

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303701

HOWARD R. POTEAT, EMPLOYEE	CLAIMANT
SEARCY NEWSPAPERS, INC., EMPLOYER	RESPONDENT NO. 1
LUMBERMEN'S MUTUAL CASUALTY CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED FEBRUARY 27, 2008

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

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

Respondent No. 1 represented by the HONORABLE DAVID  
JONES, 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 and  
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of  
the Administrative Law Judge filed August 10, 2007. In

said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.
4. Claimant has proven by a preponderance of the evidence that he is entitled to wage-loss disability of thirty percent (30%).
5. Claimant's compensable November 18, 2002 back injury is the major cause of his wage-loss disability.
6. Respondents No. 1 have failed to prove by a preponderance of the evidence that Claimant's prior impairments combined with his 2002 compensable injury to produce his current disability.
7. Respondent No. 2, the Second Injury Fund has no liability under this claim.
8. Respondent No. 3, the Death & Permanent Total Disability Trust Fund, has no liability under this claim.
9. Respondents No. 1 have controverted his entitlement to wage-loss disability benefits over and above his impairment rating.
10. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 10, 2007, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the

Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he is entitled a 30% loss in wage earning capacity in addition to his permanent anatomical impairment rating.

The claimant sustained an admittedly compensable injury to his lumbar spine on November 18, 2002. The claimant was lifting a 100-pound roll of paper when this injury occurred. As a result of this injury, the claimant has undergone three separate surgeries. On January 13, 2004, Dr. Patrick Chan, the claimant's

treating physician, opined that the claimant had reached maximum medical improvement and the claimant could return to work on January 20, 2004, with a 20-pound lifting restriction. Dr. Chan also assigned the claimant a permanent anatomical impairment rating of 20% to the body as a whole.

The evidence in the record shows that the claimant has sustained several other injuries. On May 16, 1994, the claimant visited Dr. Daniel Davidson for marked lower lumbar spasm after injuring himself while working for Land O'Frost. In a report dated May 23, 1994, Dr. James R. McCoy stated that the claimant, who was eventually hospitalized for his back pains, "was in his usual state of good health until about a week ago when he bent over at Land O'Frost to pick up a 70-lb. roll of film packaging material, and he experienced an acute onset of low back pain." An MRI dated May 23, 1994, revealed that the claimant had suffered a midline herniation of L5-S1.

On June 9, 1994, the claimant complained of pain in his low back after he fell down some steps. The claimant's back ailments eventually resolved themselves, but only after the claimant took medication, including but not limited to Stadol, Percocet, Flexeril, and Toradol.

On October 3, 1994, the claimant again reported problems with his low back. According to Dr. Davidson, the claimant had sustained a low back strain for which the claimant was treated conservatively.

On September 26, 1997, the claimant again complained of problems with his low back. According to a report dated September 26, 1997, by Dr. Randy P. Maddox, the claimant provided Dr. Maddox with a history of "back problems" stating that "he was lifting at work 4 or 5 days ago and injured his back." Dr. Maddox explained that the claimant would probably require physical therapy and prescribed various medications to the claimant, including Decadron, Demerol, Phenergan, Lortab, and Naprosyn.

On March 16, 1998, the claimant visited Dr. Davidson for "moderate diffuse lower back tenderness." According to the report, the claimant attributed his back pains to his prior work-related injury at Land O'Frost in May 1994. Dr. Davidson prescribed pain medication and hinted at having an epidural steroid injection.

On April 4, 1998, the claimant reported to the White County Medical Center complaining of his back hurting. The medical report indicated that the claimant provided a history of "chronic back pain" to Dr. Maddox.

Dr. Maddox prescribed pain medication and informed the claimant to return if his condition became worse.

While working for the respondent employer, the claimant sustained a prior compensable injury to his low back on August 20, 1998, while lifting a printer shaft. The claimant's records pertaining to this injury speak not only of claimant's "five-year history of back pain" preceding this injury, but they also mention a ruptured disc the claimant apparently suffered in 1993. Further, an MRI taken on August 21, 1998, revealed degenerative disc disease at L5-S1, as well as a bulging disc at L5-S1.

On September 1, 1998, the claimant underwent a lumbar laminectomy by Dr. Ronald N. Williams. After performing the laminectomy, Dr. Williams assessed the claimant with a 10% whole person permanent anatomical impairment rating for which the respondent employer accepted and timely paid.

As a result of a non-work-related accident, the claimant fractured bones in his right hand. The claimant estimated that prior to his November 18, 2002, low back injury, he underwent anywhere from seven to ten surgeries on his right hand, which is the claimant's dominant hand. From December 1999 to April 2002, the claimant received an overwhelming amount of treatment of

his right hand and wrist, and the claimant eventually had a steel plate installed in his right wrist, which is fused and according to the claimant, essentially immobile.

With regard to the claimant's left hand, the claimant admitted to cutting tendons in his fingers while working for Land O'Frost, where the claimant supervised twenty individuals in his role as a tech-line supervisor from 1983 until 1994. This injury resulted in the claimant being assigned a 10% permanent anatomical impairment rating to his left hand.

The claimant has frequently and consistently complained of suffering from debilitating migraine headaches from, at least, April 1994 to August 2002. The claimant also had a subclavical carotid artery bypass since his 2002 low back accident.

For his headaches and the pains associated with his back and hands, the claimant often sought out and received from various physicians pain medication, including but not limited to Stadol, Percocet, Phenergan, Hydrocodone, Lorcet, Vocodin, and Toradol. Due to the regularity and consistency with which the claimant requested pain medications for his migraine headaches, as well as his back and hand ailments, some of the claimant's physicians considered the claimant to

be suffering from a drug addiction. In a report dated July 1, 1994, Dr. David L. Staggs expressed his desire to have the claimant transferred to "Bridgeway Hospital...for depression and some pain medication abuse." Similarly, some of the claimant's physicians often denied the claimant's request for pain medication due to the claimant's narcotic-seeking behavior and his abuse of pain relievers.

The claimant admitted at the hearing to having a "long time" abuse of pain medication. However, the claimant then clarified not only that he no longer abused pain medications but that such abuse occurred prior to his 2002 accident. Despite his clarification, the claimant stated that at the time of the hearing he was under the care of Dr. Charles Schultz for low back pain management. The claimant explained that Dr. Schultz is currently prescribing him Soma and Morphine, both of which the claimant consumes four times per day, every day, as well as Hydrocodone, which the claimant consumes six times per day, every day.

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 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 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, 206 S.W.3d 258 (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 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).

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits. The claimant was released by his treating physician to return to work on January 20, 2004, with a 20-pound lifting restriction. There is nothing contained in the claimant's medical records that restrict him from working. The claimant is simply unmotivated to return to work. The claimant's testimony, during cross-examination by the respondent's counsel, is enlightening.

Q. And back to your work history, when you worked at Land O'Frost, you were making \$360.00 a week, way back in '94?

A. That sounds about right.

Q. Does that sound correct? And so, obviously, that job would pay more now, I would take it?

A. Quite a bit more, yes, sir.

Q. Okay. And you haven't filled out any applications to go try to get that job at Land O'Frost, have you?

A. I believe I tried one time to get the job back, or to get a job, and I believe they never did call me.

Q. Okay. Now, I'm talking about since your 2002 injury we're here about today.

A. No, sir, I don't believe I did.

Q. Okay. All right. And are you aware that Ms. Owen indicated that you could -- physically, as far as your limitations go, you could do that old job? Were you aware of that?

A. I guess so, yeah.

Q. Okay. And you haven't looked for any type of sedentary work position since your release in January of 2004, is that correct?

A. As far as full-time work?

Q. Yes, sir.

A. I don't remember me doing so, no, sir.

Q. Okay. And, in fact, you testified in your deposition, you didn't even look through the Sunday paper for other types of jobs, did you?

A. No, sir, I guess not.

Q. Okay. And, needless to say, you haven't gone back to try to do that job, so you don't know if you could do the Land O'Frost job?

A. There's no way in the world, sir, I could do that job.

Q. But, in fact, the doctor's restrictions indicate that you could fit within that limitation, you could do that job? It's just your personal opinion you couldn't do it?

A. If that's their opinion, that's their opinion, I guess.

Q. Okay. But, you haven't gone out and tried to do that, have you?

A. No, sir. I couldn't do it if I tried.

Q. And you haven't --

A. No, sir, I haven't tried.

Q. Okay. And you haven't looked for any other sedentary lighter-duty jobs, have you?

A. No, sir, not with the same pay I would be getting, if I was printing.

Q. You wouldn't know that, though, because you haven't looked for the jobs, is that correct?

A. That is correct, sir.

Moreover, in light of that testimony, the claimant has testified that he had no interest in going back to work unless he earned the same kind of money he was making while working for the respondent employer. The claimant has never even registered with the Employment Security Division to receive assistance in locating suitable employment. The claimant receives approximately \$1500.00 per month in Social Security Disability benefits. He works approximately 25 hours per week at a convenience store near his home. According to the claimant, while working at the convenience store he

handles the register, waits on customers, and does a minimal amount of stocking. He explained that the store owner is sympathetic to the claimant's condition and lets the claimant work at his own pace. Curiously, the claimant could not verify the amount of wages he was earning while working at the convenience store. However, the claimant explained that he earned less than the \$860.00 per month that he was allowed to earn and still receive his Social Security disability benefits. It is ironic that the claimant testified that he had not looked for suitable employment since being released to return to work by Dr. Chan in 2004, but added that he needed the wages he earned at the convenience store to supplement his monthly Social Security Disability benefits to pay his bills.

The respondents offered the testimony of Ms. Tanya Owen, a vocation rehabilitation counselor. Ms. Owen interviewed the claimant, reviewed the labor market data, the claimant's medical records, a transferrable skills analysis and a vocational assessment. Ms. Owen provided the following occupations which were identified as transferrable skills occupations the claimant could do: Manager, Retail Store; Cashier II; Sales Clerk; Optician, Dispensing; Packaging Supervisor; Buyer Assistant; Sales Rep. Printing Supplies; Silk Screen

Printer Machine Operator. Ms. Owen identified open positions in these areas which were within approximately 50 miles of the claimant's home. She conducted research on March 26 - 27, 2007. Ms. Owen summarized her findings as follows:

Mr. Poteat's (sic) sustained an injury on November 18, 2002 that would prevent him from working as a press foreman. With his current physical capacities, he should be able to return to work in the previously held positions of convenience store manager or packaging supervisor. Additionally, utilizing his transferable skills, there are jobs that are available, for which he would qualify given his current capacity and skill level.

Ms. Owen opined that the claimant could return to work in his former position as a tech-line supervisor at Land O'Frost. The claimant has failed to make any contact whatsoever with Land O'Frost to see if there are any positions available for him.

The claimant also underwent a functional capacity evaluation on March 15, 2007. The evaluation found that the claimant gave a reliable effort with 52 of 56 consistency measures within expected limits. His movement patterns were consistent with his subjective pain ratings, his subjective pain complaints were limited to activities directly related to his diagnosis,

and he denied increased low back pain with all activities unrelated to his diagnosis. The claimant demonstrated the ability to perform in the light category of work with an occasional lift/carry of up to 30-pounds. He also demonstrated the ability to perform the following activities on a consistent basis: balance, reach immediate (L), reach immediate(R), reach overhead (L), reach overhead(R), reach with 5-pound weight (R) or (L), handling (L), handling (R), bi-manual handling, fingering (L), fingering (R), and bi-manual fingering. He also demonstrated the ability to perform the following activities on a frequent basis: walk, carry up to 10 pounds, push a cart-45 pounds, pull a cart-45 pounds, kneel, crouch, climb stairs, sitting and standing. The claimant also demonstrated the ability to carry up to 25 pounds and to stoop on an occasional basis. The functional capacity evaluation found as follows:

Mr. Poteat demonstrated functional limitations in the area of material handling as he exhibits the ability to lift/carry up to 25 lbs. on an occasional basis. Mr. Poteat demonstrated moderate lumbar ARON deficits that did limit his ability to perform stooping/bending on an occasional basis. Mr. Poteat demonstrates decreased tolerance to general mobility tasks as well as he is limited to the frequent category with kneeling, crouching, climbing

stairs, walking, standing, and sitting. Mr. Poteat demonstrates no functional deficits related to reaching, handling or fingering with either [upper extremity]. Mr. Poteat's blood pressure was [within normal limits] throughout testing this date.

After I consider the fact that the claimant's treating physician released him to return to work with a 20 pound lifting restriction, the fact that the functional capacity evaluation indicated that the claimant was able to perform in the light-duty category, the testimony of Ms. Owen who found jobs within the limitations within the area the claimant lived, the fact that the claimant lacks motivation to return to work based upon his testimony and the fact that he is receiving Social Security disability benefits at this time, I cannot find that the claimant proved by a preponderance of the evidence that he is entitled to any wage loss disability benefits. Accordingly, I find that he claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in addition to his anatomical permanent impairment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner