

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607670

BILL THOMPSON, EMPLOYEE	CLAIMANT
CITY OF FORT SMITH, EMPLOYER	RESPONDENT NO. 1
CROCKETT ADJUSTMENT COMPANY, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST	RESPONDENT NO. 3

OPINION FILED APRIL 13, 2011

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

Claimant represented by the HONORABLE JOE BYARS, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE DOUGLAS M.  
CARSON, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID SIMMONS,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE CHRISTY KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an  
administrative law judge's opinion filed October 18, 2010.  
The administrative law judge found that the claimant proved

he was permanently totally disabled, and that Respondent No. 2 was liable for benefits. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant did not prove he was permanently totally disabled.

#### I. HISTORY

Bill Earl Thompson, Jr., now age 50, testified that he was a high school graduate. The claimant's testimony indicated that he served in the National Guard beginning in 1986, and that his military occupational specialty was in the area of field artillery. The claimant testified that he also served as a civil engineer in the Air Guard, "using big equipment....they showed me how to do a backhoe." The claimant's testimony indicated that he was discharged from the National Guard in 1993. The claimant testified that he subsequently worked for Gerber Products Company and Hammond Distributing, working in a warehouse for Gerber and driving a delivery truck for Hammond. The claimant testified that he underwent right knee surgery in approximately 1993 or 1994.

The claimant testified that he became employed with the City of Fort Smith in November 1999. The claimant testified, "I was put right on a truck, throwing trash, residential trash."

Dr. Nils K. Axelsen examined the claimant in March 2001 and noted that the claimant was suffering with problems related to bilateral tennis elbow. Dr. Axelsen further noted: "His third problem is pain over the lateral joint space of his right knee. He had an arthroscopy done years ago when he was about twenty-four or twenty-five. He does not remember who did it. He thinks it was someone at Holt Krock Clinic and he thinks they did a partial lateral meniscectomy." An x-ray of the claimant's right knee was done on March 28, 2001: "X-rays of the right knee show some mild flattening of the lateral femoral condyle and a small spur formation laterally. The alignment is good. Joint spaces are well-maintained. Patellofemoral articulation looks good in the sunrise view."

Dr. Axelsen's impression on March 28, 2001 was "1. Bilateral tennis elbow, right worse than left. 2. Rule out re-tear of the lateral meniscus, right knee versus posttraumatic arthritis of the right knee....We will get an

MRI scan with dye to rule out re-tear of lateral meniscus, right knee." Dr. Axelsen noted in May 2001, "The right knee MRI scan was unable to prove a re-tear in the lateral meniscus. As noted in my previous note, he had an arthroscopy done years ago on his right knee and thinks that they did a partial lateral meniscectomy....We are going to set him up for an op scope, right knee, anesthesia of choice and outpatient surgery."

Dr. Axelsen performed surgery in June 2001: "Operative arthroscopy of the right knee with a partial lateral meniscectomy." Dr. Axelsen noted during surgery, "The lateral meniscus obviously had undergone partial lateral meniscectomy in the past." The post-operative diagnosis was "1. Status postoperative arthroscopy with partial lateral meniscectomy with re-tear of lateral meniscus, right knee." Dr. Axelsen noted in June 2001, "He works as a garbage collector. We will keep him on light duty another week, in other words, just driving the truck, then he can go back to full duty without restrictions. I will see him back on a p.r.n. basis. He says his knee already feels much better."

The claimant began treating with Dr. Edward W. Rhomberg in October 2005: "Mr. Thompson is a 44 year old gentleman,

who sustained injury to the left knee the 20<sup>th</sup> of October. Apparently, he was descending a ladder from having been working up on the roof. However, as he was just starting to descend the ladder, the ladder suddenly gave way after slipping on the intermediate support between the rungs. This resulted in a mechanical fall with the majority of his weight landing on the left lower extremity. This resulted in acute knee pain and swelling....He has had previous surgeries times two on the right knee and one surgery on the right wrist."

An MRI of the claimant's left knee was performed on October 4, 2005, with the following impression: "1. Moderate knee effusion. 2. Torn ACL. 3. Bone contusion involving the posterior aspect of the lateral tibial plateau and the anterior aspect of the lateral femoral condyle. 4. Findings suspicious for a tear of the posterior horn of the lateral meniscus at the capsular margin."

Dr. Rhomberg performed an arthroscopy of the claimant's left knee on October 7, 2005. The pre-operative diagnosis was "1. Left knee ACL tear, lateral meniscus tear. 2. Bone bruise of medial femoral condyle." Dr. Rhomberg noted during surgery, "There was some evidence of some mild

chondromalacia, grade IV, over the medial femoral condyle. This was fairly small, approximately 1-2 mm in diameter." The post-operative diagnosis was "1. ACL tear, lateral meniscus tear. 2. Grade IV chondromalacia, medial femoral condyle."

The claimant was provided physical therapy for rehabilitation of his left knee beginning October 21, 2005. Dr. Rhomberg noted in December 2005, "We will have the patient return to full duty status unrestricted effective to January, 2006. Patient will follow back up in six months for repeat clinical examination."

The parties stipulated that the claimant sustained "compensable injuries to his legs" on April 10, 2006. The claimant testified, "I was on the side of the truck, there was a big metal desk and that was probably six or seven foot long and four foot tall and about four foot wide, a big, old, heavy metal one, you know, and [the driver] just got too close to it and he clipped the corner and it flipped the whole desk, you know, over towards me, so I saw it coming and the only thing I could do is try to run up beside the truck....the edge of the desk hits the right knee, just a blunt-force hit. Well, I get out of the way and then it

pins my left knee to the truck, and so I'm sitting there in lingo (sic)....We get him to stop and then back up, you know, which hurts more. But, anyway, so it fell off to the side then, and that's about it."

A medical report dated April 10, 2006 indicated that the claimant complained of pain in his left lower leg as a result of the accident. An x-ray was done on April 11, 2006:

**LEFT TIB-FIB:**

The tip of the fibula is coned off from the frontal projection and also is coned off on the lateral projection. Evidence of previous anterior cruciate ligament reconstruction surgery. No other bony abnormality.

**IMPRESSION:**

No acute bony abnormality.

Dr. Keith F. Holder gave the following impression on April 20, 2006: "1. Left lower leg contusion. 2. Right calf hematoma. 3. Status post ACL repair and status post right knee surgery X 2." Dr. Holder planned conservative treatment and returned the claimant to restricted work.

A Radiology Report was entered on April 28, 2006:

**TWO VIEW LEFT KNEE:**

Prior anterior cruciate ligament repair/reconstruction. There are mild degenerative changes at the patellofemoral articulation.

**TWO VIEW RIGHT KNEE:**

Bones are well mineralized without evidence of fracture or dislocation. No acute bony abnormalities are seen.

The record includes a Department of Veterans Affairs "Decision Review Officer Decision" dated June 14, 2006, which document included the following language: "The records reflect that you are a veteran of the Gulf War Era. You served in the Army from November 21, 1990 to June 2, 1991....Service connection for post traumatic stress disorder is granted with an evaluation of 70 percent effective January 24, 2005."

The claimant returned to Dr. Rhomberg, who performed left knee surgery on July 5, 2006: "1. Diagnostic arthroscopy. 2. Partial medial meniscectomy. 3. Partial lateral meniscectomy. 4. Chondroplasty of the lateral femoral condyle." The post-operative diagnosis was "1. Grade 3 chondromalacia of the trochlea and patella. 2. Medial meniscus tear. 3. Lateral meniscus tear. 4. Osteochondral defect, lateral femoral condyle."

Dr. Rhomberg noted in part on August 3, 2006, "He also complains of pain on the right knee....I suspect clinically that he has a lateral meniscus tear. He has a history of a motor vehicle accident that occurred in the course of

performance of his job working for the sanitation department for the City of Fort Smith. It is felt that the symptoms in the right knee are causally related to this accident as well....In regards to the left knee, I believe he has had satisfactory healing and ready to move him back to normal weightbearing."

Dr. Ronald D. Schlabach stated on September 27, 2006, "Mr. Thompson is a 45-year-old male who is followed for episodic care in this office. According to records on his chart, he was diagnosed by Dr. Russell Branum, a Rheumatology Specialist in the Fort Smith area with 'diffuse fibromyalgia syndrome' in March 2005."

The record includes a Department of Veterans Affairs "Rating Decision" dated October 19, 2006: "The records reflect that you are a veteran of the Peacetime and Gulf War Era. You served in the Army from August 18, 1987 to November 25, 1987, from November 21, 1990 to June 2, 1991 and from May 27, 1998 to October 22, 1998....Service connection for fibromyalgia (also claimed as pain in all joints) is granted with an evaluation of 40 percent effective June 30, 2006."

Dr. Rhomberg performed right knee surgery on October 27, 2006: "1. Right knee arthroscopy. 2. Debridement of lateral meniscus tear. 3. Drilling chondroplasty of lateral femoral condyle." The post-operative diagnosis was "1. Lateral meniscus tear. 2. Chondromalacia, grade III-IV, lateral femoral condyle."

Dr. Rhomberg noted on December 29, 2006, "Mr. Thompson is back in for a rating examination today of his left and right knee. He has a history of a workman's compensation injury. The patient has the benefit of having arthroscopies of both the left and right knees prior to the work related injury and subsequent to that has had arthroscopies of both knees after the injury...."

Dr. Rhomberg reported on January 16, 2007:

He has a history of injuries to both the left and right knee, both are considered workman compensable injuries. He is status post arthroscopy of both the left and right knees. Injuries to the left knee include a medial meniscus tear, a lateral meniscus tear, and also chondromalacia of the patellofemoral joint and osteochondral defect of the lateral femoral condyle. The right knee also has a history of lateral meniscus tear and chondromalacia of the medial femoral condyle.

According to the Guides for Evaluation of Permanent Impairment American Medical Association Fifth Edition, the patient would be eligible for a rating of 25% based upon a cartilage interval of 1

mm that was noted at the time of arthroscopy of both the left and right knee. In addition, because of partial meniscectomy in both knees, he would be also accorded a 10% lower extremity impairment rating. A combination of these values would result in a 33% impairment rating of the left lower extremity and a 33% impairment rating of the right lower extremity. The combination of the two lower extremities would be an impairment rating of 54%. This then completes the disability rating of Billy Thompson, Jr.

The parties stipulated that the claimant's healing period ended on January 16, 2007. The parties stipulated that the respondents "accepted liability for and have paid permanent partial disability for a permanent physical impairment of 10 percent to the left leg below the hip and 2 percent for the right leg below the hip."

The parties deposed Dr. Rhomberg on June 27, 2007. The attorney for Respondent No. 1 questioned Dr. Rhomberg:

Q. What restrictions apart from the - just an impairment rating percentage, what restrictions would you place on Mr. Thompson's activities and conversely what types of activities or what kind of employment could he engage in with the condition of his knees at this time?

A. Well, I've seen Mr. Thompson numerous times as the record would demonstrate and we have talked about how he should pursue an occupation that does not - as labor intensive perhaps as working for the sanitation department. I indicated to him that he has, is going to have progressive degenerative changes in his knees independent of treating previous ACL reconstructions or meniscal

debridements that, in fact, that the wearing away of cartilage on the end of his bones was likely to be the main source of problems in the future for him and to that end he needed to choose an occupation that would result in a less impact loading of his knees; namely, he needed to move to a more sedentary position....

Q. It is not your opinion that Mr. Thompson is incapable of working as I understand it. It is your opinion that it may be good for him to find a type of work that is less labor intensive than working a trash route?

A. Yes.

A representative of the Department of Veterans Affairs corresponded with the claimant on or about October 22, 2007:

This is to certify that the records of the Department of Veterans Affairs show you are 100-percent, permanently and totally disabled, due to a service-connected disability or disabilities.

This letter is provided for your convenience in applying for discount camping with the Arkansas Department of Parks and Tourism. In order to receive your discount, please present this letter to the park staff at the time of check-in. To be honored, this letter must be dated within the last two years.

A pre-hearing order was filed on March 30, 2010. The claimant contended that "the permanent partial impairment rating of 33% to each of the claimant's lower extremities, when combined with the claimant's pre-existing impairments, renders the claimant permanently and totally disabled."

Respondent No. 1, City of Fort Smith, contended that the claimant was "not entitled to permanent partial disability benefits in excess of the appropriate anatomical impairment rating for disability resulting from the subject accident. The claimant is not entitled to rehabilitation benefits. Further, the claimant has not offered any specific rehabilitation program."

The parties agreed to litigate the following issues:

1. The extent of permanent physical impairment.
2. Whether the claimant is permanently totally disabled.
3. Second Injury Fund liability.
4. Attorney's fees.

A hearing was held on July 20, 2010. The claimant testified that he was not physically able to return to his duties as a sanitation worker for the respondents. The claimant testified that the respondent-employer had offered him a "desk job," but that he could not do the work. The claimant testified, "I just can't be around people a lot, you know, because I've got PTSD too."

The claimant testified on cross-examination that he had not applied for work with any other employer. Upon questioning from counsel for the Second Injury Fund, the claimant testified that he was able to perform some

housework, drive a riding lawnmower, and operate a weedeater.

An administrative law judge filed an opinion on October 18, 2010. The administrative law judge found, among other things, that the claimant had sustained "permanent physical impairment of 10% to his left leg below the hip and 2 percent to his right leg below the hip." None of the parties appeal that finding. The administrative law judge found that the claimant was permanently totally disabled, and that Respondent No. 2, Second Injury Fund, was liable for permanent total disability benefits. Respondent No. 2 appeals to the Full Commission.

## II. ADJUDICATION

### A. Permanent Total Disability

A claimant cannot receive wage-loss benefits in excess of his degree of permanent physical impairment for a scheduled injury unless the claimant is found to be permanently totally disabled. Ark. Code Ann. §11-9-521(g) (Repl. 2002); *Kirkendolph v. DF & A Revenue Servs. Div.*, 2009 Ark. App. 668. Ark. Code Ann. §11-9-519(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.

An administrative law judge found in the present matter that the claimant was permanently totally disabled. The Full Commission does not affirm this finding. The claimant is only age 50 and has a high school diploma. The record indicates that the claimant served for several years in the National Guard and United States Army. The claimant testified that his military experience included training in field artillery and civil engineering. The claimant's civilian employment history included warehouse work and truck-driving delivery work.

The claimant testified that he became employed with the Fort Smith Department of Sanitation in November 1999. The parties stipulated that the claimant sustained "compensable injuries to his legs" on April 10, 2006. The claimant testified that he received a "blunt-force hit" to his right knee and that his left knee was "pinned" to a truck. Dr. Rhomberg subsequently performed surgery on the claimant's left and right knees. The parties stipulated that the claimant's healing period ended on January 16, 2007, on

which date Dr. Rhomberg assigned permanent impairment ratings to both lower extremities. The parties stipulated that Respondent No. 1 has paid "a permanent physical impairment of 10 percent to the left leg below the hip and 2 percent for the right leg below the hip." An administrative law judge found that the claimant's April 10, 2006 compensable injury had caused "a permanent physical impairment of 10 percent to his left leg below the hip and 2 percent to his right leg below the hip." None of the parties appeal that finding.

The parties deposed the claimant's treating physician, Dr. Rhomberg, on June 27, 2007. Dr. Rhomberg testified that he had advised the claimant to pursue an occupation that was not as labor-intensive as the claimant's work for the respondent-employer. Dr. Rhomberg testified that the claimant "needed to move to a more sedentary position." Dr. Rhomberg did not testify that he considered the claimant to be permanently totally disabled. Although the record shows that the claimant may not be able to return to his previous work for the respondent-employer, the preponderance of evidence does not demonstrate that the claimant is unable to earn any meaningful wages in the same or other employment.

The claimant testified that he had not attempted to return to work for any other potential employer. The claimant testified that he was able to perform some house work and light yard work. The record indicates that the claimant is receiving benefits from the Veterans Administration and Social Security Administration.

The Full Commission finds that the claimant did not prove he was unable to earn any meaningful wages in the same or other employment. We recognize that the claimant sustained compensable scheduled injuries on April 10, 2006. As a result of the claimant's compensable injuries, he sustained a 10% permanent impairment rating to his left leg and a 2% permanent impairment rating to his right leg. The claimant is now in middle age, not "advanced age," with a high school education. The probative evidence before the Commission does not demonstrate that the claimant is unable to earn any meaningful wages within his permanent physical restrictions. The Commission respectfully points out that the claimant seems content to draw permanent disability benefits and is not interested in pursuing productive employment earning wages. Nor has the claimant signaled an interest in seeking additional education or vocational

training in order to improve his prospects for securing gainful employment within his permanent physical restrictions. It is well-settled that a claimant's lack of interest and negative attitude is an impediment to the Commission's full assessment of a claimant's loss and is a factor we can consider in determining that a claimant's wage-loss disability is not as great as he states it to be. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984), citing *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). The evidence shows in the present matter that the claimant is not interested in pursuing appropriate gainful employment within his physical restrictions. The claimant's negative attitude is an impediment to an assessment of permanent total disability benefits.

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 totally disabled. The Full Commission finds that the claimant did not prove he was unable, because of his April 10, 2006 compensable scheduled injuries, to earn any meaningful wages in the same or other employment. The Full Commission's

finding in this regard renders moot any determination regarding whether Respondent No. 1 or Respondent No. 2 is liable for permanent total disability benefits. This claim is denied and dismissed.

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 would award the claimant permanent and total disability benefits from the Second Injury Fund.

Permanent Total Disability

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, Supra. However, the actual statutory analysis required of the fact finder is not the same. For wage-loss disability, the relevant inquiry, based on Ark. Code Ann. §11-9-522, is: "To what extent has the claimant's compensable injury affected his or her ability to earn a livelihood?" For permanent total disability, the relevant inquiry, based on Ark. Code Ann. §11-9-519 is: "Has the claimant proved by a preponderance of the evidence the inability to earn any meaningful wage in the same or other employment?" The claimant's compensable injuries are to portions of his body that are scheduled under Ark. Code Ann. §11-9-521. Thus, unless the claimant can prove that he has been rendered permanently totally disabled, he is not entitled to any permanent disability benefits in excess of that attributable to permanent physical impairment. Ark. Code Ann. §11-9-521(g); Kirkendolph v. DF & A Revenue Servs. Div., 2009 Ark. App. 668.

In workers' compensation law, an employer takes the employee as he finds him. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). Here, the evidence clearly shows that the claimant has experienced at least three partial tears of the lateral meniscus in his right knee, which have required surgical repair. He has also previously experienced a tear and surgical reconstruction of the anterior cruciate ligament (ACL) of his right knee. Further, the claimant has significant chondromalacia (Grade III to IV) or the degenerative loss of the protective cartilagenous covering over the various bones in his right knee joint. The evidence further shows that the claimant has had two partial tears of the lateral meniscus of his left knee that required surgical intervention, one partial tear of the medial meniscus of his right knee that required surgical intervention, and one tear of the anterior cruciate ligament (ACL) that required surgical reconstruction. The claimant also has extensive chondromalacia, or loss of the protective cartilagenous covering of the bone in various areas of his left knee. Although the claimant's compensable impairment results in ratings of only 10% and 2%, all of his physical damage has

resulted in a permanent physical impairment, as recommended by the Commission's Official Rating Guide, of 38% to the right knee, and 37% to the left knee.

The greater weight of the credible evidence shows that this permanent physical damage or impairment prevents the claimant from prolonged walking or standing, and any climbing or squatting. Essentially, the claimant is limited to sedentary-type employment.

The record reveals that the claimant is 49 years old and is a high school graduate. The claimant was in the military from 1986 through 1993. The claimant's military experience consists of being a gunner on a howitzer and operating heavy equipment, particularly a back hoe. The claimant's previous work experience involved a period of employment as an assembly line or factory worker for Gerber baby food products, and a truck driver delivery man for Hammons Heating & Air. The claimant was employed as a garbage collector for the City of Fort Smith from November of 1999 through the date of his injury. In this capacity, he would ride on the side or back of the garbage truck, jump off and empty the garbage cans into the truck, and then get back on the truck.

Clearly, the combined restrictions and limitations on the claimant's potential employment activities, the effects of the multiple injuries with their associated surgical repairs, and the claimant's extensive degenerative chondromalacia of both knees, would prevent the claimant from returning to his pre-injury employment position with the respondent. These restrictions would also prevent the claimant from returning to all of his prior employment positions. In fact, the claimant's physical inability to walk or stand for prolonged periods, to climb on objects, and to stoop or bend his knees deeply, would prevent him from performing employment positions required by essentially all factory or assembly line employments and many sales or clerical employments, such as a clerk in a 7-11. As previously indicated, the claimant is essentially limited to "sedentary" types of employment. The claimant has absolutely no prior training or experience in this area. As such, I find the claimant to be permanently and totally disabled.

#### Second Injury Fund Liability

In order for Ark. Code Ann. §11-9-525 to be applicable to this claim, the claimant must have some degree

of permanent partial disability or impairment, from a compensable injury or otherwise, at the time of his "second injury". The claimant must then sustain a "second" or subsequent compensable injury that results in additional permanent partial disability or impairment. Finally, the percentage of disability or impairment caused by the combined disabilities or impairments from all sources must be greater than that which would have resulted from the last injury, if considered alone and of itself.

The evidence presented clearly shows that, at the time of the claimant's compensable injuries on April 10, 2006, the claimant had previously undergone two and possibly three corrective surgeries on his right knee. The records of Dr. Axelsen reflect that the claimant underwent a corrective surgery, which was in the form of a partial lateral meniscectomy for a tear of the lateral meniscus, on June 1, 2001. These records of Dr. Axelson also indicate that, prior to this surgery, the claimant had undergone a previous surgical repair of a tear of the lateral meniscus, which was also in the form of a partial lateral meniscectomy. The operative report of Dr. Rhomberg, dated October 27, 2006, further indicates that, sometime prior to

the claimant's compensable injuries of April 10, 2006, the claimant had undergone surgery in the form of reconstruction of the ACL of his right knee and was experiencing some degree of laxity of the ACL, as a result of his prior injury and surgery. Further, the operative note of Dr. Rhomberg indicated that, prior to the claimant's compensable injuries of April 10, 2006, the claimant was already experiencing significant chondromalacia of the right knee.

The claimant's two previous partial lateral meniscectomies and his previous ACL reconstruction with resulting laxity would all entitle him to an assessment of permanent physical impairment under the Commission's Official Rating Guide. Under Table 64 on Page 85 of the Guide, each of the claimant's partial lateral meniscectomies would carry a permanent impairment of 2% to the leg, and his anterior cruciate ligament reconstruction with some degree of laxity would carry a permanent impairment rating of between 7% and 25% to the leg. The claimant's pre-existing Grade III to IV chondromalacia would carry a rating between 20% and 25% to the leg (Table 62, Page 83 of the Guides).

The medical records of Dr. Rhomberg show that, on October 7, 2005, he performed a surgical repair of a tear of

the claimant's ACL in his left knee, and a partial lateral meniscectomy for a partial tear of the claimant's left meniscus. In this report, he also noted the presence of Grade IV chondromalacia of the claimant's left knee joint. Under Table 62 of the Guides, this pre-existing Grade IV chondromalacia would carry a permanent impairment rating of 25% to the leg. Under Table 64 of the Guides, this prior partial lateral meniscectomy would carry an impairment rating of 2% to the leg.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he was experiencing pre-existing disability and impairment to his legs at the time of his compensable injuries on April 10, 2006. The claimant has further proven by the greater weight of the credible evidence that he sustained additional permanent disability and impairment to his legs, as a result of his compensable injuries of April 10, 2006. Further, the claimant has proven that the combined effects of these disabilities or impairments to his legs exceed that which would have resulted from the last injury (i.e., the compensable injury of April 10, 2006), considered alone and

of itself. Thus, he has satisfied the requirements of applicability of Ark. Code Ann. §11-9-525. As such, I would order the Second Injury Fund to pay the claimant permanent and total disability benefits.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner