

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F603013

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| BILL MASSEY, EMPLOYEE  | CLAIMANT         |
| NORTH LITTLE ROCK SCHOOL<br>DISTRICT, EMPLOYER   | RESPONDENT NO. 1 |
| ARKANSAS SCHOOL BOARDS ASSOCIATION<br>WORKERS' COMPENSATION TRUST;<br>C/O RISK MANAGEMENT RESOURCES, CARRIER | RESPONDENT NO. 1 |
| SECOND INJURY FUND   | RESPONDENT NO. 2 |
| DEATH & PERMANENT TOTAL<br>DISABILITY TRUST FUND   | RESPONDENT NO. 3 |

**OPINION FILED AUGUST 25, 2009**

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

Claimant represented by HONORABLE TERRENCE C. JENSEN,  
Attorney at Law, Benton, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL E. RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE ROBERT L. RODDEY  
and HONORABLE DAVID E. SIMMONS, Attorneys at Law, Little  
Rock, Arkansas.

Respondent No. 3 represented by HONORABLE CHRISTY KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the  
Administrative Law Judge filed February 12, 2009.

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

1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.

3) I find that the claimant's annual contract rate of \$17,067.00 should be divided by 39 weeks; therefore, I find the claimant's average weekly wage to be \$437.62 per week which would entitle the claimant to a temporary total disability rate of \$291.00 per week and a permanent partial disability rate of \$218.00 per week.

4) The claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled.

5) Upon consideration of all relevant wage loss factors, I find the claimant established a decrease in his wage earning capacity equal to 25% to the whole body, and is therefore entitled to wage loss disability benefits.

6) The claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity.

7) Respondent No. 1 is liable for wage loss disability in the amount of 25% to the body as a whole over and above the claimant's 10% anatomical impairment rating.

8) The preponderance of the evidence in this matter does not show that the Second Injury Fund is liable. Therefore, Respondent No. 1 is solely liable for the claimant's wage loss disability benefits awarded herein.

9) Claimant's attorney, the Honorable Terence C. Jensen, is entitled to the maximum attorney's fees under A.C.A. § 11-9-715(a) (A).

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant is permanently and totally disabled. The claimant was 74 years old at the time of the hearing. The claimant worked as a substitute teacher from age 62 until his current compensable injury of September 14, 2005. The claimant's compensable injury is a ruptured disc at L4-5, with severe stenosis and nerve compression. The claimant was awarded a 10% permanent impairment to the body as a whole as a result of his injury and following surgery.

Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449

(2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, 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); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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.

The claimant testified that, as a result of his back condition, he can be up about two hours before the pain becomes so severe he must lay down for about two hours. The claimant stated that he spends his average day following this routine of being up for about two hours and then returning to bed for about two hours to reduce the pain. The claimant testified that, if he pushes himself past his ordinary routine, he may be in bed most of the next day. He testified that, as a result of his back pain and problems, he can only walk about 50 feet with the aid of a walker. He can only stand for about 15 minutes. He cannot bend. The claimant testified that he can only operate a vehicle for about 20 minutes. He testified that he can only sit for a limited time before he has an increase in his back pain. The claimant testified that he takes Darvocet for pain, which affects his memory and stamina. The claimant stated that the Darvocet basically wipes him out. It is doubtful that any employer would allow the claimant to return to work, given the amount of pain medication the claimant must take on a daily basis to relieve his back pain. The claimant's chronic pain and use of pain medication is a factor that must be considered. See Whitlatch v. Southland

Land & Development, 84 Ark. App. 399, 141 S.W. 3d 916

(2004).

At the time of his injury, the claimant was a 71-year-old gentleman with several health-related problems, including diabetes, hypertension, and kidney disease. He had a pacemaker and defibrillator for heart problems including a low pulse rate. Even with the above problems, the claimant was able to work as a substitute teacher. The claimant is now 75 years old and extremely limited with regard to his functional abilities. In consideration of his severe back problems, chronic back pain and use of pain medications, I find that the claimant cannot earn any meaningful wages in the same or other employment and is permanently and totally disabled.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner