

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302130

RONNIE G. STONE, EMPLOYEE	CLAIMANT
ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 28, 2011

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 WILLIAM  
L. WHARTON, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed, in  
part, and affirmed, in part.

OPINION AND ORDER

The claimant appeals a decision of the  
Administrative Law Judge filed on May 3, 2010. After  
our de novo review of the entire record, the Full  
Commission reverses the decision, in part, and affirms,  
in part. The Full Commission finds that the claimant is

entitled to an award of permanent and total disability benefits arising out of his compensable injury, and reverses the Administrative Law Judge's decision to the contrary. However, the Full Commission affirms the remainder of the findings of the Administrative Law Judge.

I. PROCEDURAL HISTORY

The parties stipulated that the claim was accepted as compensable, that the claimant reached the end of his healing period and maximum medical improvement on January 16, 2006, that the respondent-employer controverted his entitlement to benefits after that time, and that the respondent-employer accepted the claimant's ten percent permanent anatomical impairment rating.

The Administrative Law Judge found that the claimant proved that all of the treatment itemized in his Exhibit 1 was reasonable and necessary, and that he is entitled to additional treatment, including pain management, for his compensable back injury. The Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled, but that he did prove

wage loss in the amount of 30%. The Administrative Law Judge found that the respondent-employer is entitled to an offset for disability retirement benefits from the Arkansas Public Employees Retirement System and the Arkansas State Highway Employees Retirement System. Lastly, the Administrative Law Judge awarded the claimant an attorney's fee.

I. EVIDENCE

The claimant was fifty-seven years old at the time of the hearing. He lived in Omaha, Arkansas, his whole life. He had a twelfth grade education and a work history of unskilled labor. The claimant was a hard worker, in his employment and at home, and he enjoyed travel, camping, and boating with family and friends, as well as helping friends with chores and jobs.

In February 2003, the claimant sustained an injury to his back when he slipped at work. He underwent diskectomy surgery in May 2003, for which a ten percent permanent anatomical impairment rating was assessed. Within three years, the claimant was diagnosed with failed back syndrome with prior diskectomy at the L5-S1 level, intractable low back pain, degenerative lumbar disc disease, and suspected

internal disk derangement syndrome.

Since his 2003 work-related injury, the claimant was unable to engage in work or play of any significance without suffering pain, requiring several days rest to recover. Since his 2003 work-related injury, the claimant underwent surgery and other procedures, injection therapies, physical therapy and a pharmaceutical regimen to address his pain. However, the claimant continued to have constant back pain and right leg numbness, as well as right leg pain, for approximately six hours a day. His right leg pain was exacerbated by walking. The claimant required a change of position after fifteen minutes of sitting or standing, and in the night, had to rise to walk and to change positions from the bed to the recliner. The claimant did not enjoy a full-night sleep, but rested in brief periods throughout the day. His medications, narcotics, and muscle relaxers, caused him to be groggy and unclear in his thinking and judgment.

The claimant was under the care of several physicians since 2003, none of whom have opined that he could return to his former job without restriction. Several stated that the claimant could not return to

work. The claimant underwent a vocational rehabilitation evaluation. The specialist determined that the claimant was unemployable, in his current condition and in the event of surgery, according to Dr. Boxell's projected results. The specialist relied upon the claimant's advanced age, limited skill set, geographical location, education, and physical condition, as described in the medical records and by the claimant. Dr. Chu, the claimant's primary care and pain management physician, agreed with this assessment, noting the claimant's need for narcotic pain medication.

A functional capacity evaluation demonstrated that the claimant could work at the "light" work classification. The claimant's wife testified that after that evaluation, the claimant returned home to take his pain medications and was "laid up" for three days due to exacerbated pain. Dr. Chu stated that he expected that the claimant would have suffered after the completion of the evaluation, based upon the man's medical condition. Dr. Chu also noted that the claimant's best effort in the evaluation showed that the claimant was honest in his complaints and limitations, and that the evaluation only showed what the claimant

could do "at that time."

The medical records for 2008 and 2009 show that the claimant's pain was increasing, that his medications were controlling his pain less effectively, and that he continued to have palpable muscle spasms and severely limited range of motion of his back.

## II. PERMANENT DISABILITY BENEFITS

Arkansas Workers' Compensation law provides that, when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Rutherford v. Mid-Delta, 102 Ark. App. 317, 319, 285 S.W.3d 248 (2008), citing Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In order to be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove by a

preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998).

If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Permanent total disability is defined as the "inability because of compensable injury or occupational disease, to earn any meaningful wage in the same or other employment." Ark. Code Ann. Sec. 11-9-519(e)(1); See Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to

affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14).

In this claim, the claimant received a ten percent impairment rating, after his microdiskectomy in 2003, arising out of his compensable injury. Therefore, he has passed the first hurdle for wage loss. The claimant has also satisfied the major cause requirement, because all of the medical evidence, including the opinions of the claimant's treating physicians, supports a conclusion that the claimant's problems are directly

related to his 2003 compensable injury. The Full Commission affirms the Administrative Law Judge on these issues.

However, the Full Commission reverses the Administrative Law Judge's decision to award of wage-loss disability in the amount of 30%, and to deny permanent and total disability benefits. The evidence in the record demands a finding of permanent and total disability. The opinions of the claimant's medical providers, of a vocational specialist, and of a functional capacity evaluator, detail the claimant's inability to earn wages, supported by the testimony of the several witnesses and the medical record.

The claimant's family physician, Dr. Chu, his neurosurgeon, Dr. Williams, and the respondent's neurosurgeon, Dr. Boxell, have all opined that the claimant could not return to work in his former capacity. His pain management physician, Dr. Lampert, stated that the claimant's pain management regimen included reduced activities. His family physician recommended application for disability. Dr. Boxell felt that the claimant could do almost no work without surgery, and that, with surgery, he could not fully

return to his prior employment. Further, with surgery, there was a seventy percent chance that the claimant would experience pain reduction sufficient to allow him to return to work with restrictions.

In September 2005, Dr. Boxell stated that with only pain management, the claimant might be capable of some form of light-duty work, which could consist of paperwork and perhaps sitting at a desk, with the ability to change positions frequently, as required for pain relief. He could not lift, push or pull objects weighing more than 20 pounds. He could not climb ladders or work at heights. He could not perform work that would require him to be in a bent-over position at the waist for longer than a minute at a time. Dr. Boxell stated that, "in short, I think there is very little that this gentleman could do if he continues to live with his pain." By December 2005, he stated that after surgery, "it would be unlikely that he could return to prior work." He did give a seventy percent chance that surgery would reduce his pain and improve his function. His prognosis was that the claimant would not return to his prior work. The Full Commission finds that the opinions of Dr. Chu, Dr. Williams and Dr.

Boxell, in particular, are worthy of great weight.

Dr. Boxell's opinion is well supported by the circumstances in which the claimant is found. The claimant had a work history of manual labor, with a twelfth grade education. He was 57 years of age at the time of the hearing. He lived in Omaha, Arkansas. He was limited in the amount of time he could drive, and he required daily use of narcotics, taking Hydrocodone four times daily. Further, the claimant required the use of Flexeril at night to help him sleep through his pain, which caused grogginess until noon the next day. He required the freedom to sit, stand, and walk, as needed. After his functional capacity evaluation, he required three or four days to recover, during which time he was limited to laying down or sitting in his couch. After riding his riding lawn mower for less than one hour, he required two or three days of recovery. The claimant, a dedicated worker whose disability has caused damage to his mental well-being and his self-worth, did not believe he could work. He arrived at this conclusion after attempting to work despite his injury, after attempting to perform household tasks, and after attempting to merely accomplish his activities of daily

living.

To identify a flexible job, performing paperwork or a similar light-duty work, during which he could sit, stand, walk, and lay down at will, with allowance for reduced hours or sick days on a regular basis, within limited driving distance from his home in Omaha, Arkansas, and which he could accomplish safely and effectively while on Hydrocodone and under the side effects of his intermittent use of Flexeril, is impossible. Add to this conundrum the fact that the claimant's symptoms had increased, so that, by June 2009, Dr. Chu had prescribed a cane to prevent him from falling, and that the claimant's pain was no longer effectively controlled by his pain medication regimen. This conclusion is consistent with the opinion of vocational rehabilitation specialist, Bob White, that the claimant was not employable, and that retraining was not recommended, based upon the claimant's age, education, pain, and physical limitations.

The claimant's age at the time of White's review was fifty-five. White explained that this was considered advanced age in vocational terms, meaning that, without a transferable skill set, the ability of

an individual of advanced age to re-enter the labor force is significantly restricted. At the time of the hearing, the claimant was fifty-seven years of age, and, as of the date of this opinion, the claimant is approximately fifty-eight and one-half years old. His work history was manual labor, and he had not worked since March 8, 2006, exacerbating the vocational disadvantage of his age and his limited skills, with an extended break in employment.

White also noted the claimant's education, limited to high school, with no other vocational training. He noted that a high school education and above indicates ability in reasoning, arithmetic and language skills which permit performance of semi-skilled through skilled work, and that those abilities are acquired in formal schooling at the twelfth grade level or above. The Full Commission notes that the claimant only has a twelfth grade education and no further vocational or other education since he was eighteen years of age.

White relied upon the claimant's self-reported limitations, which were consistent with what he reported to his physicians and with the restrictions placed upon

him by his doctors.

White also looked to a professional publication addressing limitations caused by disc derangement with pain, and to Dr. Boxell's assessment of the claimant's disability without surgery. White stated that, with or without further medical treatment, the claimant could not return to his employment with the respondent, because his job was outside the limitations set out by Dr. Boxell, even with surgical intervention. While his report does not reflect Dr. Boxell's discussion of the claimant's limitations with surgery, White is correct in his statement. The respondent's Doctor's Release to Work states that lifting up to one hundred pounds is a part of the normal work routine of the claimant, which Dr. Boxell stated he would not be able to do, with or without surgery. Furthermore, in September 2006, Dr. Lampert stated that surgery was probably not indicated. Thus, the restrictions Dr. Boxell enumerated for the claimant, without surgery, are the appropriate consideration.

White pointed out that the claimant's condition made the performance of routine activities of daily living difficult, and that any activity increased

his pain from moderate to severe. This is entirely consistent with the testimony and the medical reports in this claim. White felt that, at age fifty-five, this would "take him out of all employment."

White stated that the claimant's condition was consistent with a diagnosis of failed back syndrome. The Full Commission recognizes that White is not a physician or other medical professional, and that he did not hold himself out to be. He clearly relied on the medical records and professional publications and his education and experience in vocational rehabilitation. There is no need for the Commission to rely upon him for a medical diagnosis of failed back syndrome. His opinion, however, is useful as a vocational specialist's determination of the validity of the claimant's reported limitations and condition, from a vocational point of view.

White also looked to the claimant's reports of significantly reduced stamina and endurance, including his ability to start, sustain, and complete tasks, and his increased fatigue related to lack of sleep. Again, this is consistent with the testimony in this claim and with the medical records. White stated that employment

requires dependability, reliability, the ability to perform a task from beginning to end at an acceptable pace, within particular schedules. These requirements conflict with the claimant's abilities.

White made a comment that "[a]t his age, given his education and work history, I don't believe surgery will allow him to return to the labor force although hopefully it can reduce his pain." Again, while this smacks of medical opinion, when read carefully, it is apparent that White felt that the potential improvements surgery offered, described by Dr. Boxell, were insufficient to make the claimant employable. This is based upon his education and experience as a vocational rehabilitation specialist.

White, whose business is to perform vocational services, stated that he had nothing to offer the claimant, vocationally, and that he did not recommend a job search. The Full Commission finds that his report is entitled to great weight.

On July 29, 2008, the claimant underwent a functional capacity evaluation. The general conclusion was that the claimant was able to perform in the "light" classification of work, which is defined as a physical

demand of eleven to twenty pounds for up to one-third of a work day, one to ten pounds for up to two-thirds of a work day, and negligible weight for two-thirds to a full work day. His functional limitations included no repetitive bending, stooping or twisting of the low back. He had poor tolerance to activities that required him to work at floor level. The claimant required a change from sitting to standing, and vice-versa, after twenty to twenty-five minutes of either activity. This report is consistent with Dr. Boxell's September 2005 opinion concerning his limitations.

What the functional capacity evaluation report does not do is address the vocational impact of these limitations in conjunction with all the other factors involved, including his age, education, work history, location, medications and side effects, and pain level. Dr. Boxell was clear that the claimant would require rest in between activities, even one as simple as standing and flagging traffic for less than half-an-hour at a time. He was clear that the claimant would require the freedom to change position, sit, stand, and walk, frequently. All of the physicians have been clear that the claimant will continue to require pain medications,

including narcotics and muscle relaxers which cause him to be groggy. Dr. Chu testified that, while some people used such medication during their workdays, narcotics could cause lack of focus and concentration, and could impact judgment, which the claimant testified occurred with his use of the narcotics. The claimant consistently reported, throughout his treatment, that activity, whether it was work itself, driving, or household activities, caused him "to pay" for a couple days afterward, in increased pain. The claimant and the other witnesses also testified to this fact. The claimant testified that, after the functional capacity evaluation, he was laid up with pain for three or four days, and that he had used all of his regular medicines, including the narcotics, that morning.

While a functional capacity evaluation is an often helpful expert opinion, it is not conclusive evidence of a claimant's capacity to work. Second Injury Fund v. Exxon Tiger Mart, 70 Ark. App. 101, 15 S.W.3d 345 (2000). While the claimant's functional capacity evaluation is useful, it does not address every issue regarding the claimant's ability to work, nor does it address the claimant's actual employability or

vocational status. The Full Commission is responsible to look at those other factors to determine whether the claimant is permanently and totally disabled, and whether he suffered wage loss.

In McDonald v. Batesville Poultry Equipment, 90 Ark. App. 435, 206 S.W.3d 908 (2005), the Court of Appeals found that there was no substantial evidence to deny an award of permanent total disability. In that case, the claimant sustained a leg injury and a resultant 51% permanent anatomical impairment rating to his leg. The claimant was 46 years old at the time of the hearing, and lived with his sister. He had a high school diploma, but was functionally illiterate. He worked in the construction of chicken houses for about twenty years, but his work was unskilled. A vocational expert's opinion that the claimant could find employment in his community did not take into account psychological and psychiatric reports showing learning disabilities, illiteracy, and further significant limitations to his ability to perform work. The current claimant is older than the McDonald claimant. While the current claimant does not have the mental deficits seen in McDonald, he held a high school diploma, but no other training. He

had a lifetime of unskilled labor. Furthermore, the vocational expert found that he was unemployable, in contrast to McDonald. McDonald supports a conclusion of permanent total disability here.

In Cleary v. Cloudy's Trucking, Full Commission Opinion filed September 13, 2005 (WCC No. F008725), the claimant was awarded permanent and total disability. He was 52 years old, with a tenth grade education. He had worked as a truck driver for the prior thirty years, work which required physical capability beyond his current abilities. He had extensive physical limitations due to his physical condition, including a 53% impairment to his left leg, almost constant use of a cane, inability to lift, and inability to sit more than one hour or walk more than a short distance. His work restrictions were for sedentary work, limited to no more than five hours a day, for no more than five days a week. His doctor opined that the claimant was unable to engage in full-time work and unable to return to his previous employment. He had no transferable job skills or prior work in a sedentary position. The factors affecting the claimant's ability to earn a living are remarkably

similar to the Cleary claimant.

To paraphrase the Court in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 406, 141 S.W.3d 916 (2004), if one considers the claimant's limited education and work history, heavy labor employment skills, constant and regularly severe pain in his lumbar spine, coupled with the side effects of his necessary prescription narcotic pain medication, in addition to his advanced age and the opinions of his treating physicians, the claimant is clearly permanently and totally incapacitated from earning wages. The Full Commission finds that the claimant is permanently and totally disabled.

The Full Commission notes that there was some mention of the claimant's use of alcohol in the record. We find that the record does not show that alcohol played a role in the claimant's back problems or disability.

### III. Conclusion

After the Full Commission's de novo review of the entire record, we reverse the decision of the Administrative Law Judge on the issue of permanent disability, and award permanent and total disability

benefits to the claimant. The Full Commission affirms the opinion of the Administrative Law Judge that the claimant proved that all of the treatment itemized in the claimant's Exhibit 1 was reasonable and necessary medical treatment of his compensable back injury, for which the respondents were liable, that the claimant was entitled to additional medical treatment of his compensable back injury including pain management, that the respondent-employer was entitled to an offset for disability benefits which the claimant received pursuant to the Arkansas Public Employees Retirement System and the Arkansas State Highway Employees Retirement System, and that the claimant was entitled to an attorney's fee.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

**CONCURRING AND DISSENTING OPINION**

I respectfully concur in part and dissent in

part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has proven by a preponderance of the evidence that the medical treatment for his back was reasonable and necessary, the finding that the claimant was entitled to additional medical treatment in the form of pain management, and the finding that the respondents are entitled to an offset for disability benefits for which the claimant received from the Arkansas Public Employees Claim Retirement System and the Arkansas State Employees Retirement System. However, I must respectfully dissent from the majority's finding that the claimant was permanently and totally disabled. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant underwent a Functional Capacity Evaluation in July of 2008, which reflected he could perform work in the light classification. The claimant has not responded to an offer of rehabilitation or job placement assistance. He testified at the hearing that he was not interested in any vocational rehabilitation because "I don't know what I could do." It appears to me that the claimant is not motivated to return to work. Therefore, based upon the

claimant's age, education, work experience, the nature and extent of his injuries, his permanent restrictions, and all other relevant factors, it is my opinion that the claimant has is not permanently and totally disabled. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's finding that the claimant is permanently and totally disabled.

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KAREN H. MCKINNEY, Commissioner