

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E505070

JESSE TEDDER, EMPLOYEE	CLAIMANT
FLUOR CORPORATION, EMPLOYER	RESPONDENT NO. 1
TRAVELERS INSURANCE CO., CARRIER	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 6, 2009

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

Claimant represented by HONORABLE FLOYD M. THOMAS, JR.,
Attorney at Law, El Dorado, Arkansas.

Respondent No. 1 represented by HONORABLE PHILLIP CUFFMAN,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 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 December 9, 2008.

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

1. The Arkansas Workers' Compensation

Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed on April 3, 1995, at which time the claimant sustained compensable injuries to his back and right ankle.

3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$270.00 for temporary total disability and \$203.00 for permanent partial disability benefits pursuant to a Full Commission Opinion dated January 19, 2007.

4. Respondents No. 1 have paid appropriate medical expenses through the last hearing in this case which occurred on November 16, 2005.

5. Respondents No. 1 have accepted and paid permanent partial disability benefits of 8% to the back as assessed by Dr. Paul Tucker on January 17, 1996, and 14% to the lower extremity as assessed by Dr. Ruth Thomas on July 17, 1996.

6. This matter has been the subject of a prior hearing and an appeal to the Arkansas Workers' Compensation Commission and to the Arkansas Court of Appeals. The decision of the Arkansas Court of Appeals dated October 24, 2007, is *res judicata* and is binding on the parties, the Full Commission and the Administrative Law Judge.

7. The claimant reached the end of his

healing period on July 17, 1996.

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

9. Considering the claimant's age, education, work experience, medical evidence, motivation, post-injury income, claimant has proven by a preponderance of the evidence that he is entitled to 7% wage loss benefits sustained as a result of his compensable back injury.

10. Claimant's entitlement to the wage loss benefits awarded herein shall commence as of the date of this award becomes final.

11. Respondents have controverted the claimant's entitlement to wage loss disability benefits. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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.

A. WATSON BELL, Chairman

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 would award the claimant permanent and total disability benefits.

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 v. Mid Delta Community Services, Inc. ___ Ark. App. ___, ___ S.W. 3d ___ (2008). Such factors include the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Other factors include motivation, post-injury income, credibility, demeanor, prior work history and education. 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).

The claimant was 51 years old at the time of the original hearing on the issue of permanent and total disability. He has a high school education. His work

experience is limited to heavy labor as a boiler maker, earning \$16.00 to \$18.00 per hour plus benefits. The claimant has not received any training in sedentary work activities. Beyond his compensable injuries, the claimant's health history includes an eye condition (pterygium) that has required four surgeries, kidney stones and hepatitis.

The claimant has had a herniated disc in his back since his fall in 1995. He has a fused right ankle which causes him pain in his right leg. The claimant stated that he remains symptomatic with back pain and weakness in his left leg which causes him to stumble and fall. The claimant walks with a cane. The pain causes sleep disturbances and limits his ability to walk or sit for long periods of time. His doctors have limited him to standing on his feet no longer than 15 minutes at a time. Dr. Thomas and Dr. Ackerman have both commented that they did not feel that the claimant would be able to return to work.

I find, based on the medical record and the claimant's credible testimony, that he has proved by a preponderance of the evidence that he is unable to earn any meaningful wage in the same or other employment. The

claimant, due to his back injury and his ankle injury, which can be considered in a claim for permanent and total disability, has shown that he is severely limited in his ability to perform activities required to return to the work force. In my opinion, based on the claimant's age, education, work experience, medical evidence and other matters, the claimant has met his burden of proving that he is permanently and totally disabled.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner