

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606978

WILLIAM CROW, EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT NO. 1
CROCKETT ADJUSTMENT, INC., INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 15, 2010

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

Claimant represented by the HONORABLE NEAL HART, Attorney at  
Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE WILLIAM G.  
BULLOCK, Attorney at Law, Texarkana, Arkansas.

Respondent No. 2 waived its appearance.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed March 5, 2010. The administrative law judge  
found that the claimant proved he was permanently and  
totally disabled. After reviewing the entire record *de*  
*novo*, the Full Commission reverses the administrative law

judge's finding that the claimant proved he was permanently and totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 35%.

I. HISTORY

William Desmond Crow, age 46, testified that he graduated from high school in 1982. Mr. Crow testified that his work history included hauling ice for approximately one year and that he planted trees. The claimant testified that the tree-planting job was physically demanding.

The claimant testified that he worked as a correctional officer in Texas from about 1985 to 1989 and subsequently worked as a correctional officer/jailer in the Bi-State Justice Building in Arkansas. The claimant then worked for about 18 months on a manual labor job at Weyerhaeuser. The claimant subsequently obtained a Commercial Driver's License and began driving a truck for Shields Lumber. The claimant worked at Shields Lumber for three years and then began driving for Sidney Smith Trucking. The claimant next began working as a self-employed logger. The claimant supervised six workers in this employment. The claimant testified that the logging company went bankrupt after approximately five

years. The claimant testified that his only additional education beyond high school was "a little insurance school for two weeks" in about 1991. The claimant testified that he received a certificate and sold insurance for approximately four months.

The record indicates that the claimant was hired at Cooper Tire & Rubber Company in November 2000. The claimant described his initial work for the respondent-employer as heavy manual labor. After about a year, the claimant testified, he bid to work in "mold service." The mold service job also required heavy manual labor. The claimant testified that he was working as a Mold Serviceman at the time of his compensable injury. The claimant testified that he earned approximately \$22 per hour, and that he worked 50-60 hours per week.

The parties stipulated that the claimant sustained a compensable injury to his cervical spine on or about March 27, 2006. The claimant testified that he injured his head and neck after a safety bar "caught me on the top of my head." The claimant wrote on an Employee Report Of Injury signed March 27, 2006, "While moving to loosen top bolts, caught head on safety bar, causing a downward -back motion."

The claimant reported that he had injured the left side of his neck.

Dr. Tim Reynolds examined the claimant on March 31, 2006: "Patient was hit in the head Monday by a safety bar at work, pain in the left side of his neck and shoulders down into his hands." Dr. Reynolds assessed radiculopathy and neck disorder. An MR of the claimant's cervical spine was taken on April 6, 2006, with the following impression:

1. C5-6: Mild degenerative disc space narrowing with posterior spurring and mild effacement of the anterior thecal sac.
2. C6-7: Mild degenerative disc space narrowing with a suspected left posterolateral disc protrusion and mild left neural foramina narrowing.

Dr. Reynolds returned the claimant to full work duty on April 8, 2006.

The claimant began treating with Dr. Reza Shahim on May 4, 2006. Dr. Shahim noted, "I reviewed the cervical spine MR which shows a disc herniation at the left C6-7 resulting in foraminal stenosis....Mr. Crow is symptomatic from C6-7 foraminal stenosis and disc herniation. This is brought on by a work injury. I would recommend conservative management including physical therapy. If his symptoms were to continue cervical trigger point injections or ultimately

surgery may be of some benefit. He agrees with conservative management. He should go to physical therapy for four weeks and at that point he may return to full duty if his symptoms have resolved."

Dr. Shahim performed a cervical discectomy and fusion on June 19, 2006. The post-operative diagnosis was "1. Disc herniation and stenosis at C6-7. 2. Large left foraminal disc herniation." The parties stipulated that the respondents "accepted the cervical spine claim and paid extensive benefits, including but not limited to a C6-7 cervical discectomy."

Dr. Shahim noted on July 10, 2006, "He underwent an anterior fusion and decompression at C6-7. He has done well since the surgery. His says his arm pain is much improved. He does complain of some tingling numbness in the right side and most of the numbness on the left side has resolved....I would like to keep him off work for another three weeks. He may return to light duty at that point."

The claimant testified that the respondent-employer provided light-duty work: "I was working in the mold shop, venting molds and washing molds." The claimant testified that the work was within his physical restrictions. The

claimant agreed on cross-examination that he returned to work on August 2, 2006. Dr. Shahim noted on October 3, 2006, "He may return to light duty with no lifting greater than 30 lbs. We will also place him on Elavil, 75 mg. q hs."

Dr. Barry D. Baskin examined the claimant on October 18, 2006 and gave the following impression: "Mr. Crow is a nice 42 year old gentleman who had an accident on 3/27/06. He had a safety bar hit him in the head and he is having headaches, posttraumatic in nature, and had a cervical fusion at C6-7. I think his problem, right now, is occipital headaches and muscle spasm, probably occipital neuralgia. **PLAN:** I am going to get him in for some physical therapy for myofascial treatment, deep muscle stretching and massage. I will see him in follow up and we will see how he does. If he does not get benefit from the therapy, then I will do an occipital nerve block when he returns...."

Dr. Baskin referred the claimant for a program of physical therapy beginning October 26, 2006. Dr. Baskin administered an occipital nerve block on November 9, 2006. Dr. Baskin noted on November 27, 2006, "The left occipital nerve block that I did provided him very good benefit for 2

days only. He states that the pain came back and he has had some headaches and neck pain since that time....We will treat him with Hydrocodone ½ tab as needed for pain and we will see how things go." Dr. Baskin noted on December 21, 2006, "I think that doing facet blocks in the cervical spine at C6-7, C7-T1 facet levels would be good. We are going to get this done on 12/27 at Radiology Consultants International. He can continue on his current light duty indefinitely." Dr. Shahim assigned the claimant a 9% whole-person impairment rating on December 27, 2006.

Dr. Baskin reported on January 18, 2007 that facet blocks had provided the claimant good relief. The claimant testified, however, that he did not benefit from treatment provided by Dr. Baskin. Dr. Shahim reported on February 9, 2007, "I have recommended to him to undergo a Functional Capacity Evaluation. Based on the Functional Capacity permanent restrictions could be given to him. Since he has had marked improvement in his symptoms I would not recommend further treatment. I will be glad to re-evaluate him if needed." Dr. Shahim noted on April 2, 2007, "Return to medium work duty per FCE restrictions on April 2, 2007." A document from the respondent-employer indicates that the

claimant was transferred from the Old Job Classification of "Mold Serviceman" to a New Job Classification, "Temp. Mold Service," effective April 18, 2007.

The claimant reported that he injured his neck and center of back on April 25, 2007. The claimant wrote on a Report Of Injury, "While flipping top half of a mold I caught the mold to prevent it from flipping again." The claimant followed up with Dr. Shahim on May 7, 2007: "He had another on-the-job injury lifting a few weeks ago. Since then he is having more interscapular pain and some left shoulder pain. The pain has not changed significantly, but there is more of it in the upper thoracic region and he is having more headaches....I did obtain flexion and extension X-rays of the cervical spine that show a stable anterior fusion at C5-6. No subluxation....I have recommended to him to undergo a course of physical therapy with mild cervical traction. He wants to receive cervical epidural steroid injections. We will refer him for that. He should remain on light duty based on restrictions given by the Functional Capacity Evaluation. I would recommend permanent restrictions based on the Functional Capacity Evaluation.

If his symptoms were to continue, we will obtain an MR of the cervical spine."

Dr. Shahim noted on July 19, 2007, "I think he should undergo a course of physical therapy. We will reduce his weight restrictions to less than 30 pounds."

The claimant began pain management treatment with Dr. M. Carl Covey on September 12, 2007.

Dr. Shahim reported on February 4, 2008:

He underwent a cervical myelogram....He has had a fusion at C6-7 and he developed a disc protrusion and osteophyte at C5-6 at the level above on the left side. It does cause foraminal stenosis.

**DECISION MAKING:** He does have a large disc herniation, so I have explained to him that further surgery at the C5-6 level is elective. If his symptoms were to worsen he should consider further anterior decompression at C5-6. His symptoms are primarily on the left side and most likely related to the C5-6 level. He is under the care of Dr. Covey. We did discuss retirement for him since he is having a hard time performing his duties. I am supportive of his retiring from manual duties. He should continue with his light duty restrictions based on the Functional Capacity Evaluation. I will plan on following up with him in a few months.

The claimant followed up with Dr. Shahim on February 26, 2008:

I would recommend that he would have a Functional Capacity Test done. Based on the Functional Capacity Test, he may return to his work with

restrictions, generated by Functional Capacity. The impairment rating stays the same at 9 percent. He does have disc disease and central disc herniation at C5-6. He should consider cervical epidural steroid injection at that level. He also has central disc herniation in the thoracic spine. He may require injections at the other levels. He agrees with me that he does not want to have surgery at this point. It is possible that in the future, he may require surgery at the C5-C6 level. I am releasing him at this point. He is at MMI and he may follow with Dr. Covey for pain management.

The parties stipulated that the claimant "reached maximum medical improvement and the end of his healing period for his cervical injury no later than February 26, 2008." The parties stipulated that the respondents "made payments toward a 9% body-as-a-whole rating from Dr. Shahim."

The claimant underwent a Functional Capacity Evaluation on March 3, 2008:

Mr. Crow's evaluation resulted in demonstrated functional limitations in the area of material handling as he exhibits the ability to lift/carry up to 50 lbs. on an Occasional basis. Mr. Crow demonstrates significant restrictions with AROM of the cervical spine and exhibited decreased tolerance to reaching above shoulder level with either UE. Mr. Crow performed all other abilities tested at the Frequent to Constant level.

#### **CONCLUSIONS**

Mr. Crow completed functional testing on this date with reliable results.

Overall, Mr. Crow demonstrated the ability to perform work in the Medium classification as defined by the US Dept. of Labor's guidelines, over the course of a normal workday with limitations as noted above....

The claimant underwent another course of physical therapy beginning July 9, 2008.

The parties stipulated that the claimant "cannot be permanently and totally disabled prior to the last day he worked on September 29, 2008."

The claimant was seen in Dr. Covey's office on September 30, 2008:

This is a pleasant patient with a history of cervical spine pain. He has had surgery on the cervical spine in the past. He recently had a Cervical RF. He had some increased pain after the CRF but with a medrol dose pak and time this resolved. Saturday 9/27/08 he heard a "pop" in his neck and immediately had increased pain. He was in to see Dr. Shahim today who requested he come here for adjustment in pain medication. Presently he has a 25 and 12mcg fentanyl patch on. He takes 6 hydrocodone a day for pain....

Reviewed current list of medications. He is having nausea everyday and usually takes 2 phenergan a day for nausea. He recently started baclofen and neurontin and states the nausea has been worse since starting these. He is not sure if they are the problem. Discussed stopping the Baclofen. He has flexeril at home and has taken it before without problems. He also is concerned about the episode over the weekend and states his lips were blue and he threw up on Saturday. He says he has had this happen several times....Discussed changing medication routine.

Written instructions given to patient.

The claimant was assessed with "Radiculitis, Upper" and "Pain in Shoulder." Work Status was "Full Time, off til 10/21/08 by Dr. Shahim."

Dr. Covey noted the claimant's Work Status on November 10, 2008, "remains off work." Dr. Covey performed "Bilateral greater occipital nerve blocks" on November 20, 2008.

Dr. J. Michael Calhoun corresponded with a representative of Systemedic Corporation on February 13, 2009:

I have recently had the pleasure of evaluating Mr. Crow in the office. As I am sure you are well aware, he is a straightforward 45-year-old man who initially injured his neck while working for Cooper Tire in 2006. He ultimately underwent an MRI which showed what appeared to be a foraminal disc herniation on the left at C6-C7. He was ultimately referred to Dr. Reza Shahim. Dr. Shahim saw the patient on June 8, 2006. He suggested surgical intervention, and the patient subsequently underwent a C6-C7 anterior cervical discectomy and fusion on June 19, 2006. Dr. Shahim reports that there may have been some transient improvement, but he subsequently underwent a repeat MRI of the cervical spine in August, 2006, and an MRI of the thoracic spine in September of 2006. He continued to have left-sided headaches, thoracic pain, neck pain, and some pain intermittently in the left arm. He was returned to light duty in October of 2006. Since that time he has had trigger point injections, occipital nerve blocks, facet

blocks and facet rhizotomies under the guidance of Dr. Qureshi, Dr. Krishnan, and Dr. Covey. He had been declared maximally medically improved in February of 2007 and an FCE had been ordered, but then the patient returned. He was treated with further injections under the guidance of Dr. Covey but continued to be symptomatic. The patient last underwent an MRI of the cervical spine on September 30 of last year. Dr. Shahim has now suggested removal of his plate at C6-C7 with a C5-C6 anterior cervical discectomy and fusion.

The patient's primary complaint is neck pain with radiations into the occipital area and into the left temporal and frontal area. There is also some pain which radiates down his posterolateral arm to radiate to the forearm. There are no right-sided symptoms. When asked, the patient states that he does not really feel that the surgical intervention at C6-C7 helped him to a great deal. On the other hand, he is tired of being on pain medications including a fentanyl patch and undergoing repeat procedures under the guidance of Dr. Covey. He denies any symptoms prior to his injury in 2006....

His current medications include Hytrin, Flexeril, Phenergan, Nexium, fentanyl patch, oxycodone and aspirin....

Neurologic examination of the upper extremities reveals that there is adequate deltoid, biceps, and triceps function bilaterally. There are adequate finger flexors and abductions bilaterally. Sensation is intact to pinprick in the C5, C6, C7 and C8 dermatomes bilaterally. There are 1+ biceps, brachioradialis, and triceps reflexes bilaterally.

Review of the several of the MRIs does show some residual foraminal stenosis on the left at C6-C7. There are also some degenerative changes at C5-C6 with bilateral foraminal stenosis slightly worse on the left.

I talked at length with Mr. Crow and his wife. I explained to him that it appears that the first operation really did not help him to any degree and that there is less than a 50% chance of significant improvement with repeat surgery at C5-C6. Nevertheless, his other option is to continue with chronic pain management. Most assuredly he will never return to working at Cooper Tire.

Personally, I explained to Mr. Crow, I would not advocate further surgical intervention....Most assuredly if he does not undergo surgical intervention, he will have to undergo chronic pain management under the guidance of Dr. Covey....

Dr. Calhoun informed Mackie Tiner of Crockett Adjustment on February 18, 2009, "I am sorry not to be more specific. I do not think Mr. Crow would benefit from repeat surgical intervention, thus I would state that removal of his hardware at C6-C7 and an anterior cervical discectomy and fusion at C5-C6 is not medically appropriate."

Dr. Shahim stated in part on March 30, 2009, "I think he should undergo cervical facet block and facet rhizotomy. I think that has worked for him previously. It's not necessarily a perfect solution to his problems, but it may reduce his pain for some time. I will ask Dr. Covey to consider that....I will plan on following up with him in a few months, but we'll keep him off work for the next three months."

Dr. Kevin J. Collins saw the claimant on April 20,  
2009:

Patient is here for an impairment rating at the request of Dr. Carl Covey. He had a work related injury that resulted in several herniated or bulging discs. He is s/p fusion per Dr. Reza Shahim in 2006. In any event, he is herniated above and below that area and he wants to fix those as well. He has weakness with atrophy in the left tricep with numbness that goes down to the wrist with tingling in the fourth and fifth digits consistent with C-7 radiculopathy. He also has evidence of occipital neuralgia with pain that emanates from his neck to just behind his eye on the left side and down as previously stated. He has had moderate intermittent pain for three years. He is considered disabled and has just recently been awarded Social Security Disability in the last week or two. He uses his left arm. Jarring sensation and tension aggravate his symptoms. Moving his head around helps decrease the pain along with Oxycodone. He states he has a deep ache with stabby, burning features, numbness, tingling and a sharp pain down the left side. He drops things in his left hand.... He has moderate to severe pain throughout the day. The pain is moderate to severe with sitting and standing. This affects his ability to sleep pretty much all the time. He sleeps two to six hours a night....Movement, dampness, exercise, coldness, pressure, going to work all aggravates his circumstance. He is here for an impairment rating only. I will notify me that I am not a treating physician and will defer treatment to Dr. Carl Covey....

He used to work for Cooper Tire as a waste oil handler. He tried to go back to work but did poorly and now he is fully disabled which is reflected by Social Security Disability. He is able to get dressed and take care of his wants and needs at home but that is it....

## ASSESSMENT &amp; PLAN:

1) Patient is s/p work related injury with a herniated disc that was fused. He continues to have ongoing numbness and tingling. He also has two level herniated discs above and below that need to be fixed. From my understanding, he has three level disc disease including the fusion.

2) According to the Guidelines for Evaluation of Permanent Impairment, 5<sup>th</sup> Edition, 15-6 DRE cervical spine, DRE cervical category 4, he would qualify for 25% because he has had a successful arthrodesis but continues to have radiculopathy with decreased reflexes at the triceps, atrophy at the triceps and numbness and tingling in the fourth and fifth digits. He gets an additional 1% for each of the other two levels for a total of 27% impairment rating.

3) He clearly is fully disabled in my medical opinion and that has already been borne out by being approved quite rapidly for his Social Security Disability.

4) With the amount of narcotic and other medications would preclude him from driving back and forth and from being around forklifts, machinery, presses, vibration, etc....

The claimant followed up with Dr. Shahim on June 1, 2009:

He continues to have posterior neck pain and intrascapular pain, shoulder and arm pain. The pain radiates into the posterior aspect of both arms, worse on the left than on the right side. He's had prior cervical epidural injection and facet block without any significant improvement. He continues to have posterior neck and arm symptoms. He's currently under pain management. He's taking Fentanyl, Oxycodone, and Flexeril....

I have offered him multiple options. He could undergo the fusion at the adjacent level at C5-6. Authorization was not given by Worker's Comp. He

has chronic symptoms. I'm going to have him follow up with Dr. Covey for pain management. I do agree with his permanent disability since he has very chronic symptoms. I will be glad to reevaluate him if needed.

The claimant followed up with Dr. Covey on June 24, 2009:

Patient with complaints of pain in the left side of head and down rt shoulder.... His current medications include: Pristique, Protonix, Duragesic patch 75mcg, Flexeril(bid), hytrin, Percocet(4-6a day), and Phenergan. He reports that his current pain medication regimen is working well to control his pain. He denies any increased somnolence, decreased alertness, or increased constipation with his current pain medication regimen....He is bothered by numbness in the bilateral hands and pain traveling to his elbows bilaterally....He is inquiring about a spinal cord stimulator to help treat his head and arm pain. He is interested in pursuing options that will help decrease his pain and allow him to decrease the pain medication....

Start Amrix to help address the musculoskeletal component to his neck and BUE pain. Provided samples and instructed to take between 6-7 pm to maximize the effects of the medication. He was instructed to not take the Flexeril if he found the Amrix more helpful in controlling his muscle spasms....Patient was told that the medication could make them queasy, itchy, sleepy, and/or constipated. They were told not to drive, climb any ladders, or sign any contracts. They were also asked not to suddenly stop the medication as this could cause a withdrawal syndrome. The patient understood and consented to taking the medication as prescribed.

Dr. Covey assessed "Radiculitis, Upper," "Pain in Shoulder," and "Muscle Spasm."

A pre-hearing order was filed on August 24, 2009. The claimant contended, among other things, that the claimant's work injury had rendered him permanently and totally disabled. The claimant alternately contended that he had sustained wage-loss disability "in an amount to be determined at trial." The respondents contended, among other things, that the claimant was not permanently and totally disabled, and that the claimant had not suffered wage-loss disability as a result of the claimant's compensable injury. The respondents contended that they were entitled to an "offset" pursuant to Ark. Code Ann. §11-9-411, "because the respondents have paid or may have paid benefits under its group health program and/or its short-term disability program and/or its long-term disability program."

A hearing was held on December 17, 2009. The claimant testified that he had not benefitted from surgery provided by Dr. Shahim. The claimant testified that he suffered from worsening headaches, along with increased pain in his neck and pain/numbness in his left upper extremity. The claimant

testified that he had an active Commercial Driver's License. The claimant testified that he was no longer licensed to sell insurance and could not try that profession again, because of an inability to concentrate due to the medication he was taking. The claimant testified that unless he took "three narcotic pain killers" every morning, he was "not able to function." The claimant testified that he had difficulty standing.

An administrative law judge filed an opinion on March 5, 2010. The administrative law judge found, among other things, that the claimant proved he was permanently and totally disabled beginning September 30, 2008. The respondents appeal to the Full Commission.

## II. ADJUDICATION

An administrative law judge found that the instant claimant proved he sustained anatomical impairment in the amount of 10%. Neither party appeals this finding. The administrative law judge also found, "9. The claimant has established by a preponderance of the evidence that he is entitled to benefits for permanent and total disability as a result of his admittedly compensable injury, and that the permanent and total disability began on September 30, 2008."

The Full Commission does not affirm the administrative law judge's finding that the claimant proved he was permanently and totally disabled.

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 expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b) (1) (Repl. 2002). Ark. Code Ann. §11-9-522(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 is a relatively young man, only age 46. The claimant is a high school graduate and has a diverse work history. The claimant's varied employment has included work as a truck driver, a correctional officer, and a logger. The claimant was at one time professionally licensed as an insurance salesman. The

claimant testified that he still has an active Commercial Driver's License. The claimant began working for the respondent-employer in November 2000. The claimant eventually became a Mold Serviceman for the respondents. The parties stipulated that the claimant sustained a compensable injury to his cervical spine on March 27, 2006. The claimant subsequently underwent a cervical discectomy and fusion from Dr. Shahim. Dr. Shahim released the claimant to light duty after surgery, and the claimant testified that the respondent-employer provided light work duty beginning August 2, 2006. Dr. Shahim assigned a 30-pound lifting restriction on October 3, 2006.

The claimant began treating with Dr. Baskin on October 18, 2006. Dr. Baskin opined in December 2006 regarding the claimant, "He can continue on his current light duty indefinitely." In February 2007, Dr. Shahim arranged for the claimant to participate in a Functional Capacity Evaluation. Although this Functional Capacity Evaluation was not made part of the record, Dr. Shahim noted on April 2, 2007, "Return to medium work duty per FCE restrictions on April 2, 2007." The respondent-employer thereafter re-classified the claimant's job, effective April 18, 2007.

Dr. Shahim noted on February 4, 2008, "We did discuss retirement for him since he is having a hard time performing his duties. I am supportive of his retiring from manual duties. He should continue with his light duty restrictions based on the Functional Capacity Evaluation." The parties stipulated that the claimant reached maximum medical improvement and the end of his healing period for the compensable injury no later than February 26, 2008. The claimant underwent another Functional Capacity Evaluation on March 3, 2008. The Functional Capacity Evaluation indicated that the claimant could occasionally lift and carry up to 50 pounds, and that the claimant was able to perform medium-level work. Nevertheless, the claimant did not work for the respondent-employer after September 29, 2008.

The Full Commission does not affirm the administrative law judge's finding that the claimant proved he was permanently and totally disabled. We recognize Dr. Calhoun's opinion in February 2009, to wit: "Most assuredly he will never return to working at Cooper Tire." Nevertheless, the record shows that the claimant was provided medium work within his physical restrictions until the claimant effectively resigned his employment on

September 29, 2008. Dr. Collins opined in April 2009 that the claimant was "fully disabled which is reflected by Social Security Disability." The Commission is unaware of what basis or criteria the Social Security Administration relied on to determine that the claimant was "fully disabled." Based on the record before us, however, we note that there have been two Functional Capacity Evaluations from which it was concluded that the claimant was not fully disabled. The results of the Functional Capacity Evaluations indicated that the claimant was able to return to medium level work activity.

In *Tiller v. Sears, Roebuck & Co.*, 27 Ark. App. 159, 767 S.W.2d 544 (1989), the Arkansas Court of Appeals affirmed the Commission's determination that the claimant did not prove she was permanently and totally disabled. Like the instant claimant, the claimant in *Tiller* was only 46 years old but testified that she had difficulty sitting or standing for long periods of time, and also required medication for her pain. The Court affirmed the Commission's determination that the claimant was not motivated to return to work. *Tiller, supra*, citing *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946

(1984). The Full Commission likewise determines in the instant matter that the claimant is not motivated to return to work. We must assign minimal weight to any medical conclusion that this 46-year-old man is unable to earn any meaningful wages in the same or other employment. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 35%. Our finding is based on the claimant's relatively young age, the claimant's high school education, his diverse work history, including supervisory experience, his current Commercial Driver's License, and two Functional Capacity Evaluations which concluded that the claimant could return to medium-level work. The Full Commission also does not find that the claimant is precluded from earning any meaningful wages because of his apparent reliance on high doses of prescription medication.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant proved he was permanently and totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 35% in excess of the 10% anatomical impairment

awarded by the administrative law judge. The respondents are entitled to an offset for benefits received by the claimant in accordance with Ark. Code Ann. §11-9-411 (Repl. 2002). The claimant's attorney is entitled to fees for legal services in accordance with 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).

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. "Permanent total disability" is the inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(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. 102 Ark. App. 317, 285 S.W. 3d 248 (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).

Here, after a de novo review of the record, I find that the claimant proved by a preponderance of the evidence that he is unable, because of his injury, to earn any meaningful wages in the same or any other employment, and is, therefore, entitled to benefits for permanent total disability.

In considering the claimant's entitlement to permanent and total disability, I place great weight on the medical evidence showing the claimant's severe pain and the side effects associated with the narcotic pain medication he takes daily. See Whitlatch vs. Southern Development, 84 Ark. App. 399, 141 S.W.3d 916 (2004). The preponderance of the evidence establishes that the claimant became so limited by his pain and pain medication that he was no longer capable of earning any meaningful wage in any type of employment as of September 29, 2008. The medical record indicates that the claimant was undergoing pain management techniques in 2008, including cervical epidural injections on January 8, 2008, on June 2, 2008, and on June 24, 2008; bilateral cervical medial branch/facet joint nerve blocks at C4, C5, C6, and C7 on August 1, 2008, and on September 9, 2008; and bilateral occipital nerve blocks on November 20, 2008. When Dr. Shahim proposed additional surgery to treat the claimant's painful condition, Dr. Calhoun opined on February 13, 2009, that additional surgery had less than a 50% chance of providing significant improvement. Dr. Calhoun also opined that the claimant will require chronic

pain management, and that he will never return to work at Cooper Tire.

As early as February 4, 2008, Dr. Shahim indicated that he supported the idea of the claimant retiring from manual duties. On March 30, 2009, Dr. Shahim indicated that he would keep the claimant off of work for three months. However, on June 1, 2009, Dr. Shahim indicated that he agreed with the claimant's permanent disability, since he has very chronic symptoms. On February 4, 2009, Dr. Covey noted that the claimant's medications at that time were Duragesic Patch, Flexeril, Nexium, Percocet, and Phenergan. Dr. Covey recorded a history that the claimant has had problems going to sleep at the wheel. During the course of his evaluation for permanent impairment on April 20, 2009, Dr. Kevin Collins rendered an opinion that the claimant is fully disabled and that, with the amount of narcotic and other medications the claimant takes, he is precluded from driving back and forth to work and precluded from being around forklifts, machinery, presses, vibration, etc.

The claimant's last light-duty work at Cooper Tire required driving a forklift. The claimant's work history as a correctional officer required that he be physically

capable of breaking up fights. The claimant's work history running a stick laying machine at Weyerhaeuser required lifting, pushing and pulling heavy objects. His work history as a chip truck driver for Shields Lumber Sidney Smith Trucking required driving a big chip truck. For the five years that the claimant owned his own logging company, he was required to alternate between operating a skidder, a loader, and driving a truck.

In light of the claimant's cervical pain, the narcotic medication prescribed to control that pain, and the cautions in the record against the claimant operating machinery or driving, I find no aspect of the claimant's work history which persuades me that the claimant has the skills, training, or experience to earn a meaningful wage in his current physical condition. Consequently, after considering the claimant's age, education, work experience, the nature and extent of his injury and impairment, his pre-injury earnings, his post-injury earnings, his motivation in attempting to return to work after a fusion surgery which did not improve his condition, and all other relevant factors, with emphasis on the claimant's use of pain medication and its side effects, I find that the claimant

has established by a preponderance of the evidence that he is permanently and totally disabled.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner