

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508814

WILLIE B. JONES, EMPLOYEE	CLAIMANT
R. C. LANDSCAPING, EMPLOYER	RESPONDENT NO. 1
FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 7, 2009

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

Claimant represented by the HONORABLE MARC I. BARETZ,
Attorney at Law, West Memphis, Arkansas.

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

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

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an
administrative law judge's opinion filed July 10, 2008. The

administrative law judge found that Respondent No. 2 was liable for permanent total disability benefits. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%, for which Respondent No. 1 is liable.

I. HISTORY

Willie B. Jones, age 62, testified that he reached seventh grade in school. Mr. Jones testified that his work history involved "mostly foundry work" in steel mills. The claimant also drove a tractor and performed general farm work. The parties have stipulated that the claimant sustained a compensable injury on June 6, 2005. The claimant testified that a mower he was driving accidentally overturned and fell on top of him. The claimant received emergency treatment on June 6, 2005. The clinical impression was acute myofascial strain, lumbar.

A CT scan of the claimant's lumbar spine on June 16, 2005 showed a "Burst compression fracture of L1 of a mild degree with anterior wedging. This is also associated with mild vacuum disc phenomena at the L1-2 space and possibly a

tiny avulsion chip fracture of the superior anterior osteophyte at L2 and also the spinous process of L1 vertebra." A CT of the cervical spine on June 16, 2005 showed "Fractures of the spinous processes of C4, C5, and C6 vertebrae."

The claimant began treating with Dr. Jeffrey A. Kornblum on June 24, 2005. Dr. Kornblum's notes included "PSH: Unknown cranial procedure - MVA. Teeth extraction." Dr. Kornblum recommended, "I have advised that he start wearing a TLSO and I have told him to expect to be wearing that for about two month (sic) while the spine heals."

The claimant followed up with Dr. Kornblum on October 25, 2005:

It has been several months since he was last seen, several appointments have been rescheduled. He notes that when he is lifting he has some back pain, he is not in a brace at this time. On exam he is ambulating well. Straight leg raising is negative. Strength is 5/5. He has had follow up x-ray, the degree of collapse appears to be essentially the same, there has been no progression in his compression deformities. Spinous process fractures in the cervical spine again noted. Impression: Mr. Jones is status post injuries as previously outlined with regard to compression fractures at L1 and L2 and clay shoveler fractures in the cervical spine. I have advised that he avoid any lifting over 30 pounds until the end of the year, as well as not

to be shoveling through the end of the year. I have advised him in general of considering less laborus (sic) activities with regard to seeking out employment. If the need arises he may be referred for re evaluation.

The parties have stipulated that the claimant reached the end of his healing period on October 25, 2005.

A hearing was held on May 26, 2006. The claimant testified at length regarding the circumstances of his employment and compensable injury with detail, specificity, and recall. The claimant testified on cross-examination:

Q. Do you have any intention of trying to go back to work? Now that's a yes or no answer.

A. No.

Q. Okay. Have you tried to go back on your Social Security Disability?

A. I tried.

Q. Have you been on Social Security disability for a long time?

A. I really can't think how long.

Q. Okay. Has it been since you fell off a porch and broke your jaw back in the '80's?

A. That's when I got on....

Q. Was it cut off at some point?

A. They - they cut me off because I was only allowed to only make so much.

And so Randy turned in too much on me a couple times and they cut me off.

So I have been off on this accident for about two year (sic) before I had drawn - before I drew any check, you know, they cut me off completely. But they still let me keep my insurance.

An administrative law judge filed an opinion on August 23, 2006. The administrative law judge found that the

claimant sustained injuries to his lumbar and cervical spine on June 6, 2005. The administrative law judge found that the claimant was entitled to temporary total disability benefits and reasonably necessary medical treatment. The respondents appealed to the Full Commission, which filed an opinion on May 14, 2007. The Full Commission found that the claimant proved he sustained a compensable injury on June 6, 2005. The Full Commission found that the claimant proved he was entitled to temporary total disability benefits through October 25, 2005.

Dr. Kornblum informed the claimant's attorney on June 15, 2007, "I am writing you in regard to your letter of May 17, 2007 with regard to the impairment rating of Mr. Jones. Utilizing the AMA Guidelines it would be 17% taking into account two compression fractures and a spinous process fracture. As per my note of October 25, 2005, I had asked Mr. Jones to maintain a lifting restriction through the end of the year. I have not seen him since that time and had no expectation at that time that he would require any long-term restrictions."

The parties stipulated that Respondent No. 1 "accepted an 11% whole person anatomical impairment as a result of the June 6, 2005, compensable injury."

A Vocational Rehabilitation Consultant, Heather Taylor, provided a Vocational Rehabilitation Evaluation on January 28, 2008:

Mr. Jones has not worked since his injury in June 2005. According to his treating physician (Dr. Kornblum) he was to remain on a lifting restriction thru the end of 2005, but Dr. Kornblum stated that he had no expectation that Mr. Jones would have any long-term physical restrictions. However, Mr. Jones did not return to work with his employer, as attempts from the employer to contact Mr. Jones were unsuccessful (according to the records I reviewed).

Based on this medical information, it appears that Mr. Jones has the physical ability to return to work - at least with his former employer, R.C. Landscaping. However, based on my assessment, Mr. Jones appears to have some mental barriers that could prevent his successful return to the workforce....

Other medical issues noted by Dr. Kornblum (6/24/05) included: an unknown cranial procedure, MVA, and teeth extraction....

I also asked Mr. Jones about a "cranial procedure" mentioned in a report from Dr. Kornblum. He said he was not aware of any brain surgery. He told me that he had a car wreck in the 1960's (he had a slight scar on his forehead, but was unable to confirm a head injury). He said since then his memory has not been very good....

Mr. Jones said he last completed the 8th grade in Earle, Arkansas. He said he quit school to go to work.

During my meeting with him, I administered the *Wide Range Achievement Test III*. This is a basic academic test on reading, writing, and arithmetic. Mr. Jones performed well below average. He scored at a *Kindergarten* level in Reading, a *First Grade* level in Spelling, and a *Pre-Kindergarten* level in Arithmetic. These scores could suggest a learning disability, or it could correlate with a prior head injury....

Based on Mr. Jones' work history, he has no transferrable skills, as he has only performed unskilled labor his entire working life. Although he does know and recognize numbers and letters, he would be considered functionally illiterate. Based on the medical records I reviewed, he does not appear to have any permanent physical limitations as a result of his 6/05 injury.

His employer tried to contact him in 2005 about coming back to work, but was unsuccessful. Mr. Jones told me that he is "done with" working, and does not think he can do much anymore.

I believe Mr. Jones' best opportunity for returning to the workforce would have been with his employer, R.C. Landscaping back in 2005 when his employer tried to bring him back to his previous job. This employer was apparently aware of Mr. Jones' mental deficits, and had provided him employment for several years. However, I understand that this option is no longer available.

According to the treating physician, Dr. Kornblum, Mr. Jones appears to have no permanent physical limitations that would prevent him from returning to his previous job, or possibly some other kinds of unskilled labor. In my opinion, his main barriers to successful return to work are: his

age, very limited education, illiteracy, memory problems, lack of skills and no transferable skills, and very poor presentation and communication. Based on all of these issues combined, it is my opinion that his chances of returning to the workforce with another employer are very poor. Therefore, I am not recommending a vocational rehabilitation plan for Mr. Jones.

As the records mentioned a prior cranial procedure and head injury, it may be beneficial to obtain a neuropsychological evaluation to try and determine the extent of his mental deficits. This is the only recommendation I have at this time....

A pre-hearing order was filed on February 19, 2008.

The claimant contended that he was totally and permanently disabled. Respondent No. 1 contended, among other things, that the claimant "has been on Social Security disability since the 1980s for a head injury....In April of 2005, a past medical history noted a head injury due to a motor vehicle accident....the Respondents contend that if there is any wage loss, it would be the responsibility of the Second Injury Fund."

Respondent No. 2, Second Injury Fund, contended that the claimant was "not permanently and totally disabled and is not entitled to permanent partial disability benefits in excess of his anatomical impairment rating for his injury pursuant to A.C.A. §11-9-522. The claimant suffered no combination of prior impairment or disability with the

current injury to create a greater disability than the last injury, in and of itself, to prove Second Injury Fund liability pursuant to Midstate Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988)."

The parties agreed to litigate the following issues:
"amount of permanent physical impairment; wage loss/permanent total disability; second injury fund liability; and controverted attorney fees."

The claimant consulted with Dr. A. J. Zolten on or about April 9, 2008:

This is the first referral by Heather Taylor at Systematic Corporation (Workman's Comp case management) for neuropsychological testing to assist in characterizing this patient's cognitive abilities secondary to closed head injury....

Willie sustained a significant back injury in 2005. This back injury was work related, and he did receive some Workman's Compensation associated disability benefits, although discussion with Heather Taylor indicates that he has been cleared to return to work....Willie reports today to me that he was in a car accident in 1959 or 1960 with a head injury. He says that he does not think he lost consciousness and had quite a big gash on his forehead that needed to be stitched. He does not know how long he was in the hospital, and he did not receive any rehabilitation care. It is important to note that this occurred when Willie was about 15, and he went on to have a full work career.

Willie identifies current problems as back pain with limited walking, limited ability to stand,

and pain that occurs when he is restricted to sitting in a car for a long period of time because of a long drive to the clinic today....Patient also reports head pain....

Functional speech and language would indicate that he has very limited innate cognitive abilities. He remained task oriented, and comprehension of instructions was limited. Almost all instructions had to be presented more than once, indicating that his ability to process information was severely limited. Based on these observations, the data generated by the present evaluation is thought to be a reasonable estimate of his current functioning....

In summary, Willie Jones is a 61-year-old African American male who has apparently had a lifelong history of unskilled labor who is now out of the workforce and on social security disability income most secondary to a back injury several years ago. This patient is fairly severely impaired across the board. He has a remote history of a possible closed head injury, but I do not think that this is contributory to his current functioning right now. The patient has very limited cognitive skills from a premorbid perspective, and he has a significant risk factor for cerebrovascular disease, as he has untreated hypertension at the present time....

A CT of the claimant's brain was done on April 17,

2008:

Morphologically the brain is normal. Diminished attenuation in the white matter tracts adjacent to the lateral ventricles, particularly near the frontal horn of the lateral ventricle bilateral. Changes are likely secondary to sequela from microvascular ischemia. There is a linear area of diminished attenuation subinsular on the right that may represent sequela from a previous CVA. No focal encephalomalacia is present in the left

or right hemisphere. Mild supratentorial atrophy and compensatory ventricular dilatation. Brainstem, basal ganglia and cerebellum unremarkable. Extensive vascular calcification in the posterior fossa related to the vertebrobasilar system.

IMPRESSION:

Mild-moderate microvascular ischemic change in the white matter. Possible remote CVA involving a focal area subinsular on the right. No evidence for an acute intracranial event or hemorrhage. Supratentorial atrophy.

A hearing was held on April 23, 2008. The claimant testified that, before he began working for the respondent-employer, he received Social Security Disability "From my head....I can't tell you about when and time, but I got hurt in an accident....A car accident." The claimant testified on direct examination:

Q. Now, you worked for R C Landscaping, right?

A. Right.

Q. And you got hurt, is that right?

A. Right.

Q. Do you remember when that was?

A. That was in June the 6th of 2005....

Q. Have you done any work at all since this accident?

A. No.

Q. Why haven't you?

A. On account of my back.

Q. What's wrong with your back?

A. It bothers me. I can't stand up too long, you know.

Q. How long is too long?

A. I might be sometimes about 10 or 15 minutes, and after that I started getting weak. Sometimes it bothers me so bad I have to go back to the hospital and they take and they got a big tube and has something in it and they shoot it up my back and it stops the pain....

Upon questioning by Respondent No. 2's attorney, the claimant agreed that his back was his main problem in preventing a return to work.

An administrative law judge filed an opinion on July 10, 2008. The administrative law judge found that the claimant had a permanent physical impairment in the amount of 17%. The parties do not appeal that finding. The administrative law judge found, "6. The claimant sustained a prior injury to his head resulting in mental deficits, which when combined with the present compensable injury, along with the claimant's age, education, and work history has resulted in his present status disability of permanently totally disabled. Respondent #2 is liable for the payment of wage loss benefits in excess of the claimant's 17%

anatomical impairment." Respondent No. 2, Second Injury Fund, appeals to the Full Commission.

II. ADJUDICATION

A. Wage Loss

Ark. Code Ann. §11-9-522(b) (Repl. 2002) provides:

(1) 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.

Ark. Code Ann. §11-9-519(e) (Repl. 2002) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

In the present matter, the claimant sustained a permanent anatomical impairment in the amount of 17%. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%. The claimant is age 62 and has very little formal education. The claimant testified that his reading and writing ability are very limited. The claimant's work history includes primarily

unskilled manual labor. The parties stipulated that the claimant sustained a compensable injury on June 6, 2005. Subsequent diagnostic testing showed fractures in the claimant's lumbar and cervical spine, but surgery was not recommended. In October 2005, Dr. Kornblum advised the claimant to seek labor which was less physically strenuous. The claimant reached the end of his healing period on October 25, 2005.

In January 2008, the vocational consultant noted the claimant's work history of unskilled manual labor in addition to the claimant's limited academic abilities. The vocational consultant opined that the claimant "has no transferrable skills, as he has only performed unskilled labor his entire working life....it is my opinion that his chances of returning to the workforce with another employer are very poor. Therefore, I am not recommending a vocational rehabilitation plan for Mr. Jones." Nevertheless, the consultant also opined that the claimant "does not appear to have any permanent physical limitations as a result of his 6/05 injury....Mr. Jones told me he is 'done with' working and does not think he can do much anymore."

The claimant informed the vocational consultant that he did not intend to try and return to work. The Full Commission notes the claimant's testimony in 2006 that he did not intend to return to work. The record in the present matter demonstrates that the claimant is not motivated to seek suitable employment within his physical abilities. Dr. Kornblum did not assign any permanent physical restrictions. The claimant's lack of interest in returning to work and his negative attitude are an impediment to a full assessment of the claimant's wage-loss disability, and his demonstrated lack of motivation can be considered by the Commission. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). The vocational consultant opined that the instant claimant had the physical ability to return to work, albeit apparently not with the respondent-employer. The claimant has proved that he sustained 40% wage-loss disability in addition to 17% anatomical impairment. The claimant did not prove by a preponderance of the evidence that he was permanently and totally disabled as a result of his compensable injury.

B. Second Injury Fund liability

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 claimant suffered a compensable injury on June 6, 2005. There is no probative evidence before the Commission demonstrating that prior to the compensable injury the claimant had a permanent partial disability or impairment. The Full Commission recognizes Dr. Kornblum's June 24, 2005 notation, "PSH: Unknown cranial procedure - MVA." Dr. Kornblum's notation of an unknown cranial procedure is not probative evidence demonstrating that there was a prior permanent partial disability or impairment. During the May 26, 2006 hearing before the Commission, there was no indication in the claimant's lengthy detailed testimony that he was suffering from a "mental deficit" resulting from a prior permanent partial

disability or impairment. The claimant testified that he began receiving Social Security disability in the 1980's after falling from a porch and breaking his jaw. There is no evidence before us demonstrating that the claimant had a permanent partial disability or impairment involving his jaw. Nor is there any evidence demonstrating a "mental deficit" as a result of the claimant's fall from a porch.

Heather Taylor, the vocational consultant, interviewed the claimant on January 28, 2008. Ms. Taylor did mention the unknown "cranial procedure" referred to by Dr. Kornblum. The consultant noted, "He told me that he had a car wreck in the 1960's (he had a slight scar on his forehead, but was unable to confirm a head injury). He said since then his memory has not been very good." We are unable to rely on Ms. Taylor's January 28, 2008 notation as probative evidence demonstrating that the claimant had a permanent partial disability or impairment as the result of a motor vehicle accident.

Dr. Zolten, a psychologist, examined the claimant on April 9, 2008. Dr. Zolten opined that the claimant had limited cognitive abilities but noted, "He has a remote history of a possible closed head injury, but I do not think

that this is contributory to his current functioning right now." A CT of the claimant's brain was taken on April 17, 2008. This diagnostic test showed ischemic change in the white matter, a "possible remote" cerebrovascular accident, and "no evidence for an acute intracranial event or hemorrhage." Neither Dr. Zolten's report nor the CT of the brain are probative evidence demonstrating that the claimant had a prior disability or impairment involving his brain. Nor does the record show that the claimant had "mental deficits" resulting from a motor vehicle accident.

Even if there was a permanent partial disability or impairment prior to the compensable injury, which the evidence of record before the Commission does not demonstrate, there was no proof that a disability or impairment combined with the recent compensable injury to produce the claimant's current disability status. The claimant expressly testified that he considered himself unable to work "on account of my back." We note the claimant's testimony of record at the April 5, 2006 deposition that a possible remote head injury "doesn't affect me" with regard to the claimant's ability to return to work. Neither the claimant's testimony nor the

documentary evidence before us demonstrates that there was a "combination" producing the claimant's current disability status. Respondent No. 2 is not liable for wage-loss disability benefits in the present matter.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant was permanently and totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%. We again note that the parties do not appeal the administrative law judge's finding that the claimant's anatomical impairment rating was 17%. The anatomical impairment and wage-loss disability shall be the sole responsibility of Respondent No. 1. The claimant's June 6, 2005 compensable injury was the major cause of the claimant's anatomical impairment and wage-loss disability. 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, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

Respondent No. 2, Second Injury Fund, is not liable for fees for legal services in the present matter.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

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

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I dissent from the finding that the claimant proved by a preponderance of the evidence that he was entitled to a 40% loss in wage earning capacity in addition to his permanent anatomical impairment rating. I concur in the finding that the claimant is not permanently and totally disabled and that the Second Injury Fund has no liability.

In my opinion, the evidence is crystal clear that the claimant's disability status is due to his prior head injury and not due to his work-related injury with the respondent employer. The medical evidence demonstrates that the claimant was released to return to work by Dr. Kornblum, his treating physician, with NO restrictions no later than

December 25, 2005. The claimant, on his own, decided not to return to work. The respondent employer was more than willing for the claimant to return to work. However, for whatever reason the claimant failed to return to work.

The medical evidence also demonstrates that the claimant did not seek treatment for his back for almost 18 months after Dr. Kornblum released him in October of 2005. In fact, the claimant had sought medical treatment on at least two occasions prior to his July, 2007, emergency room visit, for other medical problems, i.e. hand injury and chest pain. Further, the July, 2007, visit for his back was for an injury the claimant had while loading a tractor and was not for treatment of his work-related injury.

Moreover, the vocational rehabilitation assessment does not show that the claimant is entitled to wage loss. Ms. Taylor, in her report, stated that the claimant did not have any permanent restrictions that would keep him from working. She also stated that the claimant said he was "done with working."

After considering all of the evidence, it is my opinion that the claimant has failed to prove by a preponderance of the evidence that he is entitled to wage

loss disability benefits in addition to his permanent anatomical impairment as a result of his work-related injury. Although the claimant has other issues which may prevent him from working, neither the respondents nor the Second Injury Fund are liable for any loss any wage earning capacity the claimant might have. His loss in wage earning capacity is due strictly to the claimant's pre-existing closed head injury for which he was drawing Social Security disability benefits prior to going to work for the respondent employer. Accordingly, I dissent from the majority's award of 40% loss in wage earning capacity in addition to his permanent anatomical impairment rating.

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 opinion. I specifically concur in the majority's award of wage-loss disability in the amount of 40% above his anatomical impairment rating. However, the majority further states: "The claimant did not prove by a

preponderance of the evidence that he was permanently and totally disabled as a result of his compensable injury." It is my belief that the majority's conclusion regarding permanent and total disability is not supported by any findings and is therefore insufficient to withstand judicial scrutiny. After a de novo review of the record, I find that the claimant has proved his entitlement to permanent and total disability benefits, and therefore, I must respectfully dissent on this issue.

While the analysis required in a claim for permanent and total disability is similar to that conducted to determine wage loss disability, it is not the same. See Rutherford v. Mid Delta Community Services, Inc. ___ Ark. App. ___, ___ S.W. 3d ___ (2008). Wage loss disability is defined as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). In determining wage-loss disability, in addition to the percentage of permanent physical impairment, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future

earning capacity. Ark. Code Ann. §11-9-522 (b) (1). Such other matters 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).

Permanent total disability is defined as inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (e) (1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2).

The same factors considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Rutherford, Supra. However, the actual statutory analysis required of the fact finder is not the same. For wage loss disability, the relevant inquiry, based on Ark. Code Ann. §11-9-522, is: "To what extent has the claimant's compensable injury affected his or her ability to earn a livelihood?" For permanent total disability, the relevant inquiry, based on Ark. Code Ann. §11-9-519 is: "Has the claimant proved by a preponderance of the evidence the

inability to earn any meaningful wage in the same or other employment?"

Here, the claimant is sixty-one years old. He is functionally illiterate. He has worked his entire life in manual labor jobs. On June 6, 2005, a tractor rolled over on him, breaking his back in multiple places. The testimony of the claimant shows that he has been unable to work ever since. The vocational consultant, in her report stated that the claimant is unemployable. The majority, in its analysis of Second Injury Fund liability agrees that the claimant was employable until the tractor accident in 2005. Based on the evidence of record, I find that the claimant has clearly met the statutory burden of proving his inability to earn any meaningful wage in the same or other employment as required by Ark. Code Ann. §11-9-519 (e) (1). The claimant, due to his compensable back injury cannot return to any type of physical labor. Due to his limited education and functional illiteracy, the claimant cannot pursue lighter, sedentary employment. Ark. Code Ann. §11-9-519 (c) states that permanent and total disability shall be determined in according to the facts. Here, the facts show that the

claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits.

For the aforementioned reasons I must respectfully concur with the majority's award of 40% wage loss disability, but respectfully dissent from the majority's denial of permanent and total disability benefits.

PHILIP A. HOOD, Commissioner