

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F505997

PHILLIP K. SYKES, EMPLOYEE	CLAIMANT
KING READY MIX, INC., EMPLOYER	RESPONDENT NO. 1
BITUMINOUS CASUALTY CORP., CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 21, 2010

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

Claimant represented by the HONORABLE FREDERICK "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by the HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed September 29, 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 set forth above are reasonable and are hereby accepted.
3. The Arkansas Workers' Compensation Act is constitutional.
4. Claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled.
5. Claimant has proven by a preponderance of the evidence that he is entitled to wage-loss disability of ten percent (10%).
6. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary treatment in the form of physical therapy and pain management for his compensable neck and back injuries, as reflected in Claimant's Exhibit 3.
7. Claimant has not proven by a preponderance of the evidence that he is entitled to treatment of conditions and alleged injuries to areas other than his neck and back—such as his alleged headaches.
8. Claimant has proven by a preponderance of the evidence that he is entitled to reimbursement for, and mileage and travel expenses incurred pursuant to, treatment of his compensable neck and back injuries, including physical therapy and pain management.
9. Claimant has not proven by a preponderance of the evidence that he is entitled to reimbursement for, and mileage and travel expenses incurred Sykes - Claim No. F505997 pursuant to, treatment of anything other than his compensable neck and back injuries.
10. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity

benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002). This includes a controverted fee based on the fact that Respondents No. 1 did not pay indemnity benefits based on an average weekly wage that they controverted but ultimately stipulated to.

11. Because Respondents No. 1 agreed on July 7, 2009 to the stipulation offered by the other parties at the hearing concerning Claimant's average weekly wage, and that stipulation has been accepted, the issue concerning the calculation of the average weekly wage is moot.

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**

The majority finds that the claimant is not permanently and totally disabled. After a de novo review of the record, I disagree. 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).

Here, four doctors and a vocational rehabilitation counselor have all opined that the claimant cannot work due to either his physical condition or the pain medication that he is taking. On February 14, 2007, Dr. Eric Akin stated:

At this point I think he is definitely at maximum medical improvement. I do not think further surgery of the lumbar or cervical spine will improve his current symptoms. I think that he may require intermittent treatments from a pain management specialist indefinitely. I have advised him that at this point if he does not feel that he can continue working at his present job he will need to consider finding new employment or seek disability. He will receive a disability rating of 18%.

On August 10, 2007, Dr. Dirk Alander stated:

At this point he has been out of work for about four years. It is really unlikely that he is going to be able to return to any type of productive work in the future because of this continued problem of pain in the neck, shoulders and head especially on narcotics that he has to continue.

On January 4, 2008, Vocational Specialist Bob White stated:

#### Conclusions

Observation indicated Phillip had difficulty getting up from a seated position and had to use both arms to push himself up-significant problems putting on his coat, and slow, guarded motion while walking. He can't wear a hat or sunglasses due to sensitivity and often does not sleep for days. Phillip Sykes future is bleak and in my opinion there is no employment issue in this case. He should and does devote his full attention to relief of pain. From a physical, cognitive and psychological standpoint I have nothing to offer Phillip and no recommendations in this case.

On October 29, 2008, Dr. Kian-Huat Lim stated:

...He has been requiring strong narcotics for pain control and has been to my clinic every month for narcotic refill. From my physical examination, Mr. Sykes has pain at his neck and shoulder and the pain is aggravated with movement of the neck. This will significantly limit his ability to perform his daily activities or carrying out strenuous physical activities.

On April 21, 2009, Dr. Robert Holloway stated:

...Mr. Sykes has been under my care since February 18. He is suffering from cervicalgia. He has extremely limited motion of his cervical spine. He has undergone cervical facet joint corticosteroid injections with mild improvement. He would be unable to sustain gainful employment secondary to his cervical neck pain and restricted range of motion of his neck.

Due to his compensable neck injury and the surgery performed related to his compensable neck injury, the claimant takes a very high dose of Oxycontin, 80 mg., three times a day. 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). I would also note that the claimant in this case has an 18% anatomical impairment, which is significantly greater than the claimant in Whitlatch, in which the Court of Appeals reversed the Full Commission and awarded permanent and total disability benefits.

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For the aforementioned reasons I must respectfully  
dissent.

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PHILIP A. HOOD, Commissioner