

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107697

JAMES ELLENBERG, EMPLOYEE	CLAIMANT
BURNETT GIBBS MOTORS, INC., EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 16, 2008

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

Claimant represented by HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 not represented by counsel at the hearing.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 17, 2006.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant sustained a compensable injury on May 17, 2001 to the neck and back.
3. A maximum compensation rate for a 2001 injury of \$410.00 for TTD and \$308.00 for PPD.
4. Respondents No. 1 accepted a total of 17% anatomical impairment rating.
5. Claimant reached the end of his healing period on August 31, 2004.
6. Claimant's medical treatment after August 31, 2004, with Dr. Ward was for the purpose of pain management and did not constitute a new healing period.
7. Claimant has failed to prove by preponderance of the evidence that he is entitled to permanent and total disability benefits in that he has been released to return to light duty work.
8. Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss benefits.
9. The preponderance of the evidence demonstrates that there is no Second Injury Fund liability in this case since

claimant's permanent partial impairment is directly related to his May 17, 2001 work-related injury.

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 & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree with the majority's findings that the claimant sustained compensable injuries to the neck and back on May 17, 2001 and has sustained permanent impairment of 5% to the neck and 12% to the back, for a combined total of 17% permanent physical impairment. I also agree with the majority's finding that the Second Injury Fund does not have liability in this claim. However, based upon a de novo review of the record in its entirety, I find that the claimant's healing period did not end until January 10, 2006, and, as the claimant was totally incapacitated from work from May 16, 2005, when the claimant's authorized treating physician took the claimant off work, until January 10, 2006, the date claimant reached maximum medical improvement, the claimant is entitled to temporary total disability benefits for this time period. Furthermore, as I find that the claimant has proved by a preponderance of the evidence his entitlement to

a significant increase in his permanent impairment rating in the form of wage-loss disability, I must also dissent from the majority's finding that the claimant is not entitled to any wage-loss or permanent and total disability benefits.

HISTORY

The claimant worked for the respondent employer as a mechanic. On May 17, 2001, the claimant and two co-workers were attempting to move a car that was raised on a floor jack, when the vehicle jerked, injuring the claimant's spine. The claimant underwent his first neck surgery, to the C6-7 area, on July 30, 2001. The claimant underwent his second neck surgery, to the C3-4 area, on April 16, 2002. The claimant underwent his third neck surgery, to correct a dowel problem in the C3-4 area, on May 31, 2002.

In July of 2002, after the third surgery, the claimant returned to the respondent and inquired as to whether or not he would be put back to work. The respondent told the claimant, who had made \$72,000 the year he was injured, that he could come back to work if he took a 15% pay cut. The claimant declined.

In August of 2002 the claimant went to work for another employer, IPSCO, as a generator technician. At IPSCO, the claimant made \$14.50 an hour, approximately 48 hours per week, and he estimated that his yearly pay with overtime would be \$60,000.

In September of 2002, Dr. Adametz assigned the claimant a 12% permanent impairment rating to the body as a whole for his neck injuries.

The medical records indicate that while the claimant was working at IPSCO, he began to experience a recurrence of lower back pain, related to the May 17, 2001, specific incident at work, and that he returned to Dr. Adametz for treatment, and eventually had to stop working for IPSCO in February 2003.

A Hearing was held on this claim on May 22, 2003. The issues at the hearing were additional medical treatment for the claimant's neck injury, additional temporary total disability benefits for the claimant's neck injury and the compensability of the claimant's lower back injury. On August 11, 2003, the Administrative Law Judge found that the

preponderance of the evidence reflects that the claimant sustained a compensable low back injury on May 17, 2001, and that the preponderance of the evidence reflects that the claimant remains in his healing period for both his compensable neck and back injuries and is entitled to temporary total disability from February 13, 2003 to a date yet to be determined.

On September 23, 2003, Dr. Adametz stated:

CHART NOTE: Mr. Ellenberg came back to the office on 9/23/03. He says that his neck is doing fairly well, although he has trouble turning it to the right. That apparently became somewhat of a problem with a job where he was doing a lot of driving, unfortunately, so now he hasn't worked since about February. He also complained a lot about pain in his low back, and that is really where his worst pain is now. It gets into both legs to some degree, although the right is probably worse than the left. He did get an MRI scan of his lumbar spine and it shows a couple of small bulging discs and possibly an annular tear, particularly down L5-S1.

DECISION MAKING: Fortunately, I did not see anything major on the MRI and I do not believe that he is going to require surgery on any of these things. That really puts us back to symptomatic treatment of both his back and his neck. I am going to get him back on medication

using some Vioxx and do an epidural steroid injection on his back. He also says that he was given a trial of some Neurontin and that he thought that helped his back and his legs a fair amount, and so I started him on 300 mg. tid, although I told him to start a little lower and to work up to that dose. The next thing that I really think that we need to do is get him back to work, it may take doing a functional capacity evaluation or some vocational rehab to get him back to a job.

On July 16, 2004, Dr. Adametz wrote:

CHART NOTE: Mr. Ellenberg came back in on 7/16/04. He says that physical therapy and the traction actually aggravated his pain, and now he is in more pain than ever. Most of his pain fortunately is still in his back and not really in his legs. I think somehow he must have pulled something and has some muscle spasm.

DECISION MAKING: At this point, my best suggestion was to add some Cyclobenzaprine to his current medications and see if that will help some more. Otherwise, I don't have a lot else to offer him. I do feel like he has reached maximum medical improvement at this point. I don't really have any additional treatment planned for him except just to continue medications as needed. The only other consideration would be to let somebody like one of the pain physicians see him if his pain was just intolerable, but I have attempted

to keep him off narcotics for the most part and would still try to do that if I can, and just get him by on the anti-inflammatories, muscle relaxers, and Neurontin. I talked to him about going back to work just from a structural standpoint, but I just wouldn't want him to do any heavy lifting. Unfortunately, due to his pain level and his lack of mobility, he has just not been able to do much of anything and he is convinced that he can't really do anything that would require any kind of bending or twisting at all, which leaves him out of most of the things he is qualified for.

On August 31, 2004, Dr. Adametz assigned an additional 5% impairment rating for the bulging disk in the claimant's back, stating that nothing further could be done from a neurosurgical standpoint, but recommended pain management.

On December 13, 2004, Dr Adametz stated:

CHART NOTE: Mr. Ellenberg came back to the office today. He says that his back is still bothering him a lot. Apparently he never got his functional capacity evaluation and I am not sure exactly why, but he says it is a long drive for him to come here to Little Rock. He also says that his pain is pretty bad since he stopped taking Vioxx when it was taken off the market and he feels like it is even worse.

I talked to him about options and really the best thing I have for him is some more medication. He was low on everything and so I am going to refill his prescription for Neurontin and Cyclobenzaprine. I am going to give him a prescription for Celebrex to see if that will help some. He is to the point that he really would like to consider pain management just in case they have something additional to offer him, but wanted to see someone in Pine Bluff. I do not personally know any of the doctors down there that well and so he is going to contact his case manager and try to get setup for both a functional capacity evaluation and pain management probably in Pine Bluff. It would really be nice if we could get him some kind of sedentary type job or some training where he could manage to get back to work in some fashion, although he probably is going to be limited in his ability to do much, especially anything physical.

On January 18, 2005, Jerry Daniel performed a functional capacity evaluation (FCE). The results are stated as follows:

FUNCTIONAL CAPACITY EVALUATION RESULTS

The results indicate that Mr. Ellenberg is able to work at the Light Physical Demand Level for an 8 hour day according to the Dictionary of Occupational Titles, U.S. Department of Labor, 1991.

His FCE performance demonstrates significant functional deficits referable to the lower back. Based on those demonstrated deficits, some accommodations may be necessary for him to safely perform work tasks within the Light Physical demand level. Those accommodations are:

- 1) restriction from work tasks that require performance of forward bending, stooping, squatting or kneeling.
- 2) restriction from work tasks that required standing/walking in excess of one hour at a time.
- 3) restriction from work tasks that require frequent stair climbing,
- 4) restriction from work tasks that require normal standing/walking balance.

VALIDITY/BEHAVIORIAL PROFILE

Mr. Ellenberg passed 29/32 validity criteria during the FCE, 91% which suggests excellent effort and valid results which can be used for medical and vocational planning.

On March 1, 2005, Dr. Adametz reported:

CHART NOTE: Mr. Ellenberg came back to the office on March 1, 2005. Apparently he saw one of the pain management doctors there in Pine Bluff, but they really didn't do anything for him and didn't want to continue to follow him or give him his medications. He is out of the medicines now and so he is hurting quite a bit again, mostly in his low back.

DECISION MAKING: I'm going to continue his medicines and give him new prescriptions for Neurontin, Cyclobenzaprine, and I'm going to try him on Naproxen. He really did the best on Vioxx, but since that was taken off the market, I think this is our next best choice. He also did receive some benefits in the past from the epidural steroid injection, so I think it would be worth setting him up for another one of those. As far as work goes, he did undergo a functional capacity evaluation and apparently put in good effort on it. They recommended light duty type work and so I would recommend that as well.

On March 8, 2005, the claimant contacted Arkansas Rehabilitation Services for assistance. His initial interview contains the following statement:

The client states that he worked for approximately 17 years as an auto mechanic and automotive technician and through the years was able to make a very good living. In May 2001 he had an on the job injury that damaged his cervical and lumbar spine. In 2001 and 2002 he had a total of three cervical spine surgeries with fusion. The claimant states that he has very little neck pain and experiences minor problems with numbness in one finger on his right hand. He currently is experiencing lumbar back pain and is being treated with steroid injections which produce various levels of success. He states

that he is very limited as to what he can do physically. The doctor has released him to return to work as long as it is considered light physical work. He is being seen for these medical problems by James Adametz, MD in Little Rock, Arkansas. The client told me that he is having trouble with depression and showed me where he is beginning to lose hair. He is in the process of requesting permission from workers compensation to see his family doctor for this problem. The claimant is unsure of what career path to follow but is leaning toward computer repair. He receives workers' compensation benefits. Dale was told about our services by his attorney. Dale is not trying to receive permanent disability benefits and states that he wants to return to the workforce.

A March 17, 2005 "Psychological Screening Report" from Arkansas Rehabilitation Services states that the claimant has average intellectual and academic ability, and that pursuing advanced education or skilled technical training would be feasible, as the claimant does not have any academic or intellectual deficits.

A March 17, 2005 "General Medical Assessment" from Arkansas Rehabilitation Services indicates that the claimant does not have the capacity to kneel, push or pull or perform

any strenuous labor. The report indicates that his working conditions cannot be outside or in extreme temperatures and that the claimant is limited to light duty with permission for intermittent sitting and standing.

Dr. Thomas Ward became the claimant's treating physician, through the change of physician procedure, on May 16, 2005. After reviewing the claimant's medical records and examining the claimant, Dr. Ward outlined the following:

PLAN:

1. Mr. Ellenberg is requesting something for depression at this time and given the long term use of his Neurontin I believe that this is called for. I have started him on Zoloft 50 mg once in the morning to be increased to 2 tablets in the morning over the next several weeks.
2. Additionally I have increased his Hydrocodone to 10/650 to be taken up to 6 times per day.
3. Finally, we need to proceed with some injections to the quadratus lumborum, longissimus, multifidus, and iliocostalis lumborum muscles of the low back and proceed with these injections further to the cervical spine. The purpose of these injections are two fold.
 - A. To correct the kyphotic anticolic positioning that postural changes have taken effective Mr. Ellenberg over the years in an attempt to upright his posture, extend the muscle abilities in

these areas to conform to the additional changes in posture, and begin to work abilities of Mr. Ellenberg's posture to bear weight through the upright standard positions of muscles, ligaments and B. bones as opposed to the deformed positioning and posture that he has acquired.

C. To reduce the myoclonic jerks which appear to be occurring in the nighttime and, in this instance, may take the form of dystonia.

After the initial visit Dr. Ward took the claimant completely off work.

In Dr. Ward's December 6, 2005 note, he stated:

Generally speaking I think the benefits of his current changes in his medication are worthy of progressive monitoring, and it will be our effort to establish the stable medication profile over the next two or three months. Following this, it would be reasonable to indicate a maximum medical improvement status and assign disability figures for the combination of regions involving the cervical and the lumbar spine.

Dr. Ward saw the claimant again on January 10, 2006, and he noted that there was no apparent additional improvement, based on previous injections and, for that reason, no further injections would be directed at his

cervical or lumbar spine condition. The doctor went on to comment:

Based upon a reasonable degree of medical certainty and to the best of my ability, Mr. Ellenberg has reached the point of maximum medical benefit and will no longer have future improvements from treatment rendered from our office for his condition. He will have continued use of medications and will be seen in a routine follow up for that purpose.

The record contains a report from a vocational counselor, Ms. Tanya Owen, dated April 6, 2006. This report states:

RETURN TO PREVIOUS EMPLOYMENT

The physical limitations outlined by the FCE performed in January 2005 and restrictions outlined by Dr. Adametz preclude Mr. Ellenberg from returning to work in job roles that require him to exert more than 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Light Work). Mr. Ellenberg's work history has consisted of Medium and Heavy positions, according to the Dictionary of Occupational Titles (D.O.T.) [see attachment for definitions]. Therefore, he is unable to return to his past work.

Ms. Owen performed a Labor Market Survey, and identified three types of jobs the claimant might be able to perform in the Dewitt area. Ms. Owen identified the job classification of Service Advisor/Manager, earning a mean annual salary of \$29,850; Maintenance Superintendent, earning a mean annual salary of \$43,570; and Dispatcher/Alarm System Monitor, earning a mean annual salary of \$34,270.

DISCUSSION

WAGE LOSS/PERMANENT TOTAL DISABILITY

The first issue I must address is the majority's denial of permanent disability benefits in excess of the claimant's permanent impairment rating, i.e., wage-loss disability benefits and permanent and total disability benefits. Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Johnson v. Latex Constr. Co., 94 Ark. App. 431, ___ S.W.3d ___ (2006). The Commission is charged with the duty of determining disability based upon consideration of medical evidence and other matters affecting wage loss,

such as the claimant's age, education and work experience. Id. Such other matters that may be considered include 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). Ark. Code Ann. §11-9-522

(b) (1) states:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience and other matters reasonably expected to affect his or her future earning capacity.

As I find that the preponderance of the evidence of the record clearly shows that the claimant has sustained severe wage-loss disability, if not permanent and total disability, due to his compensable neck and back injuries, I

must strongly dissent from the majority opinion on these issues.

Here, the claimant was forty-five years old on the date of the hearing. He has undergone three cervical surgeries, two of them fusions, one at the C6-7 level and another at the C3-4 level. At the hearing, the claimant testified that he could not kneel and that he could not walk around much. He stated that his right leg stayed numb and that he had balance problems. He was primarily employed by the respondent from 1985 through 2001 as a mechanic. During the previous full year of work, the claimant earned in excess of \$72,000. The claimant testified that he had been denied Social Security benefits and is supported by loans from his friends and family. He testified that he has not been able to work since February of 2003. He applied for unemployment benefits in 2004, stating that he was willing and able to go back to work, but did not receive benefits due to the fact there was no money in his account to draw. Claimant's medications include Avinza for pain and Lexapro for depression. He also takes Celebrex, Naproxen, Lyrica,

Xanax, Soma, and Lunesta. Although the claimant testified that he has around twenty college hours, he has never had any experience in office work, secretarial work, or clerical work.

On July 16, 2004, Dr. Adametz stated:

I talked to him about going back to work just from a structural standpoint, but I just wouldn't want him to do any heavy lifting. Unfortunately, due to his pain level and his lack of mobility, he has just not been able to do much of anything and he is convinced that he can't really do anything that would require any kind of bending or twisting at all, which leaves him out of most of the things he is qualified for.

On December 13, 2004 Dr. Adametz stated:

It would really be nice if we could get him some kind of sedentary type job or some training where he could manage to get back to work in some fashion, although he probably is going to be limited in his ability to do much, especially anything physical.

The Functional Capacity Evaluator, Jerry Daniel, found that due to the claimant's physical restrictions the claimant cannot return to work as a mechanic, and can only

return to work at the Light Physical Demand Level for an eight (8) hour day. The Functional Capacity Evaluation showed that the claimant's limitations were in the low level for frequent material handling, occasional standing, occasional walking, never bending, frequent reaching, never squatting, never kneeling, never balancing, light arm control, and occasional climbing.

Ms. Tanya Owen, the vocational expert hired by the respondent stated:

Mr. Ellenberg's previous positions have consisted of heavy labor. Return to work in that capacity is not possible with his assigned physical restrictions. However, based upon a functional capacity evaluation completed and reviewed by Dr. James Adametz, Mr. Ellenberg is able to perform Sedentary and limited Light level work.

Applying the evidence of record to the wage-loss factors of Ark. Code Ann. §11-9-522 (b) (1), it is clear that the claimant has sustained severe wage-loss disability. The only evidence of record presented by the respondent as to potential wages in potential jobs the claimant may

qualify for with his physical restrictions, found in Ms. Owens' April 16, 2006 report, indicates a salary range of \$29,850 to \$43,570, clearly a reduction in the \$72,000 the claimant was able to earn as a mechanic.

Although the majority's finding as to permanent and total disability benefits is stated as "Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent and total disability benefits in that he has been released to light duty work" which is clearly incorrect as a matter of law, and although the majority's finding as to wage-loss disability benefits is stated as "Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss benefits" which does not provide a sufficient basis to determine as to exactly why the majority has denied wage-loss disability benefits, I find that the majority most likely denied the claimant permanent disability benefits in excess of his permanent impairment rating based not on the preponderance of the evidence of record, but on erroneous conclusions made by the Administrative Law Judge. The Administrative Law

Judge apparently based her conclusions on the respondent's arguments about the claimant's alleged "lack of motivation to return to work." I find that if the majority had properly conducted a de novo review of the record, the majority would have noticed that the Administrative Law Judge not only arbitrarily disregarded the entirety of the relevant evidence of record, but also failed to apply the wage-loss factors contained in Ark. Code Ann. §11-9-522 (b) (1) to the evidence of record.

The respondent's first argument is based on the fact that the claimant did not accept the respondent's "offer" to re-employ the claimant, after his third neck surgery, only if he would accept a 15% pay cut. Not only is this argument misplaced, as the offer of employment was made three years before the most recent hearing, the offer is also not statutorily sufficient to bar the claimant from the receipt of permanent disability benefits. Ark. Code Ann. §11-9-522(b) (2), states:

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

obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

However, Ark. Code Ann. §11-9-522 (c)(1) states:

The employer or its worker's compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident.

Clearly, the respondent's offer of employment at a 15% cut in pay, does not raise the statutory bar of Ark. Code Ann. §11-9-522, as it requires an offer of a job "at wages equal to or greater than his average weekly wage at the time of the accident." Furthermore, although the claimant may have been able to work as a mechanic at the time the respondent's offer was made, the evidence of record show that the claimant is now unable to return back to work

as a mechanic, thereby rendering the respondent's offer patently unsuitable at the time of the hearing.

As the respondent's offer of employment clearly does not meet the statutory requirements of Ark. Code Ann. §11-9-522 (c) (1), the respondent is apparently arguing that the claimant's refusal to accept the respondent's offer is evidence that the claimant lacks motivation to return to work, as a factor under Ark. Code Ann. Ark. Code Ann. §11-9-522 (b) (1). However, this argument is contradicted by the fact that the claimant, after rejecting the respondent's offer, accepted a job at IPSCO, also for wages less than his pre-injury pay. If, during that time period, which, as noted above, is the only time period appropriately considered, the claimant lacked motivation to return to work, he would not have immediately sought employment elsewhere.

The respondent's second argument is based, apparently, on the theory that since the claimant is intelligent and has four hours of college-level computer training, and has not enrolled in college classes subsequent

to his work injury, he must lack the motivation to return to work. Ark. Code Ann. §11-9-505(b)(3) states:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

However, I find that the respondent has not presented evidence indicating that the respondent actually offered the claimant a program of vocational rehabilitation or job placement assistance. An employer relying upon the defense enumerated in Ark. Code Ann. §11-9-505 must show that the claimant refused to participate in a program of vocational rehabilitation or job placement assistance, or through some other affirmative action, indicated an unwillingness to cooperate in those endeavors, and that such refusal to cooperate was without reasonable cause. See

Burris v. L & B Moving Storage, 83 Ark. App. 290, 123 S.W.3d 123 (2003).

The respondent has presented the testimony of Ms. Tanya Owen, a vocational expert, which indicates that the respondent hired her to evaluate the claimant for assistance with either job-placement or vocational rehabilitation. However, Ms. Owen's testimony indicates that she did nothing but identify jobs that she believed the claimant could perform, based on a search of computerized want ads. Ms. Owen's testimony indicates that although she did evaluate the claimant, she did not actually set the claimant up with either job interviews or a program of vocational rehabilitation, although she did inform the respondent that the claimant could receive free services through Arkansas Rehabilitation Services. As the respondent has not offered a program of vocational rehabilitation or job placement assistance which could be unreasonably refused by the claimant, thereby triggering the bar Ark. Code Ann. §11-9-505 (a), I find that the respondent's argument that the claimant lacks motivation to return to work because he

did not pursue the "phantom" program offered by the respondent, to be clearly erroneous.

Furthermore, the respondent's argument that the claimant lacks motivation to return to work is clearly contradicted by the evidence of record. The evidence of record shows that the claimant, upon the advice of his attorney, pursued vocational rehabilitation on his own, through Arkansas Rehabilitation Services. Ms. Barbara McDaniel, the claimant's counselor at Arkansas Rehabilitation Services, upon questioning by the claimant's attorney stated:

Q: Did you consider him to be motivated when you first opened the file on him?

A: Yes.

Q: Do you still feel that he is motivated?

A: Yes.

Upon questioning by the respondent's attorney, Ms. McDaniel stated:

Q: Now Mr. Buckner asked you about Mr. Ellenberg's motivation, and you indicated you felt he was very motivated. Wouldn't you agree that if someone was very motivated, that they would've at least tried to go to class

and see if they could withstand the academic as well as physical challenges of going to college?

A: I think he was motivated and went out to the college and got information on the curriculum that was available. I can't say that it was a lack of motivation that kept him from attending class or enrolling. He did not enroll.

A case narrative report, attached to Ms. McDaniel's deposition shows that the claimant was motivated to pursue the vocational rehabilitation offered by Arkansas Rehabilitation Services, but was unable to do so due to his medical condition, not due to a "lack of motivation." On June 2, 2005, the claimant informed Ms. McDaniel that he was ineligible for a Pell Grant. On August 10, 2005, the claimant informed Ms. McDaniel that he would not attend fall classes because his back was not doing well. On November 10, 2005, the claimant informed Ms. McDaniel that he was now on three different pills for depression. On March 16, 2006, Ms. McDaniel spoke with the claimant about his pain and depression. On that date Ms. McDaniel concluded:

Dale seems level headed and stated that his care is coordinated by a pain management specialist. Dale and I discussed the goals of ARS and we agreed to close his case. Its obvious to me that Dale is no longer able to seek employment. If Dale's health improves at a later date he can reapply for services.

Based on the above, I find that the evidence the majority has apparently considered as to lack of motivation to return to work actually shows that the claimant is motivated to return to work.

As the respondent has clearly not met the requirements necessary to bar the claimant from the receipt of permanent disability benefits under either the specific statutory provisions of Ark. Code Ann. §11-9-522 (b) (2) or §11-9-505(b) (3), for the majority to find that the claimant's alleged lack motivation to return to work is sufficient to bar him from receipt of wage-loss disability benefits, ostensibly under Ark. Code Ann. §11-9-522 (b) (1) is clearly erroneous. Furthermore, the majority's conclusion is contrary not only to the evidence of record and Ark. Code

Ann. §11-9-522 (b)(1), but it is also contrary to recent Arkansas Court of Appeals cases addressing what exactly constitutes a lack of motivation to return to work when the claimant has objectively documented physical limitations.

In Buford v. Standard Gravel Company, 68 Ark. App. 162, 5 S.W.3d 478 (1999), the Court of Appeals reversed a decision by the Commission that found the claimant's motivation to be "sadly lacking." The Commission, in part, emphasized what they determined to be lack of motivation in the claimant's reluctance to go back to work. However, the Court noted that the record "simply does not contain facts that support the Commission's conclusion that Buford was "sadly lacking" in motivation. They, instead, noted the claimant's serious injuries, multiple spinal surgeries, and Mr. Buford's request of his doctor to return to work, which he attempted.

In Whitlatch vs. Southern Development, 84 Ark. App. 399, 141 S.W.3d 916 (2004), the claimant before his injury, worked full time and liked his job, but, because of severe pain and the side effects from his medication, the

Court of Appeals reversed the Full Commission's determination that the claimant was not permanently and totally disabled and had only suffered 50% wage-loss disability. The Court of Appeals stated:

In short, when taking into consideration appellant's limited education, manual-labor employment skills, severe pain in his backs and legs, coupled with the side effects of necessary prescription pain medication, in addition to the testimony of his doctors and vocational expert, we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission...

As seen in Buford and Whitlatch, although apparently not considered by the majority, the Arkansas Court of Appeals has recognized the difference between an alleged "lack of motivation" and an inability to engage in substantial gainful activity because of a claimant's physical condition and physical restrictions. Here, the claimant testified:

Q: Okay. In your present condition, Dale, do you feel like you could go back and do any part of any job that you have ever done in the past?

A: All I've ever done in the past is mechanic, and I can't do that anymore.

Q: Why?

A: Because my body won't let me.

Q: Why?

A: I hurt too bad.

Here, the majority has, in essence, penalized the claimant for being realistic about his physical condition and his physical restrictions, both of which are well-documented in the medical record. As stated above, I strongly dissent from the majority's finding that the claimant is not entitled to any wage-loss or permanent and total disability benefits. The preponderance of the evidence of record clearly shows that the claimant has suffered severe wage-loss disability, and indicates that the claimant may in fact be permanently and totally disabled.

TEMPORARY TOTAL DISABILITY

The second issue I must address is the claimant's entitlement to temporary total disability benefits. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway &

Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

Here, the medical records show that the claimant reported to Dr. Ward, who had become his authorized treating physician, through the AWCC's change of physician procedure on May 16, 2005. On this date, Dr. Ward began treating the claimant with injections designed to correct the claimant's posture and increase his mobility. Dr. Ward took the claimant completely off work on May 16, 2005, and did not release him to return to work, until Dr. Ward opined that the claimant had reached maximum medical improvement, on January 10, 2006. Therefore, I find that the preponderance of the evidence shows that the claimant was in his healing

period and totally incapacitated from work from May 16, 2005 until January 10, 2006.

In conclusion, I agree with the majority's findings that the claimant sustained compensable injuries to the neck and back on May 17, 2001 and has sustained permanent impairment of 5% to the neck and 12% to the back, for a combined total of 17% permanent physical impairment. I agree with the majority's finding that the Second Injury Fund does not have liability in this claim. However, as I find that the claimant has proved by a preponderance of the evidence his entitlement to a significant increase in his permanent disability benefits, in the form of severe wage-loss disability, I must respectfully dissent from the majority's finding that the claimant is not entitled to either wage-loss disability or permanent and total disability benefits. Furthermore, as the claimant's authorized treating physician took him totally off work on May 16, 2005, I find that the claimant is entitled to temporary total disability benefits from May 16, 2005 to January 10, 2006, the date the claimant's authorized

treating physician stated that the claimant had reached maximum medical improvement, and must respectfully dissent from the majority on this issue as well.

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

PHILIP A. HOOD, Commissioner