

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408467

CALVIN MOSLEY, EMPLOYEE	CLAIMANT
CONWAY SOUTHERN EXPRESS, EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILTY TRUST FUND	RESPONDENT NO. 3

OPINION FILED AUGUST 27, 2007

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

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

Respondent No. 1 represented by HONORABLE MICHAEL E. RYBURN, 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 and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 11, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.
3. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004.
4. Claimant's healing period ended on November 28, 2005.
5. Respondent #1 accepted two permanent impairment ratings, 7% to Claimant's low back and 6% to Claimant's cervical spine.
6. Claimant's average weekly wage is \$891.55; his temporary total disability rate is \$453.00; and his permanent partial disability rate is \$343.00.
7. In 1999, Claimant was paid for a 5% permanent impairment rating to his cervical spine.
8. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits. His functional capacity evaluation demonstrates that he is employable in a sedentary capacity; there is no

substantial medical evidence to the contrary.

9. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to 25% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injuries are the major cause of his decrease in earning capacity. He could perform his job prior to his compensable injuries; since then, the medical evidence and functional capacity evaluation prove that Claimant cannot perform the extent of physical labor that he could beforehand.

10. Respondent #2, the Second Injury Fund, is liable for wage-loss disability benefits payable to Claimant. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004, while he was in the employment of Respondent #1. Prior to those injuries Claimant had an impairment, as evidenced by the medical evidence relating to his 1999 injury and the stipulated 5% permanent impairment rating resulting from that injury to his cervical spine. Claimant's 1999 impairment combined with his recent compensable injuries to produce his current disability status: his 2004 neck injury was at the same level of his cervical spine as his 1999 injury; his physical limitations increased substantially following his

2004 injuries; and the medical evidence demonstrates that Claimant's 2004 neck injury aggravated a pre-existing process.

11. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715(a)(2)(A), to be paid by Respondent #2.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

The claimant appeals and Respondent No. 2 cross-appeals the December 11, 2006 opinion finding that the claimant was entitled to wage loss benefits in the amount of 25%. The Administrative Law Judge further found that the Second Injury Fund was liable for payment of those benefits. The claimant contends that he is entitled to permanent and total disability benefits. The Second Injury Fund argues that the claimant did not sustain wage loss benefits in the amount of 25%. The Second Injury Fund further argues that they should not be liable for payment of any wage loss benefits. The Majority now affirms and adopts this decision as their own.

After a de novo review of the record, I concur in part and dissent in part. Specifically, I concur with the finding regarding Second Injury Fund liability. However, I find that the claimant is entitled to permanent and total disability benefits or benefits in excess of those awarded by the Majority.

The claimant sustained admittedly compensable injuries to his neck, low back, and ankle on August 10, 2004. The parties stipulated that the claimant's healing period ended on November 28, 2005. The claimant's injuries occurred when the 18-wheel truck he was driving turned over.

The medical records from the claimant's accident with the respondent employer show the claimant's ankle was x-rayed on the day of the accident. The claimant was noted to have a possible fracture of the left ankle. The claimant apparently also sustained injuries to his right ear, left calf, and knee. On August 16, 2004, the claimant was noted to have multiple bruising, including bruising over the left calf with a small hematoma. The claimant continued with

conservative treatment for his ankle fracture, neck pain, and for the hematoma in his calf.

On October 22, 2004, an MRI was performed. The claimant's history was noted to be, "Low back and left leg numbness." The report revealed degenerative changes in the claimant's spine. It also revealed bulges at L3-4, L4-5, and L5-S1. On November 3, 2004, Dr. Collins ordered an MRI of the claimant's cervical spine. The test showed the claimant suffered from cervical spondylosis.

On November 12, 2004, Dr. Jordan recommended the claimant undergo decompression surgery for levels C4 to C6. The claimant's surgery was delayed due to the respondents' unwillingness to provide treatment. On January 4, 2005, Dr. Jim Moore opined that the claimant would be a candidate for the recommended surgery. He further indicated that the claimant's condition appeared to be, "an aggravation of a pre-existing process."

On February 15, 2005, Dr. Jordan noted the claimant had suffered from cervical problems since 2001. The note provided that the claimant had been doing well until

2001, and indicated that he had been in an accident which caused an increase in neck pain, muscle spasms, and weakness in his arms. The report noted the claimant's MRI now revealed multi-level spondylosis with canal and foraminal compromise. Dr. Jordan recommended surgery. On the same date, the claimant underwent surgery in the form of a cervical laminectomy and posterior fusion with posterior Blackstone instrumentation from C3 to C6. Postoperative x-rays which were performed on the day of the surgery showed the claimant had degenerative changes from C3 through C6 with cervical pedicle screws.

The claimant returned to Dr. Collins for treatment on February 23, 2005, and reported that the surgery had not significantly helped his condition. Repeat x-rays were performed on March 21, 2005, and showed the claimant had multi-level disk space narrowing and proliferative changes, particularly from C4-6. However, the claimant's surgical hardware was also noted to be intact. Likewise, x-rays from May 17, 2005, also revealed the claimant had "marked degenerative disk disease" at C3 through C6.

The claimant was treated again on May 17, 2005.

The note provides,

On exam he also has a limited cervical range of motion which fits with his complaint of stiffness. He has some weakness of the left lower extremity from an old injury and has burning pain there. The left leg tends to collapse when he is up. The left knee jerk is brisker and there may have been some cord injury from the cervical spine problem. His left grip is somewhat weaker than the right. He is not working and has not worked since the accident in August 2004.

He doesn't have much pain, taking only Skelaxin. He last took medicine one week ago. It will be difficult to return him to work, but we will plan to have a functional capacity examination in August and see what his capabilities are at that time.

On August 10, 2005, Dr. Dillard indicated the claimant was complaining of numbness in his right hand and difficulty with his left leg giving way and his leg buckling. Dr. Dillard indicated those symptoms could all be indications of his stenosis or surgery. Dr. Dillard recommended another MRI of the claimant's lumbar and

cervical spine. He also recommended an EMG to see if the claimant suffered from cervical radiculopathy and recommended the claimant return to Dr. Jordan. On September 23, 2005, Dr. Jordan, in response to a questionnaire from the respondent carrier, indicated that the claimant's buckling of his lower extremities did not appear to be related to his cervical fusion.

MRIs of the claimant's cervical and lumbar spine were performed on October 5, 2005. The MRI of the claimant's cervical spine showed,

IMPRESSION:

1. POSTSURGICAL CHANGES FROM C3 THROUGH C6 WITH LOSS OF CERVICAL LORDOSIS AT THESE LEVELS.
2. C3/4 DEMONSTRATES MODERATE SIZED NEURAL FORAMINAL NARROWING.
3. C6/7 DEMONSTRATES MODERATE LEFT NEURAL FORAMINAL

The MRI of the claimant's lumbar spine revealed,
IMPRESSION:

1. MULTILEVEL DEGENERATIVE DISC DISEASE IS NOTED IN THE LUMBAR SPINE.
2. At L4/5, THERE IS MILD TO MODERATE BILATERAL NEURAL FORAMINAL NARROWING.

3. AT L5/S1, THERE IS AN ANNULAR
TEAR NOTED WITH MODERATE TO SEVERE
BILATERAL NEURAL FORAMINAL
NARROWING SECONDARY TO A BROAD-
BASED DISC BULGE.

On December 22, 2005, a FCE was performed. The examiner concluded the claimant was able to work in the sedentary category. The claimant was noted to have consistent responses and abilities with his pain. The claimant reported that he continued to suffer from stiffness and soreness with intermittent throbbing. The claimant also reported low back pain with a pins-and-needles sensation. The claimant also reported intermittent numbness of his forearms and numbness to the left hand for his middle three fingers. The claimant also reported bilateral numbness of his legs and that his knees buckled when he would walk. The claimant reported that his usual pain was at an average of 6 to his neck and 7 to his back. He reported that he had an increase in symptoms when he was active. He also reported that he could perform some activities of daily living, but it would take longer, due to pain. The claimant also

reported he could not vacuum or sweep and that he suffered from sleep disturbances. The examiner noted that the claimant's test results were consistent and that self-limiting behavior of the claimant was consistent with his pain and correlating increase in heart rate. It is also significant to note that the claimant reported that, at the end of his test, he reported pain levels of 7 out of 10 to his neck and 9 out of 10 to his back.

On December 28, 2005, the claimant was deemed to be at MMI. At that time, Dr. Bruffett indicated that the claimant had undergone an EMG which was "relatively normal." Dr. Bruffett noted the claimant suffered from stiffness in his neck, and indicated that would not be surprising, given the claimant's condition. Dr. Bruffett opined that the claimant's leg buckling could be related to either his cervical or his lumbar spine. Dr. Bruffett assigned the claimant an impairment rating of 12% to the cervical spine and 7% to the lower back, which, after using the combined value chart, would equal an 18% rating. Finally, Dr. Bruffett also noted,

I talked to Mr. Mosley about returning to work. He has not worked in almost a year-and-a-half. He has a 12th grade education and previously drove a truck. He does not feel that he is capable of returning to that line of work, and that does not surprise me after all that he has been through. If he wants to look into some other line of work, or some other type of occupation, we could get an FCE to help define his capabilities. However, he does not feel that he is going to realistically go into any other line of work. This is really all he knows. I have told him that he probably needs to apply for disability.

Medical records were also introduced regarding a prior injury to the claimant's neck. A note dated July 15, 1999, indicates the claimant had suffered an injury in September. The claimant's injury was described as, "... a central cord type injury at the time of a motor vehicle accident back in September. This was the result of a hyperextension injury superimposed on some pre-existing acquired spinal stenosis." Dr. Cathey noted the claimant's neurological deficits had essentially resolved and placed the claimant at MMI. The claimant was placed at MMI and released to return to full duty. The claimant was given a 5%

impairment rating. Dr. Cathey also apparently discussed the warning signs of progressive cervical myelopathy with the claimant.

A note dated January 8, 2001, indicates the claimant had a motor vehicle accident in 1999, at which time he suffered trauma to the neck. The claimant apparently also reported that he had been told he would eventually need to consider surgery because of paresthesia and weakness of his left arm.

At the time of the hearing, the claimant was 54 years old. The claimant testified that he had completed high school. He indicated that his past work experience was to work on an assembly line for a bicycle manufacturer, working in a warehouse, and working as a truck driver. The claimant testified that he had worked for JB Hunt for 13 years and had been earning \$65,000 per year. The claimant indicated that he was required to load and unload the trucks. The claimant testified that he was terminated from that job after being in a wreck. The claimant further described that he had worked in a position with Integration Distribution,

moving trailers and containers. Finally, he indicated that he had been working for the respondent employer for almost five years when he was in his accident.

The claimant testified that he held two positions with the respondent employer. The claimant initially worked on a regional route and then took a job where he unloaded trucks. That job required the claimant to take trailers from Little Rock, Arkansas, to Conway, Arkansas, and then load and unload from four to nine trailers per day. The trailers contained school furniture. The claimant testified that, after receiving seniority, he was moved to work in regional driving. The claimant said he earned significantly more money working in regional driving. The claimant indicated that for the year of 2003, he earned \$37,873. However, during 2004, the year the claimant was injured, he earned \$42,290. Notably, the earnings for 2004 were only from January to August, which is when the claimant was injured.

The claimant testified that the respondent employer discharged him the day he sustained his admittedly

compensable injuries. He also indicated that he has not been offered any vocational rehabilitation assistance.

The claimant also testified regarding his current symptoms. The claimant testified that his low back constantly feels as though it is in knots. He described that he cannot sleep at night. He further testified that he can walk, but that his legs frequently buckle. The claimant testified that he took prescription pain medication provided by Dr. Collins until he ran out. He now takes hot baths to help relieve his pain. He further indicated that he has not returned to Dr. Jordan because he could not get authorization from the respondents. The claimant also described that he has neck pain and that his shoulders and arms will go to sleep occasionally. The claimant testified that he will sometimes try to mow his yard but that he has a friend that usually mows his yard. The claimant described that he has difficulty bending, stooping, and lifting. Finally, the claimant testified that he suffers from headaches which are associated with his admittedly compensable injuries.

The claimant testified that he has not worked or looked for work since being involved in the accident with the respondent employer. He also testified that he feels he is unable to work and is drawing social security disability benefits. The claimant testified that between the payment for his impairment rating and his social security disability benefits, he is receiving around \$3,100 or \$3,200 per month.

The claimant also described prior injuries to his neck. The claimant testified that, while working for JB Hunt, he sustained a neck injury. The claimant said he was given a 5% impairment rating for degeneration and indicated he settled the claim with JB Hunt for \$10,000.

After a review of the record, I find that the claimant has shown that he is entitled to permanent and total disability benefits. The claimant has significant impairment ratings to his neck and back and continues to remain symptomatic from those conditions. There is no indication that the claimant's report of these symptoms appears to be exaggerated in any way. Likewise, Dr. Bruffett advised the claimant that he should consider disability and

Dr. Jordan indicated the claimant would have "great difficulty" in returning to work. Given the well-documented severity of the claimant's condition and pain levels, and the fact that the claimant has only worked in a manual labor capacity and has no experience in sedentary work, I find that the claimant will be unable to return to work. Furthermore, in my opinion, even if one does not find that the claimant is permanently and totally disabled, then I find that he should be awarded wage loss benefits greatly in excess of those awarded by the Majority.

While the claimant has made no attempt to return to work, it is apparent that he sustained significant impairment as a result of the combination of his pre-existing injury and compensable injuries. In fact, the claimant has been approved to receive social security disability benefits, one of his physicians advised him to apply for disability benefits, and one indicated that the claimant would have difficulty returning to work. When these factors are considered in conjunction with the claimant's pain level and lack of experience in anything but manual

work, I find that it is apparent the claimant is entitled to wage loss benefits in a higher amount than that awarded by Majority.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Pursuant to Ark. Code Ann. §11-9-522, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating and can find a claimant permanently and totally disabled based upon wage loss factors. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W. 3d 916 (2004). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b) (1) (Repl. 2002); Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307,

635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

The claimant credibly testified that since his compensable injury, he still suffers from pain in his neck and back and has headaches. The claimant has difficulty sleeping at night due to his condition and also described that, on occasion, his hands will go numb and his legs will buckle. The claimant also suffers from difficulty in bending or lifting and has difficulty performing routine tasks such as mowing his yard. Though the claimant has not been taking prescription pain medication, he did so until he ran out, and is apparently attempting to seek additional medical care for which he has had difficulty getting authorization from the respondent employer. Furthermore, he has to relieve his pain by taking hot baths.

The medical records also corroborate the legitimacy of the claimant's symptoms. The symptoms recounted by the claimant appear throughout the various doctors' reports, and there appears to be no doubt as to the legitimacy of the symptoms. Furthermore, despite the

assertions of the Majority, the claimant appears to be permanently and totally disabled. In particular, I note the claimant's treating physician is of the opinion that the claimant is disabled. On December 28, 2005, Dr. Bruffett advised the claimant he should apply for disability. While it is apparent that Dr. Bruffett also discussed the possibility of the claimant having an FCE, he, nonetheless, after speaking with the claimant, told him to apply for disability. I simply cannot believe that Dr. Bruffett would have given such advice had he not believed the claimant would be unable to return to the workforce.

Additionally, I note that on May 17, 2005, Dr. Jordan also indicated that, while the claimant could submit to an FCE, it would be difficult to return him to work. This further evidences the fact that the claimant would be unable to return to the workforce. Though the Majority concludes that this is not evidence of the claimant's inability to return to work, I do not agree. As with Dr. Bruffett, Dr. Jordan indicated the claimant likely could not return to work. While Dr. Jordan indicated an FCE

could be performed, in my opinion, the tone and language used in his report shows that he did not think the claimant would be able to return to the workforce, but would agree to the claimant having an FCE. Furthermore, when considering the fact that the claimant was approved for disability benefits, it is apparent that the claimant is, in fact, unable to return to work.

Finally, I note the claimant's FCE indicated he could return to sedentary work. However, during the examination, the claimant reported that he was experiencing a significant amount of pain. Those pain responses were considered by the examiner to be consistent with the claimant's injury and his activities. This is significant, as pain is a factor that is to be considered when awarding wage loss. See, Whitlatch, supra. It is also apparent that the examiner of the FCE did not consider the claimant's pain in determining if the claimant could return to work. In this instance, it is particularly significant to note the claimant's pain because the examiner specifically noted that the claimant's complaints of pain were consistent with his

pain and activities. Therefore, even though the examiner indicated the claimant could physically perform sedentary work, when considering his pain, it is evident that he would not realistically be able to perform work at even that level.

I also find that it is curious that the respondents have not offered the claimant vocational rehabilitation in order to allow the claimant to at least try to return to work. The claimant, despite realistically believing he cannot return to work, and having been approved for disability benefits, has indicated he would be willing to try sedentary work. Yet, the respondents have made no attempt to find sedentary work at their place of business. In fact, they have not attempted to retrain the claimant or find him other work. If the claimant were truly able to return to work, I simply cannot believe the respondent would not take such steps to return the claimant to the workforce.

Finally, I address the contention that the claimant is not motivated to return to work. I strongly reject such a contention. The claimant has a strong work

history, as evidenced by the fact that he has worked in a manual capacity throughout his entire adult life.

Furthermore, he returned to work even after sustaining other injuries. As to the assertion that the claimant did not attempt to return to work after this incident, I note that the claimant was not afforded such an opportunity by the respondent employer. Additionally, he was not offered vocational rehabilitation and was advised by his physician to apply for disability benefits. Given such considerations, I simply do not believe the claimant's failure to return to work is evidence of lack of motivation. Rather, it appears that the claimant realistically knows he cannot return to work.

Next, I address the veiled assertion that the claimant's receipt of disability benefits and the payment for his impairment rating has decreased the claimant's motivation. I note that for the year of 2004, the claimant earned some \$42,290 during the first eight months of his employment. This equates to wages of over \$5,000 per month, and approximately \$1,250 per week. Yet now he is only

receiving approximately \$3,000 per month. This is a dramatic reduction in the claimant's earnings. Furthermore, the claimant's entitlement to benefits in excess of his impairment rating is in litigation, therefore it is likely the claimant has been advised that his workers' compensation payments are by no means something he can expect to receive forever. Accordingly, it is apparent that the claimant's receipt of workers' compensation benefits is not a valid consideration in the claimant's motivation to return to work.

In short, when considering the fact that the claimant only has a history of working in manual labor, would not be able to work in that capacity, and had a high rate of pay prior to being injured, it is apparent that the claimant will not be able to replace his wages. In fact, when considering that two physicians have indicated that the claimant would likely be unable to reenter the workforce, and the extreme, legitimately documented pain associated with the claimant's minimal actions during the FCE, I find that the claimant has shown that he is entitled to permanent

and total disability benefits, or at a minimum, wage loss benefits greatly in excess of those awarded by the Majority.

Though the respondents contend the claimant is not motivated to return to work and could work in some capacity if he wished, the evidence simply does not support such a finding. The claimant's own treating physician encouraged him to apply for disability benefits which were granted. Furthermore, given the fact that the claimant suffers extreme pain in his neck and back and has numbness in his hands and arms on occasion, I simply do not believe that he would legitimately be able to return to even sedentary work.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner