

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404094

BILLY PILLOW, EMPLOYEE	CLAIMANT
SANYO MANUFACTURING CO., EMPLOYER	RESPONDENT NO. 1
MITSUI SUMITOMO INSURANCE CO., CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 10, 2007

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

Claimant represented by HONORABLE M. SCOTT WILLHITE, Attorney at Law, Helena-West Helena, Arkansas.

Respondent No. 1 represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent no. 1 appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled as well as a finding that he had a 8% permanent anatomical impairment rating. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse

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the decision of the Administrative Law Judge. Specifically, we reverse the finding of the Administrative Law Judge that the claimant sustained an 8% permanent anatomical impairment rating. We find that the claimant sustained a 6% permanent anatomical impairment rating which has been accepted and paid by the respondents. Furthermore, we find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to any wage loss disability benefits.

The claimant was employed by the respondent employer as a forklift driver. On April 19, 2004, the claimant sustained an admittedly compensable injury and spent two days in the hospital. The claimant was treated by Dr. Schwartz. Following his April 19, 2004, work related incident, Dr. Schwartz's records reflect that the claimant was diagnosed with multiple contusions in addition to his preexisting hypertension, diabetes, and hypercholesterolemia. The claimant was not diagnosed with any fracture or bony injury. The claimant followed up with

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Dr. Schwartz on April 26, 2004, and was diagnosed with musculoskeletal pain, hypertension, diabetes and hypercholesterolemia.

The claimant received treatment for a brief time from Dr. Banaji in the form of conservative medication. The claimant was then referred to Dr. Frederick Parisoon who ordered an MRI on May 11, 2004. The claimant attempted physical therapy, and was then referred to Dr. Autry Parker for pain management. After receiving a Change of Physician Order from the Commission, the claimant was seen by Dr. Robert E. Abraham for a neurological evaluation.

On April 4, 2005, the claimant underwent a functional capacity evaluation which found that the claimant had put forth inconsistent effort and demonstrated inconsistencies in his responses. The examiners further commented:

...pain reports at a level 9 are not consistent with the definition of these pain levels as repeatedly given to him during testing. A 9 was defined as UNABLE TO SPEAK, CRYING OUT OR MOANING UNCONTROLLABLY-NEAR DELIRIUM. [The

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claimant's] general movement patterns were inconsistent with his high pain rating outside of formal testing. For example, during the interview portion of testing he demonstrated normal hand and arm movements as well as no guarding of the cervical region. When formally tested he had very, very slow hand movements with him shutting his eyes and groaning. He was noted to walk 40 feet in 30 seconds as he left the clinic, yet had taken well over 1 minute to cover this distance when formally tested. This again indicates a manipulation of the testing procedure.

According to the examiners, the claimant's true functional limitations remained unknown due to the unreliable results. However, the examiners stated that the claimant demonstrated at least the ability to perform work at the sedentary level.

On April 19, 2005, Dr. Parker concluded that the claimant had reached MMI, and agreed that the claimant was at least able to perform sedentary work. Dr. Parker's diagnoses of the claimant included cervical disk herniation, lumbar degenerative disk disease, and facet arthropathy.

Following Dr. Parker's report, which placed him at MMI, the claimant sought a change of physician through this

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Commission, and was seen by Dr. Abraham on June 30, 2005. Dr. Abraham, in turn, referred the claimant to Dr. Braden for pain management. The testimony of the claimant reflects that he discussed the requirements of his job duties with Dr. Braden, and that Dr. Braden still returned him to work without restrictions.

Specifically, on October 11, 2005, Dr. Braden noted that:

[The claimant] continues to have a multiplicity of complaints with his spine, which covered the entire spine as well as his cervical, thoracic and lumbar spine included.

[The claimant] is a 57-year-old, white male who sustained injury on 4-1-04. He has had chronic pain since then. He has participated with multiple physicians and has had multiple medications. He has had spinal injections done and has been seen by Neurosurgery.

His objective findings are a left-sided paracentral disc herniation at C5-6. His other findings that have been had in his other testing are more related to degenerative changes

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He has a diagnosed sensory neuropathy that is not related to the injury that he reports to have sustained.

[The claimant] has reached Maximum Medical Improvement from the injury he reports to have sustained.

He is being released back to his regular work duties without restrictions. In my experience, though, individuals such as [the claimant] do not return back to work and are very involved in their pain.

His impairment, abased upon the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, is a 6% impairment to the whole person, Based on Table 75, page 113 of the Guides.

...

There is no need for him to see me further from a Physical Medicine and Rehabilitation standpoint. He can follow with his family physician, Dr. Frank Schwartz, for renewal of his medications.

On October 12, 2005, the claimant presented to his family doctor, Dr. Schwartz, who stated that the claimant would be able to return to work without restrictions on October 20, 2005. On August 7, 2006, Dr. Schwartz

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corresponded with the claimant's counsel and stated that he had:

...had the opportunity to reevaluate [the claimant] today, and I find that he still walks with a pronounced limp and he uses a cane. He rises [sic], sits and lies down with a fair amount of difficulty. He has a decreased range of motion in the spine. At the present time, he has no changes in reflexes or weakness of the lower extremities. It is fairly obvious that he has no ability to perform any kind of task that involves lifting or prolonged standing. His management has also been complicated by severe depression following his prolonged inability to work.

At this point in time, I do not think that there is any reasonable hope given his lack of improvement since the initial injury that he will ever return to work.

However, during his September 1, 2006, deposition, Dr. Schwartz clarified his opinions regarding the claimant's ability or inability to work, and admitted that these opinions were based solely on the claimant's subjective complaints. For example:

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Q. Would you agree, Doctor, that the findings of a limp, use of a cane, rising sitting, and laying down are subjective criterial?

A. True.

...

Q. Would you agree, Doctor, that the statements, quote, It is fairly obvious that he has no ability to perform any kind of task that involves lifting or prolonged standing, end quote; and also, quote, I do not think that there is any reasonable hope, given his lack of improvement since the initial injury, that he will ever turn to work, end quote; these require you to rely on [the claimant's] subjective pain complaints, his movements in the office and on your personal observation and also his history of illness as provided to you?

A. True.

Q. Essentially, Doctor, would you agree your statements as to ability to return to work are essentially based upon his pain behavior, his complaints, and your observation of him while he was in your office?

A. Yes.

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Dr. Schwartz further testified that he thinks "that physically [the claimant] may be able to do some work; but mentally, I don't think he'll ever be able to hold a job down." Dr. Schwartz went on to opine that it was his opinion that the claimant "has become quite focused on his problem, and its basically the focus of his life right now."

It is also significant that the claimant has self-limited his behavior based upon "the alleged" side effects of the medication on his mental and physical capacity. However, none of the claimant's physicians have opined that the claimant's medication prevents him from working, operating a motor vehicle, or impedes his functional abilities in any way.

It is by now elemental that for a specific incident injury as the claimant sustained "major cause" is never a question raised when determining whether to accept compensability. There are two important provisions that address major cause - the first applies to gradual onset injuries (See A.C.A. § 11-9-102(4)(E)(ii)) and the second

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applies to permanent benefits (See A.C.A. § 11-9-102(4)(F)(ii)(a)). These provisions are not interchangeable, thus any decision with regard to one does not in any way affect any decision with regard to the other. Accordingly, it is not only reasonable, but often times necessary to raise the major cause argument with regard to permanent benefits, when a major cause argument is not applicable for compensability. Clearly, this claimant had numerous pre-existing problems. While the medical records reveal that claimant has lumbar degenerative disc disease and facet arthropathy, these were never found nor stipulated to be compensable injuries. On the record before us, any medical conditions beyond those associated with the claimant's admittedly compensable neck injury, become relevant in determining whether the claimant's compensable neck injury is the major cause of his present disability or need for treatment.

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The evidence demonstrates that the claimant had extensive preexisting conditions which include degenerative changes and sensory neuropathy. Specifically, Dr. Braden opined:

His objective findings are a left-sided paracentral disc herniation at C5-6. His other findings that have been had in his other testing are more related to degenerative changes.

He has a diagnosed sensory neuropathy that is not related to the injury that he reports to have sustained.

[The claimant] has reached Maximum Medical Improvement from the injury he reports to have sustained.

He is being released back to his regular work duties without restrictions. In my experience, though, individuals such as (the claimant] do not return back to work and are very involved in their pain

The claimant himself testified that other than his herniated cervical disc, "he is aware that Dr. Braden referred to all of his other finding as more related to degenerative changes as well as a diagnosis of sensory neuropathy that is not related to the compensable injury.

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Specifically, the low back and right leg complaints were characterized by Dr. Braden as being degenerative and unrelated to the accident."

Admittedly unhappy with the opinion of Dr. Braden, the claimant independently (and without approval by the respondents or the Commission) sought out the opinion of Dr. Joseph Boals. Dr. Boals opined on March 14, 2006, that the claimant's medical records revealed extensive preexisting degenerative changes. Regarding the claimant's x-rays, Dr. Boals stated that:

AP and lateral cervical spine show multilevel degenerative changes with straightening. AP and lateral lumbosacral spine show multilevel degenerative changes with some slight degenerative spondylolisthesis at L4-5.

Dr. Boals went on to comment regarding the claimant's MRIs:

MRI of the neck 5-11-04 showed multilevel degenerative change. MRI of the back 5-11-04 also showed multilevel degenerative change. Bone scan 6-16-04 showed facet joint disease at L5-S1 level. EMG 6-17-04 showed evidence of a severe sensory neuropathy involving the

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right lower extremity suggestive of an
S1 radiculopathy.

Despite the claimant's extensive preexisting degenerative changes, Dr. Boals diagnosed the claimant with "residuals" from injury to the neck and back, and assessed him with a 20% impairment to the body as a whole.

Dr. Boals gave the claimant an overall assessment of his impairment, which included a "13% anatomical impairment relative to the claimant's lower extremity complaints." Dr. Schwartz's deposition testimony solidifies the opinion that the restrictions that Dr. Boals placed on the claimant's ability to work, including bending, stooping, squatting, sitting, walking, and lifting, and which the Administrative Law Judge used as a basis for his opinion, were based upon "the EMG, which shows neuropathy related to the radiculopathy." All of the claimant's physicians are of the opinion that the claimant's neuropathy is in no way related to the April 19, 2004, forklift incident.

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Dr. Schwartz testified that it would be "speculative" to give an opinion as to whether the claimant's work related injury is the major cause of his alleged inability to return to work as opposed to his other conditions such as diabetes and his current mental status. For these reasons, the claimant has not, and cannot, establish that his compensable neck injury is the major cause of his permanent disability for neuropathy or any wage loss disability, as required by Ark. Code Ann. §11-9-102(4)(F)(ii).

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co.,

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46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

With regard to the determination of the claimant's anatomical impairment rating, the statutory constraints adopted by the General Assembly must be considered. A.C.A. § 11-9-704(c) (1) (B) states that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." This provision preceded Act 796. However,

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objective medical findings was not a defined term until Act 796. Prior to Act 796, the Court of Appeals in Taco Bell v. Finley, 38 Ark. App. 11, 826 S.W.2d 313 (1992) held:

"It is reasonably clear that in making its determination of physical impairment, the Commission also considered the claimant's testimony about her symptoms, including pain, and the effect of activity on those symptoms. Such consideration in the determination of permanent disability is not prohibited by Ark. Code Ann. 11-9-704 (c), so long as the record contains "objective and measurable" findings to support the Commission's ultimate determination."

By Act 796, not only did the General Assembly define "objective findings" as "those findings that cannot come under the voluntary control of the patient;" but it also gave very specific guidance with regard to what may and may not be considered when determining physical or anatomical impairment. Thus, while subjective criteria may be considered, to some extent, when assessing an anatomical impairment rating so long as the rating is supported by

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"objective and measurable findings" we are also governed by A.C.A. § 11-9-102(16)(A)(ii) which specifically states:

(a) When determining physical or anatomical impairment, neither a physician, any other medical care provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.

(b) For purposes of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range of motion tests shall not be considered objective findings.

Moreover, as mandated by the General Assembly to adopt an impairment rating guide, this Commission adopted Guides to the Evaluation of Permanent Impairment (4th ed. 1993) "exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine." Rule 34.

With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective

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only if it is the result of a diagnostic procedure which does not come under the voluntary control of the patient. Department of Parks & Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

The evidence demonstrates that Respondent no. 1 has accepted and paid, in full, a 6% permanent anatomical impairment rating for the claimant's compensable neck injury. On March 14, 2006, the claimant sought the opinion of Dr. Boals who assigned the claimant a 20% whole body permanent anatomical impairment rating. After reviewing the impairment rating of Dr. Boals, it is obvious that his opinion is not supported by objective and measurable findings pursuant to Ark. Code Ann. §11-9-704(c)(1)(B).

Dr. Boals initially gave the claimant an impairment rating for his compensable neck injury of 8% based the Fifth edition of the Guides, but Dr. Boals later changed his assessment to an 8% rating based upon the 4th edition. Dr. Boals opined that the basis of his impairment rating for the claimant's neck was a 5% rating based upon

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objective findings under the DRE Cervical Category II page 102, as well as an additional 5% impairment assignment "for the ongoing radicular pain in both hands," a subjective component. Although Dr. Boals's 8% impairment rating improperly considered the subjective component of pain, along with properly considered objective components, the Administrative Law Judge awarded the 8%. Arkansas law does not allow subjective complaints of pain to be considered with respect to assigning permanent anatomical impairment. Thus, even assuming that the subjective finding of pain is "supportive" of the objective findings and the 8% impairment rating under A.C.A. § 11-9-704, the General Assembly unequivocally prohibited physicians, any other medical care providers, administrative law judges, the Workers' Compensation Commission, and the courts from considering complaints of pain when determining anatomical impairments. Thus, should this Commission use Dr. Boals evaluation to award the claimant permanent benefits, the only portion of Dr. Boals's determination that we may statutorily consider

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is the initial 5% per DRE Cervical Category II. The respondents have accepted 6% rating as assigned by Dr. Braden and have paid that rating which is more than the 5% than the claimant is entitled to under the law. The additional 12% that Dr. Boals gave the claimant is based upon the claimant's other complaints which are not related to his compensable injury.

Therefore, after considering the evidence, we find that the claimant is entitled to the 6% permanent anatomical impairment rating that has been accepted and paid by the respondents.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart

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Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); Cross v. Crawford County Memorial

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Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Logan County v. McDonald, 90 Ark. App. 409, ___ S.W.3d ___ (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment

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of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at

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wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Supp. 2005) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

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Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

When we consider the fact that the claimant has been released by Dr. Braden without any restrictions, the fact that the claimant has a 6% permanent anatomical impairment rating, plus the fact that the claimant has failed to return to work based upon his own self-limiting behavior and subjective complaints, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits, much less permanently and totally disabled.

The claimant is a six foot, two inch tall, two hundred and ninety pound, fifty-eight year old with a ninth

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grade education, who is literate, and who in addition to his training and expertise as a forklift operator, has also received extensive training in firefighting, wild land suppression, protective equipment, forest fires, extrication, hazmat, and search and rescue. The claimant has worked for the respondent employer for thirty eight years, mostly as a forklift driver. The claimant has also worked at a service station, as a stocker at a grocery store, as a volunteer firefighter, as a security guard, as a constable, and as a volunteer search and rescue team member for the local sheriff's department. The claimant has also worked on cars changing alternators and fan belts.

Despite being released to return to work without restrictions by Dr. Braden on October 12, 2005, and again by Dr. Schwartz on October 20, 2005, the claimant has never returned to work. Although the claimant was terminated for failure to comply with Union procedures, he was reinstated by the respondent employer following Union grievance proceedings.

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Natalie Parkman, Human Resource Specialist for the respondent employer, testified at the hearing that the respondent employer was holding the claimant's job open for him; and, that following his release by Drs. Braden and Schwartz, the claimant could have returned to work in his previous position. Further, because of his Union agreement, the claimant would have returned with full seniority, earning more than he was earning at the time of his injury.

The claimant admitted that he was advised that he could return to work for the respondent employer at an even higher earning rate than at the time prior to the accident. Despite this knowledge, the claimant further admitted that he did not plan on returning to work for the respondent employer "any time soon," and is drawing Social Security Disability benefits. In our opinion, the claimant has little or no motivation to return to active employment. The claimant testified that he "does not feel that he could go back to perform his job with [the respondent employer] because of the residuals of his injury."

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The evidence demonstrates that the claimant unreasonably refused a bona fide job offer offered by the respondent employer, therefore, he has failed to prove entitlement to wage loss disability.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The respondents appeal the Administrative Law Judge's November 8, 2006 finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled as well as the finding that the claimant sustained an 8% impairment rating to the body as a whole. The respondents stipulated that the claimant sustained a compensable injury to his neck and that he sustained a 6%

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impairment rating. Although the claimant appears to have sustained an injury to his neck, lumbar back and right leg, the issues before the Administrative Law Judge were on the claimant's entitlement to an impairment rating in accordance with the neck injury and the claimant's entitlement to wage loss. The Majority has reversed the decision of the Administrative Law Judge.

The Majority erroneously finds that the claimant has failed to meet his burden of proof. Specifically, the Majority erroneously finds that the claimant only sustained a 6% anatomical impairment rating and that he is not entitled to any wage loss. In my opinion, the Majority not only arbitrarily ignores the claimant's testimony, but ignores the opinion of Bob White, a vocational specialist. For these reasons, I respectfully dissent.

History

The claimant, a fifty-eight (58) year old man with a ninth (9th) grade education, had been employed by respondents for thirty-seven (37) years. The claimant had

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been employed as a forklift driver for the entirety of his employment with the respondents, except for a short period of time early in his career when he worked in production.

The claimant's job duties included loading various objects using a clamp hook (a.k.a. clamp truck or squeeze truck) while operating the forklift. In addition to driving the forklift to load or unload objects, the claimant considered his job to be a heavy duty position due to the all the required lifting and moving of the various objects. The claimant testified that he had to physically man-handle televisions, microwaves, or whatever came onto the trailer from time to time. The claimant testified that his duties included unloading the objects on the trailers, and if an item was damaged, he would have to move it and get another item out of the warehouse. All of this included heavy lifting, and the claimant testified that he was able to perform all of his job duties prior to April 19, 2004.

The claimant was also very active in the community prior to April 19, 2004. The claimant served as a volunteer

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firefighter on the Caldwell Fire Department for 14 or 15 years. In order to serve as a volunteer firefighter, the claimant had been certified by hazmat and take courses on auto extractions, wild land suppression, forest fires, and various other subjects. In addition to serving as a volunteer firefighter, the claimant worked search and rescue for the St. Francis County Sheriff's Department and worked part-time as a security guard at a local supermarket.

On April 19, 2004, while in the respondents employment, the claimant was involved in an accident, where he sustained an injury to his neck. The claimant testified that he was loading television sets into a trailer with his forklift. At that time, the trailer began to drive off, dragging the forklift behind. The forklift lost its footing and pulled the claimant down, injuring him. The respondents do not dispute that the injury is compensable.

The claimant testified that after the accident he has had continuous pain in both his back and neck, in addition to having headaches. Soon after the accident, the

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claimant testified that he was not able to get up very well and even needed assistance in the bathroom, which was demeaning. The claimant testified that he could only walk a short distance due to the pain, and in fact, the claimant used a cane at the trial. The claimant testified that he could not sit for a lengthy period of time without adjusting, and that he can only tolerate sitting because of the medication that he receives. The claimant testified that after the accident he received prescription medication Ultram, Neurontin and Effexor, which he continually takes. The claimant also takes medication for cholesterol, diabetes, and blood pressure, which he received before the accident. However, the claimant testified that he had never missed work due to his previous conditions.

The claimant testified that he would like to return to work, but did not feel that he would be able to return to work in his present condition. The claimant testified that he could not drive the forklift as he once did, due to the prescription medication that he takes. In

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fact, the claimant testified that he had not even driven a car since the accident. Furthermore, the claimant testified that he would not be able to resume the heavy lifting that his job required. In addition to not being able to return to work for the respondents, the claimant has been unable to resume work as a volunteer firefighter, as search and rescue personnel with the St. Francis County Sheriff's Department, or as a part-time security guard with a local supermarket.

The claimant was taken to the hospital for treatment immediately after the accident, where he stayed for several days. The claimant was seen at the hospital by Dr. Schwartz, who also served as the claimant's primary care physician. However, on this particular occasion, Dr. Schwartz was also serving as the workers' compensation physician. Although the claimant's immediate medical records are not present in the record, it appears that the claimant suffered a cervical disk herniation, lumbar degenerative disk disease, and facet arthropathy.

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After conservative treatment from Dr. Schwartz for one year, the claimant was saw Dr. Autry Parker for pain management, who confirmed that the claimant suffered a cervical disk herniation, lumbar degenerative disk disease, and facet anthropathy on April 19, 2005. Dr. Parker also placed the claimant at maximum medical improvement, yet specified that the claimant could only capable of sedentary work.

The claimant then sought and received a Change of Physician Order and received treatment from Dr. Robert Abraham on June 30, 2005. Dr. Abraham noted that the claimant had neck pain on both sides of his neck and into the midline of the lower C spine. Pain, characterized by a burning and stinging sensation, is present 60% to 70% of the time. Additionally, the claimant experiences numbness in his hands and weakness in his arms with some neck pain when he exerts himself. Additionally, the claimant suffered from right leg pain along the posterior thigh calf and into the foot and is characterized as a stinging and numb sensation.

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Dr. Abraham noted that there was some weakness in the right leg, which has a tendency to "go out." Dr. Abraham noted that the claimant suffered a nondermatomal loss of sensation in whole right leg. Dr. Abraham also cited the MRI which revealed that the claimant suffered from a minimum bulge at C6-7 and minimum bulges at L3-4 and L4-5.

On October 17, 2005, the claimant was seen by Dr. Braden, a pain management specialist. Dr. Braden noted that the claimant suffered a paracentral disc herniation at C5-6. Dr. Braden did not note that the claimant suffered from bulging disks at L3-4 and L4-5, as the MRI revealed, but concluded that the "other findings" were more related to degeneration. Dr. Braden did not define "other findings." Dr. Braden also noted that the claimant suffered sensory neuropathy, which he did not relate to the accident, yet he gave no indication why he made such a finding. Without noting the claimant's job or job duties, Dr. Braden released the claimant back to his regular work duties without restrictions and declared that he was at maximum medical

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improvement. Dr. Braden then noted that the claimant's impairment, based upon the AMA Guides to Evaluation of Permanent Impairment, 4th Edition, is a 6% impairment to the whole person, based upon Table 75, Page 113 of the Guides. Dr. Braden prescribed Effexor XR, Neurontin, and Amtriptyline, and specified that the claimant should follow up with his family physician for renewal of his medication.

On March 14, 2006, the claimant sought a medical evaluation on his own with Dr. Joseph C. Boals, III. Dr. Boals recited the claimant's extensive conservative treatment, noting that it did not seem to help the claimant. Dr. Boals noted that the claimant complained of neck pain with burning in both hands and numbness that occurs while turning his neck. After reviewing x-rays and the MRI, Dr. Boals noted that the claimant showed multilevel degenerative changes with straightening in the lateral cervical spine. Dr. Boals' diagnosis was that the claimant suffered, "residuals from the injury to the neck aggravating a pre-existing arthritic change with ongoing symptomology."

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In addition, Dr. Boals noted that the X-rays revealed that the claimant suffered multilevel degenerative changes with slight degenerative spondylolisthesis at L4-5. Additionally, the EMG from June 17, 2004 showed evidence of a severe sensory neuropathy involving right lower extremity suggestive of S1 radiculopathy. Dr. Boals additionally diagnosed the claimant as suffering "residuals from injury to the back aggravating a pre-existing arthritic change with ongoing radiculopathy." Dr. Boals also noted that the claimant was now on Social Security Disability. Dr. Boals recommended that the claimant should avoid overhead work, work away from the body and work requiring repetitive flexion, extension or rotation of the neck. Additionally, the claimant should eliminate walking, standing, stooping, squatting, bending, climbing, and excessive motion in the back. Furthermore, due to the radiculopathy and severe back pain, the claimant should continue to use a cane for short distances and a walker for long distance.

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In assigning the claimant an impairment rating for the neck, Dr. Boals used the AMA Guides to Evaluation of Permanent Impairment, 5th Edition and assigned an 8% impairment of the body as a whole. Dr. Boals supported this finding by using Table 15-5, page 392, Cervical Category II and noted that the upper limit of the range was selected due to the radicular complaints associated with positioning.

In assigning the claimant an impairment rating for the back injury resulting in S1 radiculopathy, Dr. Boals used the AMA Guides to Evaluation of Permanent Impairment, 5th Edition and assigned a 13% impairment of the body as a whole. Dr. Boals supported this finding by using Table 15-3, page 384, Lumbar Category III and noted that the upper range of motion was selected since he does have radiculopathy requiring the use of a cane and narcotic information. As such, the claimant's total impairment is 20% to the body as a whole.

On March 27, 2006, Dr. Boals revised his initial assessment by providing an impairment rating under the AMA

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Guides to Evaluation of Permanent Impairment, 4th Edition.

Dr. Boals assigned the claimant a impairment rating of 5% to the body as a whole under DRE Cervical Category II page 102. Dr. Boals assigned and additional 3% impairment for the ongoing radicular pain in both hands. As such, the total impairment rating for the neck was 8% to the body as a whole. Furthermore, the impairment for the S1 radiculopathy from the back injury would be assigned a 10% impairment rating under DRE Lumbrosacral Category III page 102. He also assigned an additional 3% for increased symptoms of pain. Thus the overall body impairment equals 20% to the body as a whole. He assigned the impairment rating using general instructions of the 4th Edition on page 8 under 2.2 "Rules of Evaluations." Dr. Boals also concluded that the claimant could not return to any type of factory work, and if employable, it would require numerous handicap aides and sitting at a job with the ability to change positions often.

When the claimant was ordered by Dr. Braden on October 12, 2005 to return to work, he was physically

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unable, even though could have made higher wages when returning to work due to Union contract rules. In fact, the federal government already determined that the claimant was disabled, as evidenced by the claimant drawing Social Security Disability. Despite this, Dr. Braden returned the claimant to full duty without restrictions.

Dr. Schwartz, however, took the claimant off work until October 20, 2005. On October 21st, 2005 the respondents advised the claimant that if he was not returning to work, he would need to produce another doctor's note by October 27th, 2005. Due to Dr. Schwartz's vacation, the claimant could not produce a doctor's note until October 28th, 2005. As such, the claimant was terminated as an employee for failure to follow procedures as outlined. The claimant filed a grievance with union assistance, and he was subsequently reinstated as an employee. However, the claimant testified that he would not be able to return to work.

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On August 7, 2006, Dr. Schwartz's medical notes reveal that he does not believe that the claimant can return to work. Dr. Schwartz noted that the claimant still walks with a pronounced limp and uses a cane, and that the claimant rises, sits, and lies down with a fair amount of difficulty. Dr. Schwartz noted that the claimant has a decreased range of motion in his spine and that it was obvious that he had no ability to perform any type of task that involved lifting or prolonged standing. Additionally, his management was complicated by severe depression following his inability to work. Dr. Schwartz specifically noted that he did not think that there was any reasonable hope, given the claimant's lack of improvement since the initial injury, that he would ever return to work.

Dr. Schwartz also provided testimony in the form of a deposition regarding the claimant's condition. Dr. Schwartz testified that he stood by his assertion that the claimant would never return to work. Dr. Schwartz testified that although his findings that the claimant walks

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with a pronounced limp and rises, sits, and lies down with a fair amount of difficulty is based upon subjective criteria, he specifically testified that he used a passive range of motion test, which did not come under the voluntary control of the claimant. Dr. Schwartz also testified that he had been treating the claimant for diabetes, hypertension, hypercholesterolemia, and an occasional respiratory infection since 2002. He had never treated the claimant for pain, neuropathy, or a symptomatic degenerative problem with his back or neck prior to the April 19, 2004 accident. Only after the accident did the claimant complain of back or neck pain.

The claimant also underwent a Functional Capacity Exam (FCE) on April 4, 2005 and a Vocational Assessment on May 19, 2005. During the FCE, the claimant had not reached MMI or was even able to walk without the assistance of his walker. As such, the FCE concluded that the claimant put forth very inconsistent effort and demonstrated inconsistencies in his responses. Accordingly, the FCE

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determined that the claimant's true functional limitations remained unknown due to the unreliable results.

However, a Vocational Assessment was also performed by Bob White, a vocational specialist, who took into consideration the claimant's age, education, work history, any medically determinable physical and/or mental impairment resulting in specific vocational handicaps affecting his return to work. Mr. White made the following conclusions:

Quoting "A Guide to Rehabilitation", a Matthew Bender Publication, "Impairment - Herniated Nucleus Pulposus, Disc Derangement, Spondylitis, Spondylosis Vocational Handicaps - Often accompanied by chronic pain. Restrictions on: Lifting, carrying, standing, walking, bending, twisting, physical stamina and endurance are customary. Avoidance of uneven terrain, unprotected heights, climbing and work in awkward positions is unusually necessary."

Further, it should be noted Billy will not be competing against other 57 year old handicapped individuals for jobs in the local economy but with all students who drop out of high school, vocational technical school or college and directly enter the labor movement, individuals

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who complete high school but choose to enter the labor force instead of continuing their education, and all workers who have been fired, quit, or laid off from jobs and thrown back into the labor pool, regardless of age or gender.

Finally, all jobs require persistence and pace to complete specific job tasks - all jobs require dependability and reliability (worker traits) and the ability to complete the normal eight hour work day and 40 hour work week. All jobs have on going work processes (requiring an individual to be in a set position for a specific period of time and to complete specific work tasks) with time dependent schedules.

The issue is not can Mr. Pillows return to work for a few days or even a few weeks, but can he perform the specific essential functions of a job over a period of months and years as a reliable, dependable employee.

Mr. Pillow is worn out. At age 57 he has given his entire life in one occupation with three employers. He has no skills to offer an employer, no education and in fact has had only his ability to perform hard physical work and be a reliable dependable worker.

He has objective test which support his pain complaints and his physical

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limitations. He does not meet the criteria to perform sedentary or light work as those terms are defines and it is unlikely there is anything else to offer him medically.

There is no vocational issues in my opinion and I have nothing to offer Billy. He should diligently, however, work in controlling his weight, exercise within the normal limits and work on family dynamics, as this can deteriorate easily in chronic pain cases.

In sum, Bob White found that the claimant would not be able to return to work. Not only would the claimant physically be unable to perform most jobs that he was qualified to perform, but the labor market would not be likely to hire a person with such limitations.

Mrs. Pillow, the claimant's wife, also testified in regard to her husband's condition. Mrs. Pillow testified that prior to the accident, her husband was very active in the community and that he could basically do whatever he physically wanted to do. However, after the accident, his life has changed dramatically. She testified that he no longer works in the yard and that he now lays or sits around

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most of the day while watching TV. She often has to help him get up or down and she even has to help him get into the tub. She testified that he often makes statements about his pain.

Natalie Parkman, the Human Resource Specialist for respondents, testified in regard to the claimant returning to work. Ms. Parkman testified that the claimant exhausted 12 weeks of family medical leave and an extra 12 weeks under the union's collective bargaining contract. Ms. Parkman testified that the claimant was released to work on October 12, 2005 and he took a medical leave of absence which returned him to work October 20, 2005. When the claimant was still unable to return, Ms. Parkman sent the claimant a letter specifying that he provided a letter from a doctor giving him time off. The claimant was required to provide this documentation by October 27, 2005, however, she did not receive it until October 28, 2005. As such, the claimant was terminated as an employee. Ms. Parkman testified that had the claimant informed her that his doctor

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was out of town, then it would not have been a problem; however, the claimant never told her this information. After a grievance procedure, the claimant was given his job back, though he has yet to return to work.

Impairment Rating

As indicated above, the claimant was evaluated by several different doctors, and he received impairment ratings from Dr. Braden and Dr. Boals. Dr. Braden found that the claimant's impairment, based upon the AMA Guides to Evaluation of Permanent Impairment, 4th Edition, is a 6% impairment to the whole person, based upon Table 75, Page 113 of the Guides. Dr. Boals, on the other hand, using the AMA Guides to Evaluation of Permanent Impairment, 4th Edition, assigned the claimant a impairment rating of 5% to the body as a whole under Diagnosis Related Estimate (DRE) Cervical Category II page 102. Dr. Boals also assigned an additional 3% impairment for the ongoing radicular symptoms in both hands, for an overall 8% impairment rating. I agree with Dr. Boals in assigning an 8% impairment rating.

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After reviewing the record, I find that the Majority errs in dismissing the opinion of Dr. Boals because he appears to take subjective criteria into account. In my opinion, the Court of Appeals has quite clearly indicated in multiple recent remands, that a doctor's opinion cannot be discounted simply because it is based, in part, on subjective criteria. Furthermore, when reviewing the opinions of Dr. Braden and Dr. Boals, it is apparent that Dr. Braden incorrectly used the Range of Motion Model as a substitute for the Injury Model.

Ark. Code Ann. § 11-9-704(c) (B) (Repl. 2002) provides that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Further, permanent disability "benefits shall be awarded only upon the determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. § 11-9-102(4) (F) (ii) (a) (Supp. 2002). The Commission has adopted the American Medical Association's Guides to Evaluation of

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Permanent Impairment, (4th ed. 1993) for use in assessing the extent of permanent anatomical impairment.

As recently noted by the Arkansas Court of Appeals, an impairment rating need not be based solely on objective findings. Donald Groom v. Nekoosa Papers, Inc., Et Al., ___ Ark. App. ___, ___ S.W.3d ___ (2006). Rather, as long as objective findings are used as part of the basis for an impairment rating, subjective criteria may also be used in assigning an impairment rating. Id. In Singleton v. City of Pine Bluff, CA06-398 (Ark. App. 12-6-2006), the Court noted:

Although it is irrefutably true that the legislature has required medical evidence supported by objective findings to establish a compensable injury, it does not follow that such evidence is required to establish each and every element of compensability. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). All that is required is that the medical evidence of the injury and impairment be supported by objective findings, Ark. Code Ann. §§ 11-9-102 (4) (D) and 11-9-704(b) (4) (B) (Repl. 2002), i.e., findings that cannot come under the voluntary control of the

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patient. Ark. Code Ann. § 11-9-102
(16) (A) (i) .

The disparity in the ratings of Dr. Braden and Dr. Boals is because the Guides uses two separate ratings systems for spinal injuries. The first method is using the DRE, in what is referred to as the Injury Model. In using this method, a doctor would examine a particular patient, and based upon factors set out in the Guides themselves, placed the claimant in a particular category of impairment. According to Dr. Boals, the claimant was in a DRE Category II, which states: Minor Impairment: clinical signs of neck injury are present without radiculopathy or loss of motion segment integrity. Category II allows an impairment rating of 5 to 14%, and Dr. Boals assigned a 5% impairment rating. However, the claimant also experienced pain, characterized by a burning and stinging sensation, present 60% to 70% of the time. Additionally, the claimant experienced numbness in his hands and weakness in his arms with some neck pain when he exerts himself. As such, Dr. Boals explained that the

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claimant suffered from radicular symptoms, also known as radiculopathy. DRE's Category III states: Radiculopathy: evidence of radiculopathy is present, in which case the physician can award an additional percentage to the claimant's overall impairment rating. Based upon the claimant's radiculopathy, Dr. Boals assessed the claimant at an additional 3%, which totals an 8% impairment rating to the body as a whole.

As subjective factors are not prohibited in giving an impairment rating so long as other objective findings exist, it is clear that Dr. Boals correctly assigned the additional 3% rating for radicular symptoms. First, objective findings in the form of a cervical disk herniation exist. This has not been disputed. Second, the claimant's radiculopathy is evidenced by the claimant experiencing numbness in his hands and weakness in his arms with some neck pain when he exerts himself. Additionally, the claimant experienced a burning and stinging sensation, present 60% to 70% of the time. These symptoms were identified by several

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doctors. Although these are subjective factors, they are not prohibited from being taken into consideration due to the fact that objective findings exist.

The second method in the Guides is referred to as the Range of Motion Model and was used by Dr. Braden in assessing the claimant's impairment. Dr. Braden noted that the claimant suffered a paracentral disc herniation at C5-6. Dr. Braden also noted that the claimant suffered sensory neuropathy, which he did not relate to the accident, yet he gave no indication why he made such a finding. Dr. Braden then assessed the claimant's impairment, based upon the AMA Guides to Evaluation of Permanent Impairment, 4th Edition, is a 6% impairment to the whole person, based upon Table 75, Page 113 of the Guides. Dr. Braden appears to use Category II, Part C, which states: Intervertebral disk or other soft-tissue lesion: Unoperated on, stable, with medically documented injury, pain, and rigidity associated with moderate to severe degenerative changes on structural tests; includes unoperated on herniated nucleus pulposus with or

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without radiculopathy. As such, Dr. Braden assessed a 6% impairment rating.

_____When reviewing the opinion of Dr. Braden, it is apparent that it contains flaws. Likewise, I find that the 6% impairment rating awarded by the Majority is equally flawed. Dr. Braden's impairment rating is based upon a partial use of the other method of evaluating spinal injuries referred to in the Guides as a Free Range of Motion Model. This method provides a table which indicates a certain percentage of impairment based upon spinal injuries and then directs the evaluator to perform a number of range of motion tests upon the patient, the results of which are used to compute a second percentage of impairments. Those two percentages would then be combined using a combined values table to determine the actual degree of impairment. Dr. Braden relied only upon the table which provides impairments based upon the degree of the injury. Using Table 75 of the Guides, he determined that the claimant had sustained a 6% impairment.

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_____ However, as previously discussed, the Guides specifically indicate that the Range of Motion model should only be used when a rating cannot be given under the Injury Model. It is significant to note that Dr. Braden has not provided any indication that such would not be an appropriate method in giving a rating. Furthermore, as previously discussed, subjective factors, such as range of motion are not prohibited in giving an impairment rating so long as other objective findings exist. Even Dr. Schwartz testified that he specifically used a passive range of motion test, which revealed a decreased range of motion in the claimant's spine. Dr. Braden made no indication in his medical notes that he even performed a range of motion test. As such, in reviewing Table 75 and Braden's opinion, it appears that he did not correctly apply Table 75.

_____ Thus, the issue becomes whether the Commission should find with Dr. Braden or Dr. Boals. It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony. DeQueen Sand &

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Gravel v. Cox, 95 Ark. App. 234, ___ S.W.3d ___ (2006). The Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. Allen Canning Co. v. Woodruff, 92 Ark. App. 237, ___ S.W.3d ___ (2005). When the Commission weighs medical evidence and the evidence is conflicting, its resolution is a question of fact for the Commission. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). Moreover, the Commission can reject or accept medical evidence and determine the probative value to assign medical testimony. Hamilton v. Gregory Trucking, 90 Ark. App. 248, 205 S.W.3d 181 (2005). However, it is also well settled that the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro. Transportation Inc., CA 06-525 (Ark. App. 2-7-2007). Additionally, there is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings.

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Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

In arguing that the Injury Model or Range of Motion model be used, I note that the Guides themselves, indicate that the Range of Motion Model should be used only if the Injury Model is unavailable. The Guides indicate,

The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p. 108). That model, for instance, would be applicable to a patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the Range of Motion Model.

In this instance, Dr. Boals believed that the Injury Model was the appropriate model to use. Dr. Braden, on the other hand, did not mention the Injury Model. Instead, it appears that he simply used the Range of Motion Model without first consulting the Guides' instructions. As such, it is clear that Dr. Boals' opinion should have more weight than Dr. Braden's. Furthermore, it is apparent that

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Dr. Boals reviewed the claimant's x-rays and MRI while performing his assessment. Dr. Braden makes no reference to any objective tests, he simply states that there are objective findings. This leads me to conclude that Dr. Boals performed a more thorough exam, and as such, his results are more reliable. In sum, I find that the claimant is entitled to an 8% impairment rating. Therefore, I respectfully dissent from the Majority's finding that the claimant only sustained a 6% impairment rating.

Wage Loss

I find that the Majority errs in not awarding any wage loss. The claimant sustained very serious injuries to the neck and back, which the respondents have accepted as compensable. Furthermore, the claimant will be unable to return to his previous employment. I find that the claimant is permanently and totally disabled.

The claimant, a fifty-eight (58) year old man with a ninth (9th) grade education, had been employed by respondents for thirty-seven (37) years. The claimant had

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been employed as a forklift driver for the entirety of his employment with the respondents, except for a short period of time early in his career when he worked in production. As such, his age, education, and experience extremely limits future employment possibilities. Additionally, Vocational Specialist, Bob White, concluded that due to the claimant's age, education and experience, that he was virtually unemployable and did not even meet the criteria for sedentary work. Dr. Abraham and Dr. Boals also concluded that the claimant could only return to sedentary work. Furthermore, Dr. Schwartz opined that the claimant's depression prevented the claimant from returning to work. As such, I find that the claimant is permanently and totally disabled.

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. The wage-loss factor is the extent to which a compensable injury has affected the

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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), 54 Ark. App. 130, 923 S.W.2d 886 (1996). It is well established that a claimant's prior work history and education are factors to be considered in determining eligibility for wage-loss benefits. See Cross v. Crawford County Memorial Hosp.; Glass v. Edens; City of Fayetteville v. Guess; Curry v. Franklin Electric, supra.

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The Majority erroneously finds that the claimant should not be entitled to any wage loss because he did not meet the burden of proof for a wage loss award. The Majority finds that the claimant failed to return to work despite being released without restrictions and being offered suitable employment by the respondents. After Dr. Braden released the claimant to return to work, the respondents offered the claimant his previous job as a forklift driver, citing that Dr. Braden did not note any work restrictions. However, it is apparent from Dr. Parker's, Dr. Braden's, Dr. Boals', and Dr. Schwartz's notes that the claimant could not have realistically returned to his previous employment.

Ark. Code Ann. § 11-9-526 provides:

If an injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

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An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. Webb v. Webb, Workers' Compensation Commission Full Opinion filed June 29, 2000 (E906144). Work must be available within the employee's physical restrictions. McCuller v. Democrat Printing & Lithograph Co., Workers' Compensation Commission Full Opinion filed April 28, 1998 (E608050). Moreover, the claimant must unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

The work that the respondents offered the claimant was not suitable, and as such, his refusal was justifiable. First, both Dr. Parker and Dr. Boals' assessed the claimant as being able to return only to sedentary work. The claimant testified that his job had required him to frequently lift heavy objects, which he could not do any longer. Furthermore, the claimant labeled his employment as heavy duty due to the lifting requirements. Additionally, the claimant would be required to turn his head throughout the

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day while operating a forklift. As the claimant sustained a considerable neck injury, it would have been nearly impossible for the claimant to return to a job that required so much neck movement. As such, it would have been physically impossible for the claimant to perform the requirements of the job that was offered to him.

Second, the claimant was taking heavy medication in the form of Ultram, Neurontin and Effexor. Dr. Braden prescribed this medication. The claimant testified that he had not driven since the accident due to the effects of the medication. As such, he did not think that he could drive a forklift, as the job required. Furthermore, it is doubtful that the respondents would have actually allowed the claimant to return to work as a forklift driver, knowing that a person taking such heavy medication was a potential liability when operating heavy machinery. Additionally, it is doubtful that the claimant would have been approved by the Department of Transportation (DOT) while taking this prescription medication. As such, the respondents' "offer"

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of suitable employment was certainly not a good faith offer, as it was impossible for the claimant to perform the essential functions of that job.

_____The Majority finds that the claimant was not placed on any restrictions by either Dr. Braden or Dr. Schwartz. This is simply not a valid argument for two reasons. First, Dr. Braden made no indication in his medical notes that he knew anything about the claimant's occupation. Additionally, Dr. Braden made no indication that he knew the requirements that the claimant's job entailed. The respondents argue that the claimant testified that he informed Dr. Braden of his job requirements, though that does not appear anywhere in the record or in the claimant's testimony. Furthermore, Dr. Braden prescribed such heavy medication that it is difficult to believe that he would have knowingly sent the claimant back to driving a forklift while essentially intoxicated on prescription medication. As such, his recommendation to return the claimant to work without restrictions was made without full knowledge of the

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claimant's job requirements and should therefore not be given any weight.

_____Second, although Dr. Schwartz did not note any restrictions when returning the claimant to work, Dr. Schwartz's medical notes reveal that he did not believe that the claimant could return to work. This was evidenced by the fact that Dr. Schwartz subsequently took the claimant back off of work after Dr. Braden returned him to work. Dr. Schwartz noted that the claimant still walks with a pronounced limp and uses a cane, and that the claimant rises, sits, and lies down with a fair amount of difficulty. Dr. Schwartz noted that the claimant has a decreased range of motion in his spine and that it was obvious that he had no ability to perform any type of task that involved lifting or prolonged standing. Additionally, his management was complicated by severe depression following his inability to work. Dr. Schwartz specifically noted that he did not think that there was any reasonable hope, given the claimant's

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lack of improvement since the initial injury, that he would ever return to work.

_____Furthermore, Dr. Schwartz's testimony was that the claimant would not be able to return to work. Dr. Schwartz opined that physically the claimant may be able to do some of the work, but mentally, the claimant would never be able to hold down a job. Dr. Schwartz bolstered his opinion that the claimant would not be able to return to work by agreeing with the restrictions placed on the claimant by Dr. Boals. Dr. Boals had recommended that the claimant should avoid overhead work, work away from the body and work requiring repetitive flexion, extension or rotation of the neck. Additionally, the claimant should eliminate walking, standing, stooping, squatting, bending, climbing, and excessive motion in the back. Furthermore, due to the radiculopathy and severe back pain, the claimant should continue to use a cane for short distances and a walker for long distance. Additionally, even Dr. Parker found that the claimant could only return to sedentary work. Interestingly,

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by sending the claimant back to work Dr. Braden's opinion is contradictory to every physician's opinion in the record. As such, it is evident that the respondent's job offer was not only unsuitable, but the claimant's refusal was justifiable.

It is also important to note that the claimant suffered a deep depression due to his injury. Dr. Schwartz testified that the claimant's pain management was complicated by severe depression following his inability to work. It is evident that Dr. Schwartz did not think that the claimant could return to work, due in part to his depression. In SSI v. Lohman, ___ Ark. App. ___, ___ S.W.3d ___ (2007), the Court opined that depression does not preclude a claimant from wage loss benefits. Although the respondents assert that the claimant simply refused work, it is apparent that the claimant's depression was a substantial factor in his refusing work. However, as depression has been accepted by the Court of Appeals as a factor in determining wage loss, the claimant should not be denied wage loss by

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refusing a job that was not only unsuitable, but that the claimant was mentally unable to return to.

_____ Additionally, the Majority finds that the claimant was not motivated to return to work and therefore should be denied wage loss. This argument completely fails to consider that the claimant suffered a legitimate and undisputed injury, for which there are objective medical findings. Furthermore, the claimant still receives prescription medication for his injuries. The respondents have forgotten that the claimant cannot fake objective medical findings or the fact that his physicians, including Dr. Braden, felt that his pain was bad enough that he must continuously be prescribed prescription pain killers. Additionally, the respondents completely ignore the fact that prior to the accident, the claimant worked several jobs. After the injury, he has been unable to return to any of those jobs.

_____ The Majority further finds that the claimant did not put forth consistent effort during the FCE, and therefore the claimant's true functional limitations are

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unknown. This erroneous argument completely fails to consider the medical records from Dr. Parker, Dr. Schwartz, Dr. Boals, and the Vocational Assessment provided by Bob White. Not only do Dr. Parker and Dr. Boals assess that the claimant should be returned to sedentary work, but Dr. Schwartz testified that he agreed with Dr. Boals' assessment of the claimant's physical limitations.

Furthermore, Bob White assessed that the claimant would most likely not be able to return to even sedentary work. Bob White opined that due to the claimant's age, education, skills, and physical limitations, in addition to the labor market, he would most likely not return to work.

Bob White noted restrictions on lifting, carrying, standing, walking, bending, twisting, physical stamina and endurance. Bob White noted that the claimant would not be competing against other 57 year old handicapped individuals for jobs in the local economy but with all students who drop out of high school, vocational technical school or college and directly enter the labor movement, individuals who

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complete high school but choose to enter the labor force instead of continuing their education, and all workers who have been fired, quit, or laid off from jobs and thrown back into the labor pool, regardless of age or gender. As such, I further find, that not only could the claimant not return to the job that the respondents offered to him, it is likely that the claimant will not be able to return to work.

In the case of Clyde O. Cox v. DeQueen Sand & Gravel Company, Full Commission Opinion filed August 1, 2005 (F011701), and was later affirmed by the Court of Appeals, the claimant sustained admittedly compensable silicosis. The claimant was over forty years old, had an eighth grade education, and had difficulty reading and writing. Additionally, his only work experience was performing heavy, manual labor, which he was unable to perform. This Commission relied on the testimony of Bob White, a Vocational Rehabilitation Specialist, who indicated that the claimant, due to his age, his medical condition, and

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shortage of jobs for people with his abilities, would not be employable.

Likewise, in the present case, it is evident that the claimant's medical condition in combination with his age, job skills, and labor market prohibit him from returning to work. Accordingly, even Bob White's notes illustrate that the claimant's medical condition in combination with his work experience, age, and education along with the local job market, are all factors to consider in determining the claimant's employability. As such, I find that the claimant is permanently and totally disabled.

The Majority also finds that the claimant failed to prove that his work-related injury was the "major cause" of his disability or his work-related injury, citing his pre-existing condition. This is particularly peculiar as the respondents accepted the neck injury as compensable and have paid for all of the claimant's medical treatment. Furthermore, the respondents fail to remember that the employer takes the employee as it finds him, and employment

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circumstances that aggravate pre-existing conditions are compensable. Nashville Livestock Comm'n v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); St. Vincent Infirmary Med. Ctr. v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Public Employee Claims Div. v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992). As Professor Larson states:

Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employee aggravated, accelerated, or combined with the disease or infirmity to produce death or disability for which compensation is sought.

Varner v. Water Loo, Ind., Full Commission Opinion filed march 30, 1998 (E608272); citing 1 Arthur Larson, The Law of Worker's Compensation § 12.21 (1993).

In the present case, the Majority finds that the claimant did not prove that his neck injury is the major cause of his disability because he suffered from hypertension, diabetes, hypercholesterolemia, and

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degenerative changes prior to the accident. This is clearly wrong as the claimant did not experience any pain prior to the April 19, 2004 accident. In fact, the claimant was a very active person in the community prior to April 19, 2004. The claimant served as a volunteer firefighter on the Caldwell Fire Department for 14 or 15 years. In order to serve as a volunteer firefighter, the claimant had been certified by hazmat and take courses on auto extractions, wild land suppression, forest fires, and various other subjects. In addition to serving as a volunteer firefighter, the claimant worked search and rescue for the St. Francis County Sheriff's Department and worked part-time as a security guard at a local supermarket. Obviously, the claimant's pre-existing conditions did not prevent his activities.

Additionally, the claimant testified that prior to the accident, he had no pain. This is evidenced not only by his activity in the community, but in Dr. Schwartz's medical records and testimony that he did not treat the claimant for

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pain before the April 19, 2004 accident. The claimant's wife further corroborated the claimant's testimony that he was very active prior to the accident. Although the claimant had seen a chiropractor prior to the accident, the claimant and his wife testified that the claimant did not see a chiropractor after their date of marriage in 1981.

Therefore, it has been at least 23 years since the claimant was treated by a chiropractor. Additionally, the respondents did not present any medical records of the claimant's visit to a chiropractor, therefore making it impossible to determine which part of the body was actually treated by a chiropractor. As such, the claimant worked for at least 23 years without any complaints of pain in his neck or back until after the April 19, 2004 accident and the fact that the claimant visited a chiropractor no less than 23 years prior to the accident is entirely irrelevant.

The claimant was not physically limited until after the work-related accident. After the accident, the claimant became so limited that he even had to have his wife

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assist him with normal activities, such as using the bathroom. Dr. Boals' opined that the claimant should eliminate walking, standing, stooping, squatting, bending, climbing, and excessive motion in the back. Furthermore, the claimant should continue to use a cane for short distances and a walker for long distance. As such, it is evident that the claimant did not have these limitations prior to the accident, further evidencing that the work-related injury was the major cause of the claimant's disability.

The Majority also finds that Dr. Braden related all of the claimant's back and leg pain to degenerative or unrelated changes. As previously stated, Dr. Braden's record is afforded little weight, especially in light of the fact that the claimant did not experience pain in his neck prior to the accident. Therefore, it is evident that the claimant's work-related injury was the major cause of his disability. As such, I find that the claimant is entitled to permanent and total wage loss benefits.

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In conclusion, I find that the claimant sustained a permanent impairment rating of an additional 8% to the body as a whole, pursuant to the Guides to the Evaluation of Permanent Impairment, (4th Ed. 1993). Additionally, in light of the claimant's age, education, work experience, and skills in addition to the limitations of the local work force, I find the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled.

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner