

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613163

DANNY FRY,  
EMPLOYEE

CLAIMANT

JARDEN CORPORATION,  
EMPLOYER

RESPONDENT

SENTRY INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 12, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER,  
JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JOSEPH H.  
PURVIS, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed January 19, 2010. 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 of this claim.
2. On November 14, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On November 14, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$488.00 for total disability and \$366.00 for permanent partial disability.
4. On November 14, 2006, the claimant sustained a compensable injury to his lumbar spine in the form of a complete tear or rupture of the annulus at the L5-S1 intravertebral disc with an extrusion of external disc material and resulting nerve root impingement on the thecal sac and left S1 nerve root. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services for his compensable injury.
5. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits.
6. The claimant's healing period ended on or before November 6, 2007.
7. The respondents have accepted liability for and have paid permanent partial disability benefits attributable to a permanent physical impairment of 7% to the body as a whole.
8. The greater weight of the credible evidence establishes that the claimant has experienced a permanent physical impairment of 8% to the body as a whole, as a result of this compensable injury of November 14, 2006, and the subsequent surgery it required.
9. The claimant is entitled to permanent partial disability benefits for this degree or percentage of permanent physical impairment.
10. At the present time, the claimant is not entitled to any award for permanent partial disability from permanent functional

disability or loss of wage earning capacity pursuant to the provisions of Ark. Code Ann. §11-9-522 (b) (2). At the present time, the claimant is earning wages in excess of his average weekly wage at the time of the employment related accident giving rise to his compensable injury.

11. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits in excess of 7% to the body as a whole.
12. The appropriate fee for the claimant's attorney is the maximum attorney's fee on the additional 1% permanent partial disability benefits herein awarded for permanent functional disability.

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.

Therefore we affirm and adopt the January 19, 2010 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 entitled to 30% wage-loss disability.

At the time of the claimant's injury, he was earning approximately \$18.90 per hour, and working a 40-hour week. At the time of the hearing, the claimant was only earning \$13.19 per hour, but he was working 65 to 70 hours per week. Thus, the claimant was earning 30% less per hour at the time of the hearing than he was at the time of his accident.

In spite of the dramatic difference between the claimant's post-injury hourly rate and his pre-injury hourly rate, the majority, by affirming and adopting the opinion of the Administrative Law Judge, determined that the claimant is not entitled to any

permanent disability due to loss of earning capacity because of A.C.A. §11-9-522(b)(2), which provides:

However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of physical impairment established by a preponderance of the medical testimony and evidence.

The problem with the majority's interpretation of the statute is that it does not take into consideration that the average weekly wage at the time of the accident was calculated based upon 40 hours, and the claimant's earnings at the time of the hearing were calculated based on 65 to 70 hours per week. The claimant is now performing the equivalent of a full-time job, plus a part-time job, and is being denied benefits regarding his loss of earning capacity because of his hard work.

The legislature has specifically given the Commission authority to determine average weekly wage by a method that is just and fair to all parties concerned. See Ark. Code Ann. §11-9-518. It certainly is not fair to compare post-injury earnings based on working 65 to

70 hours per week with pre-injury earnings based on 40 hours per week. If the average weekly wage at the time of the injury was based on working 40 hours per week, the calculation regarding post-injury earnings should be based on 40 hours per week. Otherwise, the injured worker is being penalized because of his strong post-injury work ethic.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner