidence for

side-to-side crush injury. There is marked subcutaneous swelling and increased vascularity. The distal lateral fibula has marked bone bruising."

Dr. Massanelli gave the following impression on October 7, 2003: "Status post crush injury to the left ankle. He continues to have some swelling pain; however, at this point he is 2 ½ months post injury. I am going to give him an ankle brace, and I am going to let him try to go back to work. If his symptoms worsen or fail to improve, I have asked him to come to see me."

Dr. Massanelli noted on October 21, 2003, "He tried to go back to work but was unable to do so....I am going to take him back off work."

An MRI scan of the claimant's left ankle was taken on October 21, 2003, with the following impression:

1. No marrow signal abnormality to suggest an acute fracture. There is a small ankle volume joint effusion evident.
2. MRI evidence of thinning of the anterior talofibular and calcaneofibular ligament components of the lateral collateral ligament complex. The findings likely represent a previous injury/sprain with scarring and degeneration of the ligament fibers.
3. Mild tendinosis/tendinopathy of the tibialis posterior tendon.
4. MRI evidence of circumferential edema/swelling surrounding the ankle region and distal lower extremity. This does appear prominent within the

subcutaneous fat medially and laterally. The complete proximal extent is not imaged as this does appear to extend into the lower extremity. The finding may represent an underlying inflammatory process in this patient. Central/vascular causes may also be contributing to this appearance correlate clinically.

Dr. Gregg L. Massanelli noted on October 28, 2003, "He had a repeat MRI which showed some diffuse soft tissue swelling, some mild posterior tibial tendonitis, some inflammation along the anterior talofibular ligament and the calcaneofibular ligament, and a small effusion. There was no evidence of any bone bruising. Clinically, his exam is completely unchanged. He continues to have diffuse tenderness and mild swelling." Dr. Massanelli's impression was "Persistent pain and swelling of the left ankle following a crush injury."

Dr. Massanelli noted in November 2003, "His MRI shows that he does have some posterior tibial tendinitis, but I certainly do not think addressing this surgically would solve all his problems."

Dr. Jason G. Stewart, a foot and ankle surgeon, saw the claimant on December 23, 2003 and assessed "Chronic left ankle pain undetermined etiology." Dr. Stewart planned the following:

1. I have recommended seeing a pain specialist for possible RSD symptoms. I cannot however find any reason to keep him off of work any longer. Personally, it does not appear to be RSD, and I would be surprised if this were the original diagnosis. I think that it is more likely that he will need chronic pain management however since he cannot take antiinflammatories and my intervention so far has not alleviated this discomfort. I explained to him that I cannot find a reason to hold him from work. His pain is a subjective finding that some people still work with. The swelling again is something that people do work with occasionally and is not a single reason to hold somebody off of work. I do not have any further recommendations.
2. I will see him on an as-needed basis.

A three-phase bone scan of the claimant's ankles and feet on January 9, 2004 was normal.

Dr. Reginald Rutherford noted on January 9, 2004, "Mr. Dismuke is seen in follow up. His triphasic bone scan is entirely normal. There is no evidence to suggest RSD. Mr. Dismuke was appropriately advised of test results. He will report back to his family physician, Dr. Ezell, for further medical care."

Dr. Ezell opined on November 1, 2004 that the claimant had reached maximum medical improvement. Dr. Ezell referred the claimant to Dr. Massanelli for a permanent impairment rating. Dr. Massanelli reported on November 30, 2004:

Using the *Guides to the Evaluation of Permanent Impairment*, published by the AMA, 4th Edition, I would give him a 19% permanent partial impairment

of his lower extremity. He gets 7% for his loss of plantar flexion and another 7% for his loss of dorsiflexion as well as 5% for his chronic swelling. This is a combined 19% permanent partial impairment. He had no evidence on bone scan of reflex sympathetic dystrophy.

The parties stipulated that the respondents accepted a permanent anatomical impairment rating of 19% to the lower extremity.

Dr. Ezell wrote to an attorney on September 6, 2005:

This is to certify that Sylvester Dismuke is permanently disabled. The near and proximate cause of his disability is the direct result of a crushing type injury that the patient received the early hours of the morning of 07/25/03 while at work for Conagra Poultry Co. His left ankle and foot was caught between a pallet and pallet dolly fork. The patient has been unable to work since his injury....

The patient has reached maximal medical improvement and continues to be incapable of prolonged walking, standing, squatting, bending, kneeling, climbing or accomplishing repetitive use of the left lower extremity including foot and ankle. He has had continuous pain, edema and disability with extensive evaluation of the left foot crush injury. He has been assigned a 19% permanent partial physical impairment to the left lower extremity by Dr. Massanelli....

The prognosis for Mr. Dismuke ever returning to gainful employment is poor. His educational background is lacking in that the patient cannot read. He is not a rehab candidate and none of the orthopedic surgeons have deemed him a surgical candidate. His complaint has unchanged since having injured his foot 07/25/03. His condition remains unimproved.

I have been Mr. Dismuke's physician since 05/30/1996. He has not had previous histories of left foot or ankle pain....

A pre-hearing order was filed on November 14, 2005.

The claimant contended that he "suffered a compensable injury on July 24, 2003 when he was working on a pallet jack and crushed his ankle between the pallet jack and the pallet; that he was off work for 12 weeks on short-term disability commencing in the fall of 2003; that he went back to work for two weeks in February 2004, but was unable to continue; that he was advised by respondent at that time that there were no additional benefits, either short term or long term, for which he is eligible; that certain temporary total and permanent partial disability payments were subsequently made but that claimant remains entitled to wage-loss benefits, further temporary total disability and permanent total disability benefits; medical benefits, rehabilitation and attorney's fees."

The respondent contended that the claimant had received "all disability benefits, temporary total and permanent partial, to which he is entitled."

The parties agreed to litigate the following issues: "whether the claimant is entitled to additional medical treatment; whether the claimant is entitled to additional

temporary total disability benefits; in the alternative, whether the claimant is permanently totally disabled; and controversion and attorney's fees. The issue of rehabilitation is expressly reserved."

On a Social Security Administration letterhead dated December 19, 2005, an administrative law judge indicated that Disability Determination Services would schedule a consultative examination for the claimant.

The respondent's benefits coordinator informed the claimant on January 13, 2006, "I don't know if they sent you a notice or not, but our HR department terminated your (sic) as of 01-06-06, due to the length of your being off work."

On January 16, 2006, Dr. Shailesh C. Vora reported that he was conducting a neurological consultation with regard to a Social Security Disability determination. Dr. Vora assessed "1. Left ankle injury. R/O common peroneal injury. His ability to work, walk, stand, carry and handle objects, travel is impaired. Refer to the Medical Assessment form."

The administrative law judge found, in pertinent part:

3. The claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from November 1, 2004, through March 1, 2005.

4. The claimant has therefore proven ... that he is entitled to additional temporary total disability benefits from November 1, 2004, through March 1, 2005.

5. The claimant has proven ... that additional medical treatment remains reasonably necessary in connection with the compensable injury.

6. The claimant has proven ... that he is unable to earn meaningful wages in any occupation; that his compensable injury is the major cause of his permanent disability; and that the existence and extent of his disability is established by objective findings.

7. The claimant has therefore proven ... that he is permanently totally disabled.

The respondent appeals to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

The claimant sustained a compensable scheduled injury, Ark. Code Ann. §11-9-521. An employee who has suffered a scheduled injury is to receive temporary total disability compensation during his healing period or until he returns to work, regardless of whether he has demonstrated that he is actually incapacitated from earning wages. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of his injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the

disability has become more stable and if nothing further will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In the present matter, the administrative law judge found that the claimant was "entitled to additional temporary total disability benefits from November 1, 2004, through March 1, 2005." The Full Commission reverses this finding. Dr. Ezell opined that the claimant had reached maximum medical improvement on November 1, 2004. A finding of maximum medical improvement by a treating physician has been construed to mean that an employee has reached the end of his healing period. *See, Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001); *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

Further, Dr. Massanelli assigned a permanent impairment rating on November 30, 2004. Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). An injured employee is not entitled to temporary total disability compensation after his healing period has ended.

Milligan, supra, citing *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

There is no probative evidence before the Commission demonstrating that the claimant re-entered a healing period following the finding of maximum medical improvement on November 1, 2004. The Full Commission therefore finds that the claimant did not prove he was entitled to additional temporary total disability compensation.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that additional medical treatment remains

reasonably necessary in connection with the compensable injury." The Full Commission reverses this finding.

The claimant sustained a compensable injury to his left ankle in July 2003. Dr. Ezell and Dr. Massanelli initially assessed "contusion," and Dr. Ezell subsequently assessed "ankle sprain with contusion" in August 2003. Dr. Massanelli reviewed an MRI in October 2003 and found some tissue swelling but no evidence of any bone bruising. By December 2003, Dr. Stewart assessed "chronic left ankle pain undetermined etiology." Dr. Stewart did not causally connect the claimant's chronic pain to the compensable injury. Dr. Rutherford noted in January 2004 that a bone scan of the claimant's ankles and feet was entirely normal. As we previously noted, Dr. Ezell pronounced maximum medical improvement in November 2004. We recognize Dr. Ezell's referral of the claimant to Dr. Coburn S. Howell in February 2005. Yet like Dr. Stewart, Dr. Howell could not determine an etiology of the claimant's post-traumatic pain in his left foot.

The Full Commission finds that the claimant did not prove he was entitled to additional medical treatment for his compensable injury following the finding of maximum medical improvement in November 2004. Nor do we find that

the claimant's continued complaints of pain were related to the compensable injury. We therefore reverse the decision of the administrative law judge.

C. Permanent Disability

The claimant sustained an injury to his left ankle, a scheduled injury. Ark. Code Ann. §11-9-521. A claimant who sustains a scheduled injury is limited to the applicable allowances set forth in Ark. Code Ann. §11-9-521, and such benefits cannot be increased by considering wage-loss factors absent a finding of permanent total disability. *McDonald v. Batesville Poultry Equip.*, CA 04-872 (Ark. App. 4-13-2005); *Federal Compress & Warehouse Co. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996).

In the present matter, the administrative law judge found that the claimant proved he was permanently totally disabled. The Full Commission reverses this finding.

The claimant sustained a compensable injury to his left ankle in July 2003. Dr. Massanelli ultimately assigned a 19% permanent partial impairment rating, and the respondent accepted a 19% anatomical impairment rating to the claimant's lower extremity. The Full Commission recognizes Dr. Ezell's opinion in September 2005 that the claimant was permanently disabled. It is within the Commission's

province to weigh all the evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the Commission attaches more probative weight to the expert opinion of Dr. Stewart. Dr. Stewart explained to the claimant "that I cannot find a reason to hold him from work. His pain is a subjective finding that some people still work with. The swelling again is something that people do work with occasionally and is not a single reason to hold somebody off of work." In January 2006, Dr. Vora issued an opinion for the Social Security Administration indicating that the claimant's ability to work was impaired. Nevertheless, Dr. Vora did not opine that the claimant was permanently and totally disabled.

The preponderance of evidence in this case does not demonstrate that the claimant is permanently totally disabled. The Full Commission therefore reverses this finding of the administrative law judge.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he was entitled to additional temporary total disability compensation, and the claimant did not prove that additional medical treatment was reasonably necessary in connection

with the compensable injury. Nor did the claimant prove he was entitled to permanent total disability. The Full Commission therefore reverses the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant is not entitled to additional medical or temporary total disability benefits and denying the claimant permanent and total disability benefits. After a de novo review of the record, I find that the preponderance of the evidence shows the claimant is entitled to ongoing treatment,

including, but not limited to medication and maintenance treatment. I further find that the claimant is entitled to ongoing temporary total disability benefits and to permanent and total disability benefits.

The Majority first opines that the claimant is not entitled to temporary total disability benefits from November 1, 2004, to March 1, 2005. In making this finding, the Majority opines that because the claimant was placed at MMI as of November 1, 2004, he exited his healing period at that point. Dr. Ezell placed the claimant at MMI as of November 1, 2004. However, shortly thereafter, Dr. Massanelli suggested the claimant see a neurologist. The claimant did not see a neurologist until the following February and was not released by Dr. Howell until March 1, 2005. While Dr. Howell was not able to successfully treat the claimant, the fact remains that the additional treatment was recommended. As such, I find that at the time treatment was recommended, it was reasonably believed that further treatment would further improve the claimant's condition. To now deny the claimant benefits because of information that was not discovered until after that additional treatment was performed is in error.

Accordingly, I find that the claimant has shown he is entitled to temporary total disability benefits for the requested time period.

I further find that the Majority errs in denying the claimant additional medical treatment. Specifically, I simply cannot agree with the Majority's finding that the claimant's ongoing complaints of pain were not related to his compensable injury. The claimant sustained an admittedly compensable crush injury to his ankle. Since his accident, the claimant has required constant treatment in the form of pain medication, anti-inflammatories, and the use of TED hose. Likewise, he has been instructed by Dr. Ezell to use a cane. There is no evidence the claimant has suffered from ankle or foot pain or injury in the past. Furthermore, there has been no lapse in the claimant's need for care since the time of his injury and he has continued to present with objective findings in the form of swelling. As such, to find that the claimant's pain is not related to the work-related crushing injury is, in my opinion, simply illogical.

Injured employees must prove that medical services are reasonably necessary by a preponderance of

the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d The Court of Appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See, Patchell v. Wal-Mart Stores, Inc., ___ Ark App. ___ ; ___ S.W. 3d ___, (2004), citing Pippin, supra. Furthermore, this Commission has found that, treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See, Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April 28, 1998 (E502002); See also, Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission opinion

filed June 20, 1991 (Claim No. 704562). 845 (1983). Additionally, a claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

In the present instance there is no dispute that the claimant has suffered from a crush injury. Likewise, there is no dispute that he has continued to suffer from swelling associated with that injury. Furthermore, since the occurrence of the injury, the claimant has undergone treatment in the form of anti-inflammatories and pain medication and the use of TED hose and a cane. In fact, at the time of the hearing, the claimant specifically testified that he was receiving medication in the form of an anti-inflammatory and in the form of prescription pain medication. Additionally, there is no indication that the claimant's physicians have indicated that the claimant has no further need for pain medication or that his symptoms were not directly related to his compensable injury. In denying the claimant additional medical treatment, the Majority concludes that the claimant did not relate the claimant's pain to the compensable injury. They

further note that the MRI performed in 2003 did not show bone bruising and that Dr. Howell could not determine the etiology of pain. Finally, they make the curious statement, "Nor do we find that the claimant's continued complaints of pain were related to the compensable injury."

Immediately after the accident, the claimant's injury was assessed as being a contusion. Likewise, a CT scan performed on the claimant on August 18, 2003, revealed that the claimant had edema in his ankle and that he had bone bruising. Specifically, the report provides,

CONCLUSION:

Evidence for side-to-side crush injury. There is marked subcutaneous swelling and increased vascularity. The distal lateral fibula has marked bone bruising.

It was further established by objective findings as shown by the October 21, 2003, MRI which revealed that the claimant had a joint effusion and swelling in his ankle. Likewise, the MRI revealed that the claimant had signal abnormality within the soft tissues surrounding his ankle region and hindfoot.

Furthermore, the medical records indicate that the claimant's pain and swelling never subsided. Virtually every doctor's report in the records makes a notation of the claimant's swelling. In fact, the claimant was given a 5% impairment rating for chronic swelling and an additional 14% for the loss of dorsiflexion and plantar flexion that occurred as a result of his injury. It is undisputed that the respondents have accepted and paid for this rating. Additionally, as the claimant received an impairment rating it is only logical that he would have residual effects from his injury, including pain.

The Majority calls attention to the fact that Dr. Stewart did not causally connect the claimant's pain to the admittedly compensable injury. Likewise, the Majority notes that the claimant's bone scan returned as normal and that Dr. Howell could not determine an etiology for the claimant's foot pain. However, I find that such an opinion is not required in order to show that a causal relationship exists. Furthermore, I note that Dr. Howell simply opined that the claimant's pain etiology was unknown and was not due to nerve damage or neurological in nature. That is in no way indicative

that he had reason to dispute the claimant suffered from pain or that he was indicating the claimant's pain was due to a reason other than his admittedly compensable injury. Furthermore, I note that on February 11, 2005, Dr. Howell indicated the claimant's pain was posttraumatic in nature, which seems to indicate he believed that the claimant's pain was related to the admittedly compensable injury.

With respect to Dr. Stewart's determination that the claimant's pain was of unknown etiology, I note that he does not opine that the claimant's pain was not legitimate or related to his work injury. In fact, he specifically noted the claimant had edema. He also indicated that he believed the claimant would need chronic pain management, which in my opinion, supports the claimant's request for additional medical treatment.

I also find that the Majority errs in denying the claimant permanent and total disability benefits. I find that when considering the nature of the claimant's injury, his physical restrictions from that injury, and his limited education and work experience, he will be unable to return to the workforce.

"Permanent total disability" is the, "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. code Ann. §11-9-519(e). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4) (F) (ii) (a). Permanent total disability benefits may be awarded even where the compensable injury is a single scheduled injury. McDonald v. Batesville Poultry Equipment, 90 Ark. App. 435 , ___ S.W. 3d ___ 2005).

As a result of his injury, the claimant suffered from significant physical limitations. On January 16, 2006, Dr. Shailesh C. Vora specifically indicated that the claimant's, "ability to work, walk, stand, carry and handle objects, travel is impaired." At the bottom of the form, Dr. Vora indicated to refer to the Medical Assessment form. The Medical Source Statement indicated that the claimant could not perform lifting or carrying of any matter. Specifically, the form, indicates, "Are **LIFTING/CARRYING** affected by the impairment? If "yes," how many pounds can the individual lift and/or carry?" To the side the word

"Yes" is checked. There is also a handwritten notation that indicates, "none" directly next to the question regarding how much the claimant could lift. The next question indicates, "**Occasionally** lift and/or carry (including upward pulling). The words, "less than 10 pounds" are circled.

In response to the question, "Are **STANDING** and/or **WALKING** affected by the impairment?", the word, "Yes" is checked. Additionally, the form provides that the claimant could, in an eight-hour workday, stand or walk (with normal breaks) for less than two hours. The report further indicates that the claimant has limited ability to push or pull with his lower extremity. It also provides the claimant would be unable to climb, balance, kneel, crouch, crawl, or stoop.

_____I also note that Dr. Ezell has indicated that the claimant was permanently disabled as a result of his admittedly compensable injury. He indicated,

The prognosis for Mr. Dismuke ever returning to gainful employment is poor. His educational background is lacking in that the patient cannot read. He is not a rehab candidate and none of the orthopedic surgeons have deemed him a surgical candidate. His complaint has unchanged (sic) since having injured

his foot 07/25/03. His condition remains unimproved.

Dr. Ezell went on to opine,

It is my opinion therefore based on a reasonable degree of medical certainty that his patient is disabled. He has been assigned a 19% permanent partial disability of the left lower extremity. This rating has not included a rating for pain and suffering. His prognosis for return to work is poor. His complaints remain the same including pain, swelling, difficulty walking, and difficulty sleeping secondary to pain. He has failed medical management therapy. He is not a candidate for surgical remedies.

At the time of the hearing the claimant testified that he still has swelling in his ankle and foot and that he has regular pain that disrupts his sleep. He further indicated that since his injury he has gained 48 pounds and that he is unable to perform activities such as yardwork which he was previously able to perform. The medical records further indicate that the claimant has ongoing swelling in his ankle and at the time of the hearing the claimant testified he was still taking pain medication for his condition. Furthermore, the claimant testified that he has to use a cane. The need for this cane is corroborated by the

doctor's note from Dr. Ezell, dated September 6, 2005, in which the claimant is instructed to continue using TED stockings and his cane.

As of the time of the hearing, the claimant was 53 years old. He had no high school or college education and testified that he quit school in the 6th or 7th grade at the age of 19. He said that he is unable to read or write. Likewise, the claimant's work experience is extremely limited and is all manual in nature. The claimant briefly worked as a farm hand before working for the respondents. He worked for the respondents from 1972 until the time of his injury. He testified that his job with the respondents was to work on the bag line taking care of giblets. This job required him to stand continually handle and lift tubs weighing between 90 and 100 pounds. Accordingly, when considering the claimant's past job experience, inability to read or write, and his inability to stand or walk for more than two hours, I am simply unable to imagine any job at which he would be able to return to work. _____

I note the Majority's reliance on Dr. Stewart and his statement, "that I cannot find a reason to hold

him from work. His pain is a subjective finding that some people still work with. The swelling again is something that people do work with occasionally and is not a single reason to hold somebody off work.”

However, I find that this opinion does not overcome the other evidence in the record indicating that the claimant is unable to return to gainful employment. Furthermore, I note that pain is an appropriate consideration in determining permanent and total disability. See, Whitlatch v. Southland Land & Dev. 84 Ark. App. 399, 141 S.W. 3d 916, (2004). Furthermore, I also note that Dr. Stewart does not take into account the claimant’s limited education, past work experience, or the fact that the claimant attempted to return to his past job, only to be unsuccessful and subsequently restricted from returning to work. Finally, I note that the language of Dr. Stewart’s opinion even seems to indicate that the claimant’s swelling might impede him from working. He indicated, “The swelling again is something that people do work with occasionally and is not a single reason to hold somebody off work.”

Ultimately, I find that the evidence overwhelmingly shows that the claimant is entitled to

ongoing medical care and permanent and total disability benefits. There is no evidence that the claimant had ever suffered from ankle or foot pain prior to his injury. Likewise, since that time the claimant has had continual objective findings in the form of swelling and the only possible explanation for that condition or the claimant's continued complaints of pain are his admittedly compensable injury. Furthermore, there is no evidence that any physician has indicated that the claimant's condition would not require ongoing care in the form of maintenance medication and treatment.

Likewise, I find the claimant will not be able to return to gainful employment. The claimant is a motivated individual that attempted to return to work only to be unsuccessful due to his admittedly compensable injury. When considering the claimant's inability to read, his lack of work experience, limited education, his ongoing pain and swelling, his inability to walk without great difficulty or without the use of a cane, and the opinion of his primary care physician that he will be unable to return to work, I find that he has met his burden of showing that he is entitled to permanent and total disability benefits.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner