

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302078

RICKY C. PATE, EMPLOYEE	CLAIMANT
PAT SALMON & SONS, INC., EMPLOYER	RESPONDENT NO. 1
PACIFIC EMPLOYERS INS COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 24, 2008

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

Claimant represented by the HONORABLE EDDIE W. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part,
reversed and vacated in part.

OPINION AND ORDER

Respondent No. 1 appeals and the claimant cross-appeals
an administrative law judge's opinion filed February 27,

2007. The administrative law judge found, among other things, that the claimant was entitled to "total disability benefits beginning April 14, 2004 and continuing for 26 weeks" as a result of the claimant's mental injury. The administrative law judge found that the claimant did not prove Ark. Code Ann. §11-9-113(b)(1) was unconstitutional. The administrative law judge found that the claimant sustained 19% anatomical impairment as a result of the compensable right shoulder injury and additional wage-loss disability in the amount of 60%. The administrative law judge found that the Second Injury Fund was not liable for payment of the claimant's wage-loss disability.

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's findings with regard to anatomical impairment and wage-loss disability. The Full Commission affirms the administrative law judge's finding with regard to constitutionality of Ark. Code Ann. §11-9-113(b)(1), but we reverse the administrative law judge's finding that the claimant proved he was entitled to an additional 26 weeks for "total disability."

I. HISTORY

Ricky Pate, now age 59, testified that he became a truck driver in 1973.

The record indicates that the claimant reported a back injury while working for United Parcel Service in October 1982. A physician's impression in May 1983 included, "Chronic lumbar and right buttock pain complaints." Dr. Douglas W. Parker subsequently diagnosed "low back strain." In approximately May 1984, Dr. Parker opined that the claimant had "reached a treatment plateau. Permanent physical impairment is rated at 5% of the body as a whole."

The claimant testified that he began working for Pat Salmon and Sons in about 1994. The parties stipulated that the claimant sustained a compensable injury on January 22, 2003. The claimant testified, "I was driving an 18-wheeler and another driver driving a tractor turned left into the path - I was in the left lane and he was over in the right lane and he made a left turn to go across the median there in the turnaround and we crashed. I tried to avoid him. We crashed in the median." The claimant testified that as a result of the accident, he had "Severe headaches, shoulder pain, arm pain, neck pain."

Dr. Thomas E. Cheyne noted the following on February 7, 2003:

Mr. Pate is a fifty-four year old who complains of cervical and bilateral shoulder and arm pain with more discomfort in the right shoulder. He has numbness and pain in the forearms and hands. The numbness is more on the ulnar aspect of the hand. The pain is more on the radial aspect. He states this all began with a motor vehicle accident on 01.22.03 whenever he was driving an 18-wheeler. He was in the left hand lane and had a vehicle in the right hand lane turn to the left in front of him....

X-rays of the cervical spine indicate moderate degenerative disc disease at the C3-4 level, as well as at the C5-6 level. There is no evidence of fracture or other acute findings.

Dr. Cheyne gave the following impression: "Acute cervical strain with underlying degenerative disc disease with radiculopathy to rule out cervical disc protrusion....Mr. Pate's right shoulder has no evidence of swelling or ecchymosis. He has no gross instability and again cannot abduct beyond 90°."

An MRI of the cervical spine was taken on February 14, 2003, with the impression, "1. Reversal of the normal cervical lordosis with multilevel degenerative changes most prominent at the 4-5, 5-6, and 6-7 levels causing mild acquired spondylosis. 2. No focal disc herniation is evident."

An MRI of the claimant's brain was taken on April 8, 2003, with the impression, "1. Negative MRI of the brain."

Dr. Greg T. Jones noted the following on May 8, 2003:

There is no particular atrophy about the shoulder girdle in terms of the rotator cuff musculature, and there is some mild spasm in the right vs. the left trapezium....

I reviewed the MRI of the shoulder and of the neck from Dr. Cheyne's previous request, and there is clearly no full thickness sign of a rotator cuff tear. There is significant change at the AC joint. It is a chronic degenerative with acute swelling fluid type change and some subacromial bursitic fluid as well. The cervical spine demonstrates multilevel degenerative disc findings most prominent at 6-7 and at 5-6....

I am afraid we are in a situation of underlying bilateral issues in terms of the shoulder, AC joint and the cervical spine having preexisting degenerative changes that have been traumatized by the nature of the injury sustained, the shoulder being more peripheral and easier to "treat"....

We will reevaluate his response to injection....

On July 16, 2003, Dr. Jones' pre-operative diagnosis was as follows: "1. Multiple trauma from motor vehicle accident with traumatic bursitis, possible rotator cuff tear, acromioclavicular joint sprain with AC arthrosis and no history of instability." Dr. Jones performed the following surgical procedure:

1. Glenohumeral arthroscopy with debridement of SLAP lesion and partial thickness rotator

undersurface tear. No evidence of instability by exam and arthroscopic visualization.

2. Arthroscopic subacromial decompression with acromioplasty, CA ligament sleeve release, bursectomy and debridement of dorsal surface rotator cuff abrasion tear.

3. Arthroscopic AC joint resection/Mumford procedure via anterior approach.

The postoperative diagnoses were as follows:

1. Partial thickness undersurface rotator cuff tear with partial type I-II SLAP tear biceps anchor with glenohumeral joint.

2. Dorsal surface abrasion and chronic impingement. Post-traumatic bursitis, right subacromial space.

3. AC joint arthrosis with torn AC meniscus.

Following surgery, Dr. Jones noted improvement in flexibility of the claimant's shoulder as well as improvement in the claimant's cervical spine symptoms.

An MRI of the brain before/after gadolinium was taken on November 3, 2003, with the impression, "1. No significant intracranial abnormality evident."

Dr. J. K. Smelz examined the claimant on November 21, 2003 and gave the following Impression/Discussion:

1. Status post motor vehicle accident, with reported amnesia for the event. MRI of the brain was reportedly normal, and waking EEG was reportedly normal. These findings are all consistent with a mild traumatic brain injury ("concussive syndrome")....Neuropsychological testing at this point is not indicated; Mr. Pate is significantly depressed, and this confounds neuropsychological performance.

2. Status post right shoulder surgery, with acromioplasty, debridement of a partial thickness rotator cuff tear, and distal clavicle resection....Mr. Pate did bring some of his shoulder x-rays today. It appears that unfortunately, there is some upward migration of the distal clavicle, a complication which may occur with such surgery. I would strongly suggest that bilateral clavicular films be done, and read by a radiologist, to assess this. If the distal clavicle has indeed migrated superiorly, this has very important ramifications for Mr. Pate, in terms of chronic pain, as well as loss of shoulder stability and therefore functional right upper extremity weakness....

5. Frozen shoulder, with available active range of motion at end points. Passive range only slightly more than active....

6. Severe myofascial pain findings, with palpable spasms in the muscles of the neck and right shoulder girdle....

7. Severe Depression.

Mr. Pate shows vegetative slowing, even prior to the recent prescription of amitriptyline, difficulty sleeping, crying, some difficulty with concentration, anhedonia, and loss of libido and erectile dysfunction. He denied any suicidal ideation. Mr. Pate needs psychiatric evaluation for appropriate psychotropic medication, and monitoring until optimal levels and dosages are achieved....

7. Post traumatic stress disorder. Mr. Pate is fearful of traffic, even when someone else drives, and is apprehensive about returning to driving himself. He reports nightmares and flashbacks concerning the accident. Mr. Pate needs some short term counseling from a psychiatrist, psychologist, or clinical social worker who is experienced in dealing with post traumatic stress disorder....

Mr. Pate's primary problem at this time is his severe depression and his posttraumatic stress disorder. This increases his perceived pain, and limits his ability to actively participate in his own recovery. He needs psychiatric assessment for effective medication, and short term intervention for his post traumatic stress disorder.

Mr. Pate requires x-rays of the shoulders bilaterally, to be read by a radiologist, to assess the status of his clavicle and shoulder girdle bony status....

Mr. Pate is a truck driver. Given his current depression and stress disorder, he would be unable to return to this occupation, until these are effectively addressed and treated.

However, physically, his occupation requires using his right arm with considerable torque and force for changing gears, turning the steering wheel, ascending to and descending from the cab, as well as lifting and closing doors, and loading and unloading with lifting, and pushing and pulling. The clavicular resection, and apparent upward migration of the distal clavicle to the trapezius will not allow a sufficient stabilizing mechanism so that he can exert the necessary forces with his right upper extremity to continue in his occupation safely....

Maximum medical improvement will not be obtained until the above recommendations addressing depression, post traumatic stress syndrome, and myofascial pain syndrome have been addressed.

Impairment Rating:

Although Mr. Pate has not reached maximum medical improvement, impairment rating can be calculated at this time, because issues still needing to be addressed do not affect his impairment rating. According to the AMA Guides to the Evaluation of Permanent Impairment, 4th ed. Revised, and Arkansas WCC regulations, impairment can be calculated as follows:

1. Status post mild head injury: 0% (Tables 2,3,4,5 and 6, pp. 4/142-3)

2. Myofascial pain syndrome with pain and restricted range of motion, cervical spine: 0% impairment.

3. Depression, with vegetative signs and loss of libido. Post traumatic stress disorder; Neither interfere with functional activities of living: 0% impairment.

4. Right shoulder:

a. Decreased range of motion:

i. Flexion: 100 degrees: Fig. 38 p. 3/34: 5% IUE

ii. Abduction: 95 degrees: Fig. 41, p. 3/44: 4% IUE

iii. Internal rotation: 40 degrees: Fig. 33, p. 3/45: 3% IUE

iv. External rotation: 45 degrees: Fig. 33, p. 3/45: 1% IUE

Combined values due to loss of shoulder range of motion: 13% IUE

B. Joint Resection:

i. Complete shoulder resection, with acromioplasty, partial thickness rotator cuff tear debridement, and coracoacromial ligament removal. Table 27, p. 3/61. 24% IUE

ii. Distal clavicle resection. Table 27, p. 3/61. 10% UE

Combined values due to joint resection: 32% IUE

Combined values of shoulder impairments: 13% (range of motion) and 32% (joint resection) = 41% IUE. Using Table 3, p. 3/20, conversion from upper extremity to whole person impairment = 25% impairment of the whole person.

Dr. Smelz concluded, "In summary, combined value of all impairments, equals 25% of the whole person."

The parties stipulated that Respondent No. 1 had accepted an impairment rating of 6% to the shoulder.

Dr. Elizabeth Speck-Kern, a neuropsychologist, evaluated the claimant on January 22, 2004 and February 5, 2004. Dr. Speck-Kern's impression was "Post Concussive Syndrome" and "Post Traumatic Stress Disorder, with severe anxiety and depression."

The claimant began mental health treatment with Dr. Donald S. Chambers on May 1, 2004.

The claimant and his wife began treating with a psychologist, Dr. David J. Beare, on May 6, 2004.

Dr. Winston T. Wilson, a psychologist, corresponded with the respondents' attorney on May 4, 2006:

At your request, I performed an Independent Psychological Evaluation on Mr. Pate on this date....

It is my opinion that his present condition - Moderate brain damage - cognitive dysfunction stems from the MVA he experienced in 2003.

Dr. Wilson diagnosed the following: "Axis I: Cognitive Disorder NOS (249.9) Major Depression (296.22)." Dr. Wilson stated, "His degree of disability exceeds 50%. I recommend

that Mr. Pate be referred back to Dr. Beare to continue his psychotherapeutic relationship. I recommend that Dr. Chambers continue his medication efforts with Mr. Pate. It is my opinion that these conditions were caused by his accident at work in 2003. I saw little, if any, sign of malingering in this patient during my evaluation."

Dr. Earl Peeples provided an Independent Medical Examination on May 4, 2006:

It is apparent that he has significant central nervous system changes as it is very difficult for him to express himself. He has trouble with some words and with recall, finally assisted by his wife, as he had trouble telling me fully what had happened.

He was involved in a truck wreck in January 2003. As his vehicle moved along the interstate, he collided with another truck. He was wearing a seatbelt. He was banged or thrown about inside the cab and his truck ended right side up in the median. He indicated that it did not roll over. He did not go to the hospital or seek treatment immediately for medical problems. He was able to get out and walk about after the accident....

Initial entry by Dr. Cheyne recorded February 7, 2003 indicated complaints of cervical and bilateral shoulder and arm pain with discomfort in the right shoulder. No period of unconsciousness or central nervous system confusion or changes are recorded. No neurological deficit or confusion is noted. There is no mention of headaches as a part of the symptom complex. Cervical spine radiographs showed degenerative changes at multiple levels.

MRI of the cervical spine was performed February 14, 2003. Multilevel degenerative changes were noted with mild, acquired spondylosis. No focal disc herniation was present.

EMG report dated March 4, 2003 indicated no evidence of radiculopathy or myopathy. There is borderline evidence of bilateral carpal tunnel syndrome. No evidence of diffuse neuropathy.

In the note by Dr. Cheyne dated March 11, 2003, ongoing headaches, memory loss and personality change were mentioned. Neurology consult was, therefore, scheduled.

History recorded by Dr. William Griggs, a neurologist, dated March 19, 2003 includes incomplete memory of the incident. A lot of trouble with headaches was recorded. Personality change was noted. Physical exam includes notes that he was well oriented and can interpret proverbs accurately. His mental examination was within the normal range. No neurological deficit was noted. MRI and EEG were recommended. EEG was reported to be normal March 19, 2003.

Dr. Cheyne injected his right shoulder April 2, 2003. MRI of the brain was performed April 8, 2003 and was normal....

MRI of the right shoulder was performed April 22, 2003. It demonstrated an intact rotator cuff and some inferior spurring of the AC joint. No specific traumatic lesion was noted....

MRI was reviewed by Dr. Jones and showed no sign of a full thickness rotator cuff tear. Injection of the AC joint was undertaken....

On May 29, Dr. Jones recommended arthroscopic decompression due to continued symptoms and impingement, plus AC joint arthritis....

Surgical intervention was undertaken by the orthopedic surgeon, Dr. Jones, July 16. He was found to have partial thickness undersurface rotator cuff tear with SLAP lesions and dorsal surface abrasion and chronic impingement. He also had AC joint arthrosis with torn AC meniscus. The only abnormality listed as traumatic is "post-traumatic bursitis", right subacromial. Surgical decompression and AC joint resection was undertaken....

Dr. J. K. Smelz at the VA Hospital in Little Rock did a very extensive evaluation November 21, 2003....

It is interesting to note that impairment ratings related to the mild head injury are 0%. Myofascial pain is 0%. Depression is 0%. An unusually large impairment rating of 41% of upper extremity due to the shoulder decompression/resection of the AC joint was given. (This is a very high rating for shoulder decompression shoulder procedure.) ...

SUMMARY:

Mr. Pate has an unusual history and a progression of neurological changes that are not, in my opinion, answered by the medical records provided.

Most head injuries to which I have been exposed in my treatment of trauma over 30 years experience, severity is apparent initially and decreases with time. Mr. Pate's situation is one where his initial encounter with physicians do (sic) not demonstrate changes consistent with any head injury and it developed subsequently and worsens. This is opposite of what I would anticipate. It is noted that MRI scan of the brain was normal and that EEG was normal early in his evaluation. Later, psychological and psychiatric evaluation was undertaken and the psychiatrist indicated there was a combination of organic and traumatic findings, but does not divide these.

Mr. Pate developed shoulder difficulties, those of impingement and AC arthrosis, both acquired degenerative conditions. He was treated surgically for these. I did not see clear cut indications of trauma on the MRI done preoperatively and the only traumatic component mentioned in the operative report dictated by the orthopedist, Dr. Jones, is of post-traumatic bursitis.

Mr. Pate has incomplete function of his right upper extremity due to some limitation of internal and external rotation. This is rated very high and, I think from my point of view as an orthopedist, an inappropriate level of 41% of the upper extremity by an examining physician from the veteran's hospital. I do not think my examination today, in view of his central nervous system limitations, would be accurate enough to provide a revised rating at this time....

In view of the factors stated above, I am unable at present to provide specific permanent work restrictions, work status or recommended treatment. I am not certain that his present condition, within a reasonable degree of medical certainty is more than 50% due to the injury of January 22, 2003 and I believe this issue is most appropriately addressed by an experienced neurologist who should, in my opinion, perform an IME to see if he can identify the cause of this man's progressive neurological complaint and changes....

The parties stipulated that the claimant's healing period "ended by at least May 4, 2006."

A pre-hearing order was filed on November 1, 2006. The claimant contended that he was permanently totally disabled as a result of the compensable injury. Respondent No. 1

contended that it had paid all benefits to which the claimant was entitled, but if the claimant was awarded wage-loss disability, then the Second Injury Fund was liable for payment.

The following issues were included for litigation:

1. Extent of claimant's permanent disability, including impairment and wage loss.
2. End of claimant's healing period.
3. Second Injury Fund liability.
4. Liability of Death and Permanent Total Disability Bank Fund.
5. Attorney fee.

A hearing was held on January 22, 2007. At that time, counsel for Respondent No. 1 essentially agreed that the carrier accepted liability for the claimant's "psychological condition."

The administrative law judge found, in pertinent part:

2. Claimant's healing period for his compensable right shoulder injury ended on April 13, 2004.
3. As a result of his compensable mental injury, the claimant is entitled to total disability benefits beginning April 14, 2004 and continuing for 26 weeks. Respondent #1 is entitled to a credit for any total disability benefits paid subsequent to April 13, 2004.
4. Claimant has failed to prove by a preponderance of the evidence that the limitation of 26 weeks of disability benefits codified at A.C.A. §11-9-113(b)(1) is unconstitutional.
5. As a result of claimant's compensable right shoulder injury, he suffered a permanent physical impairment in an amount equal to 19% to the body as a whole.

6. Claimant has failed to prove by a preponderance of the evidence that he suffered any permanent impairment as a result of his compensable mental injury; specifically, claimant has failed to offer objective and measurable physical findings supporting any permanent impairment.

7. As a result of claimant's compensable injury, he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

8. The Second Injury Fund is not liable for payment of permanent disability benefits attributable to claimant's loss in wage earning capacity.

9. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits.

Respondent No. 1 appeals to the Full Commission and the claimant cross-appeals.

II. ADJUDICATION

A. Anatomical Impairment

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.2d 823 (2003), citing *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c) (1) (B). Ark. Code Ann. §11-9-102(16) provides:

(A) (i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

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

The administrative law judge found in the present matter, "As a result of claimant's compensable right shoulder injury, he suffered a permanent physical impairment in an amount equal to 19% to the body as a whole." The Full Commission affirms this finding. We recognize that Dr. Smelz ultimately assigned the claimant a 25% whole-person impairment rating. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Ed. 1993). See, *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003), citing *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001). The Commission may assess its own impairment rather than rely solely on its determination of the validity of ratings assigned by physicians. *Id.*

In the present matter, the administrative law judge determined that that range of motion testing was not objective. The claimant's attorney correctly notes that "passive" range of motion may be considered an objective medical finding to establish impairment, particularly if the passive range of motion was not within the claimant's voluntary control. *Mays v. Alumnitec, Inc.*, 76 Ark. App. 274, 64 S.W.3d 772 (2001), citing *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000). Dr. Smelz did not state in the present matter whether her findings of decreased range of motion were passive or active on the claimant's part or otherwise within or without the claimant's voluntary control. The record shows that Dr. Smelz assigned a 32% upper extremity rating based on the claimant's shoulder surgery, characterized by Dr. Smelz as "distal clavicle resection." The claimant does not argue that Dr. Smelz incorrectly characterized the nature of the claimant's surgery. The treating surgeon, Dr. Jones, did not assign an impairment rating.

The administrative law judge noted the 32% rating assigned by Dr. Smelz based on the claimant's surgery and applied the rating to Table 3, p. 20 in the Guides. The

administrative law judge found, correctly, that a 32% rating on that table equates to a 19% whole-person rating. The Full Commission affirms the administrative law judge's finding that the claimant suffered a permanent physical impairment in the amount of 19% to the body as a whole. We find that the compensable injury was the major cause of the claimant's 19% anatomical impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

B. Wage Loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

The administrative law judge found that the instant claimant "suffered a loss in wage earning capacity in an

amount equal to 60% to the body as a whole." The Full Commission affirms this finding. The claimant suffered an admittedly compensable injury and subsequently endured an extensive surgery to his right shoulder. The claimant is age 59 and most likely cannot return to his life work as a commercial truck driver. The claimant's employment was terminated following the accident, even though the record does not show a traffic citation by any law enforcement agency, and a drug screen showed that the claimant was not abusing drugs or alcohol at the time of the accident. The claimant has a 19% objective anatomical impairment to his shoulder. The claimant also now suffers from admittedly compensable mental and emotional problems. Although we do not agree with the claimant's argument that he is permanently and totally disabled, the Full Commission affirms the administrative law judge's finding that the claimant sustained wage-loss disability in the amount of 60%. We find that the compensable injury was the major cause of the claimant's 60% wage-loss disability. Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

C. Second Injury Fund

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In the present matter, the administrative law judge found that the Second Injury Fund was not liable for the claimant's loss in wage-earning capacity. The Full Commission affirms this finding. The first hurdle for Second Injury Fund liability was overcome because the claimant sustained a compensable injury at his present place of employment. The second hurdle was also overcome, because the claimant was assessed in 1984 with a 5% whole-body impairment rating following a low back strain. The third hurdle has not been overcome in the present matter. The preponderance of evidence does not demonstrate that the prior impairment combined with the most recent compensable injury to produce the claimant's current disability status.

The record shows that the claimant was able to return to full gainful employment following the prior injury and impairment rating. The testimony of the claimant and his wife attributed all of the claimant's problems to the most recent compensable injury, not the prior impairment. Nor does the testimony or documentary evidence otherwise reveal a "combination" of the claimant's prior impairment with the recent compensable injury to produce the claimant's current disability status. We affirm the administrative law judge's finding that the Second Injury Fund is not liable in the present matter.

D. Mental Injury

_____Ark. Code Ann. §11-9-113 provides:

(a) (1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence....

(b) (1) Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.

The claimant contended before the administrative law judge that the 26-week limitation of Ark. Code Ann. §11-9-

113(b)(1) was unconstitutional. The claimant argues on appeal that the statute violates the claimant's right to equal protection. Statutes are presumed to be constitutional, and the burden of proving otherwise is on the party challenging the legislative enactment. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998). All doubts are resolved in favor of a statute's constitutionality. *Foster v. Jefferson County Bd. of Election Commissioners*, 328 Ark. 223, 944 S.W.2d 93 (1997). The Full Commission finds that the instant claimant has not proven that Ark. Code Ann. §11-9-113(b)(1) is unconstitutional. We therefore affirm the administrative law judge's finding, "Claimant has failed to prove by a preponderance of the evidence that the limitation of 26 weeks of disability benefits codified at A.C.A. §11-9-113(b)(1) is unconstitutional."

However, the Full Commission does not affirm the administrative law judge's finding that "As a result of his compensable mental injury, the claimant is entitled to total disability benefits beginning April 14, 2004 and continuing for 26 weeks." The parties stipulated that the claimant sustained a compensable injury on January 22, 2003. The

claimant was diagnosed as having an acute cervical strain and he subsequently underwent surgery to his right shoulder. Dr. Smelz diagnosed severe depression and post-traumatic stress disorder on November 21, 2003. The diagnoses of depression and post-traumatic disorder were generally confirmed by Dr. Speck-Kern, Dr. Chambers, Dr. Beare, and Dr. Wilson. Respondent No. 1 accepted liability for the claimant's mental health treatment. (The claimant does not appeal the administrative law judge's finding that the claimant did not prove he suffered any permanent impairment as a result of the mental injury.)

According to their briefs on appeal, Respondent No. 1 and the claimant agree that Respondent No. 1 paid for temporary total disability through June 24, 2004. The record therefore indicates that the claimant was receiving temporary total disability when he was first diagnosed with a mental injury on November 21, 2003. The period of temporary disability from November 21, 2003 through June 24, 2004 exceeds twenty-six (26) weeks. We can find no provision in Act 796 authorizing the Commission to add an additional twenty-six (26) weeks of "disability" for the claimant's mental injury beginning April 14, 2004. We

therefore reverse and vacate the administrative law judge's finding, "As a result of his compensable mental injury, the claimant is entitled to total disability benefits beginning April 14, 2004 and continuing for 26 weeks."

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained anatomical impairment in the amount of 19% and wage-loss disability in the amount of 60%. The Full Commission affirms the administrative law judge's finding that the Second Injury Fund is not liable for the claimant's wage-loss disability. The Full Commission affirms the administrative law judge's finding that Ark. Code Ann. §11-9-113(b)(1) is not unconstitutional, but we reverse and vacate the administrative law judge's finding that the claimant proved he was entitled to an additional twenty-six (26) weeks for "total disability" beginning April 14, 2004.

The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five

hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

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

CONCURRING AND DISSENTING OPINION

I must concur, in part, and dissent, in part, from the majority opinion. Specifically, I concur in the finding that the claimant is not entitled to an additional 26 weeks of disability benefits for the mental injury beginning on April 14, 2006, as well, as the finding that the claimant did not prove that A.C.A. § 11-9-113(b) (1) is unconstitutional. I further concur in the finding that the claimant proved by a preponderance of the evidence that he sustained a 19% anatomical impairment rating to the body as a whole as assigned, in part, by Dr. Smelz. However, I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a loss in his wage earning

capacity in an amount equal to 60% to the body as a whole. Based upon my de novo review of the entire record, I find that the claimant simply did not meet his burden of proof on this issue.

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

looking for work are impediments to our full assessment of wage loss.

At the time of the hearing, the claimant was only 58 years old. The claimant has a high school education and he has attended some college courses. In addition, the claimant took classes to become a real estate agent, and he even sold real estate for a couple of years in the mid 1980's. Although the claimant's anatomical impairment rating is 19% to the body as a whole, this rating is only due to the claimant's shoulder injury. The medical records do not contain any real restrictions upon the claimant's activities or his ability to return to work. While the claimant testified that he has not driven since his accident, the medical records do not indicate that he is incapable of driving. At best, the claimant's physicians have opined that the claimant's shoulder injury would prevent him from returning to work as an over-the-road truck driver. The claimant wanted to return to work for respondent/employer after his accident and in fact reported to work for a couple days before he was terminated due to the accident. Once he was terminated,

the claimant exhibited no motivation to seek employment elsewhere. Moreover, six months after his injury, while still within his healing period, the claimant applied for and received Social Security Disability, thus further impeding the claimant's motivation to return to the work force once his healing period ended.

Accordingly, after I consider the claimant's age, education, work experience, the medical evidence and any other matters which may reasonably be expected to affect his wage earning capacity, I find that the claimant has failed to prove that he sustained a loss in his wage earning capacity in an amount equal to 60% to the body as a whole. Therefore, I must respectfully dissent from this finding.

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

KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. I agree that the claimant proved by a preponderance of the evidence that he sustained a 19% anatomical impairment rating to the body as a whole. However, I must dissent from the majority's opinion finding that the claimant was not entitled to an additional 26 weeks of benefits for his compensable mental injury. I further dissent from the finding that the claimant sustained a loss of earning capacity of only 60% to the body as a whole and that the Second Injury Fund has no liability for the payment of benefits in this case. Based on a de novo review of the record in its entirety, I find that the claimant is entitled to 26 weeks of benefits for his mental injury beginning on April 14, 2006, as matter of law. I also find that the claimant proved by a preponderance of the evidence that he is entitled to permanent total disability benefits and that the Second Injury Fund has liability for the payment of those benefits.

It is not disputed that the claimant suffers from both a physical and mental injury, arising out of a

January 22nd, 2003 accident with the respondent-employer. It is also undisputed that the claimant is entitled to temporary total disability benefits from his physical injury through April 13, 2004 and that he has sustained permanent impairment from his physical injury. In addition, there is no dispute that the claimant's mental injury has caused loss of earning capacity.

The Administrative Law Judge correctly awarded twenty-six (26) weeks of benefits for the claimant's mental injury in accordance with Ark. Code Ann. §11-9-113(b)(1). The majority opinion reverses this award and, from this decision, I must dissent. The majority bases its decision on the fact that the claimant's mental injury manifested itself on November 21, 2003, and extended for a period beyond twenty-six (26) weeks, during which time temporary total disability benefits were paid for the physical injury. This decision is apparently based on a determination that the claimant cannot concurrently receive benefits from two different injuries in the same employment, in accordance with Ark. Code Ann. §11-9-525(d), which provides:

(1) If more than one (1) injury in the same employment causes concurrent temporary disabilities, weekly benefits shall be payable only for the longest and largest paying disability

(2) If more than one (1) injury in the same employment causes concurrent and consecutive permanent partial disability, weekly benefits for each subsequent disability shall not begin until the end of the compensation period for the prior disability.

While it is true that the claimant cannot receive benefits for his mental injury for the period of time temporary total disability benefits are being paid for the physical injury, at the conclusion of the payment of temporary total disability benefits for the physical injury, the claimant can receive an additional period of disability benefits not to exceed twenty-six (26) weeks, in accordance with Ark. Code Ann. §11-9-113:

(b) (1) Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.

The facts of this case indicate that the claimant's disability from mental injury extended long after his

entitlement to temporary total disability benefits from the physical injury ended. Under these circumstances, the claimant should be entitled to the payment of disability benefits for the mental injury from the end of the healing period for the physical injury (April 13, 2004), up to and not exceeding twenty-six (26) weeks.

It is interesting to note that the majority opinion did not even address the claimant's disability from mental injury subsequent to April 13, 2004, nor have there been any arguments raised on appeal by the respondents suggesting that the claimant was not disabled during the period of time in question. In fact, the attorney for respondent No.1 contended at the hearing that the claimant's inability to work was attributable to psychological difficulties. During the twenty-six (26) week period following the end of the healing period for the physical injury, the record contains medical reports for six (6) office visits with Dr. Donald S. Chambers, psychiatrist, and three (3) office visits with Dr. David J. Beare, licensed psychologist. This medical evidence established a consistent course of treatment for the claimant's severe

psychological difficulties and confirmed the extent of disability which resulted therefrom. In addition, the record contains a medical report from Dr. J. K. Smelz, a physical medicine rehabilitation physician, and Dr. Elizabeth Speck-Kern, neuro-psychologist, which were prepared immediately prior to the claimant's treatment under Drs. Chambers and Beare, which also demonstrate significant psychological difficulties and disability from mental injury.

In their briefs on appeal, both respondents have argued that the claimant's benefits from the mental injury must be classified as temporary total disability benefits. Even if this classification were correct, which it is not, the claimant would still be entitled to benefits. In accordance with Ark. Code Ann. §11-9-525(d)(1), the disability resulting from the mental injury would have been the "longest" paying disability and would have commenced upon termination of temporary total disability benefits for the physical injury.

However, the Arkansas Court of Appeals, in Hope Livestock Auction Co. v. Knighton, 67 Ark. App. 165, 992 S.W.2d 826 (1999), has previously determined

that the benefits payable under Ark. Code Ann. §11-9-113(b)(1) are to be awarded as separate and distinct benefits, unencumbered by the statutory requirements for temporary total and permanent partial disability. In Hope Livestock Auction Co., *supra*, the Court found the claimant to have suffered a compensable mental injury and awarded the statutory twenty-six (26) weeks of benefits, even though the claimant had no permanent impairment from mental injury and did not satisfy the statutory requirements for temporary total disability, as follows:

Appellant next contends that Knighton is not entitled to temporary total disability benefits. In its brief, appellant cites *Arkansas State Hwy. and Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981), for the proposition that in order for a claimant to be entitled to temporary total disability benefits, he must show (1) that he remains in his healing period, and (2) that he is totally incapacitated to earn wages. Appellant argues that Knighton did not prove either of these requirements; therefore, he is not entitled to temporary total disability benefits. We do not agree.

[5, 6] Arkansas Code Annotated section 11-9-113(b)(1) provides, "Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits." The term "healing period" is noticeable absent from this section. "Disability" is defined as "incapacity because of a 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(9) (Supp. 1997). Once the Commission is presented with medical evidence of physical impairment and functional limitations, it must use its superior knowledge of industrial demands, limitations, and requirements to determine how a disability will affect the injured worker's ability to obtain or hold a job.

Based on the above quoted precedent, the claimant will be entitled to the disability benefits provided for under Ark. Code Ann. §11-9-113(b)(1) as long as "the Commission is presented with medical evidence of physical impairment and functional limitations", and the mental injury causes "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". Hope Livestock Auction Co. v. Knighton, supra.

Based on a de novo review of the record, I find that the undisputed evidence establishes the claimant's incapacity to earn, due to mental injury, subsequent to April 13, 2004, for a period in excess of twenty-six (26) weeks thereafter. And based on this undisputed evidence, I further find, as a matter of law, that the claimant is entitled to disability benefits for mental injury for twenty-six (26) weeks, beginning on April 13, 2004 in accordance with Ark. Code Ann. §11-9-113(b) (1) and Hope Livestock Auction Co. v. Knighton, supra.

I am also compelled to dissent from the majority opinion awarding the claimant only sixty percent (60%) to the body as a whole for wage-loss disability, as well as the majority's refusal to find Second Injury Fund liability in this case. With regard to wage-loss disability, the overwhelming weight of the evidence indicates that the claimant has been rendered permanently and totally disabled as a result of the severe physical and mental restrictions caused by the compensable injury in combination with pre-existing

impairment. The majority correctly states the law governing wage-loss determinations, but failed to properly apply that law to the facts of this particular case. Mr. Pate is a 59-year-old gentleman who has held employment as a truck driver for more than 30 years. He can no longer return to work at his previous occupation because of the physical limitations relating to his compensable right shoulder injury. In addition, he suffers from severe compensable mental and emotional difficulties, which further complicate his ability to become employed. Finally, the claimant suffers from a pre-existing cervical spine problem which has been significantly aggravated by the compensable injury, creating additional physical limitations which impede his ability to work. Under these circumstances, I find that the claimant is entitled to permanent total disability benefits and that the Second Injury Fund should have liability for those benefits.

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

PHILIP A. HOOD, Commissioner