

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. G506453**

**KENNETH A. JOHNSON, EMPLOYEE**

**CLAIMANT**

**VS.**

**LAND O'FROST, EMPLOYER**

**RESPONDENT**

**LAND O'FROST, INC. CARRIER  
PMA MANAGEMENT CORP, TPA**

**RESPONDENT**

**OPINION FILED JUNE 20, 2023**

Hearing before Administrative Law Judge, James D. Kennedy, on the 9<sup>TH</sup> day of May, 2023, in Little Rock, Pulaski County, Arkansas.

Claimant is represented by Mr. Andy L. Caldwell, Attorney-at-Law, of Little Rock, Arkansas.

Respondents are represented by Mr. Guy Alton Wade, Attorney-at-Law, of Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted on the 9<sup>th</sup> day of May, 2023. At the time of the hearing, the issues were clarified by the parties and it was agreed that the issues to be litigated at the time of the hearing were as follows: (1) compensability of an injury to the claimant's back and the related medical, and whether the claimant is entitled to PPD in regard to the back injury; (2) compensability of an injury to the claimant's head and related medical; (3) the issue of permanent partial disability or, in the alternative, wage-loss; and (5) attorney's fees. All other issues were reserved. The respondents contend the claimant did not sustain a compensable back injury and that there were no objective findings in regard to a back injury. Dr. Seale provided a zero percent (0%) rating for PPD in regard to the claimed back injury. In regard to the claimed head injury, the respondents contend that the claimant did not sustain a compensable head injury and there were no objective

findings in regard to this injury. The respondents also contended that the claimant's inability to work, if applicable, was related to conditions that the respondents were not responsible for; that the claimant is not P&T; and that he is not entitled to wage-loss or any other impairment.

A Prehearing Order dated March 13, 2023, provided that the parties stipulated that the Arkansas Workers' Compensation Commission had jurisdiction of the within claim and that an employer/employee/carrier relationship existed on or about August 21, 2015, and at all relevant times thereto. Additionally, it was stipulated that the claimant sustained a compensable right hip and neck injury. It was also stipulated that the claimant earned sufficient wages for temporary total disability / permanent partial disability rates of \$629.00 / \$472.00, respectively. Finally, the parties agreed that the claimant received an eleven percent (11%) permanent partial disability rating to the body as a whole by Doctor Seale, which was accepted and paid.

The Prehearing Order and the claimant's contentions and amended contentions, as well as the respondent's contentions were all set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. The witnesses were Kenneth Johnson, the claimant, along with his wife Patricia Johnson, and Teddy Townsend, the environmental and safety coordinator for the employer. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Arkansas Code Annotated § 11-9-704.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on August 21, 2015, the date of the claimed injuries. At the time, the claimant earned an average weekly wage sufficient for TTD / PPD rates of \$629.00 / \$427.00, respectively, per week.
3. That the claimant sustained a compensable right hip and neck injury on August 21, 2015, which was accepted by the respondents.
4. The claimant received an eleven percent (11%) disability rating to the body as a whole in regard to his neck injury, which has been paid in full.
5. That the claimant has failed to satisfy the required burden of proof to show that he sustained a compensable work-related injury to his back and head on August 21, 2015, and consequently the claims for medical, as well as PPD in regard to the back injury, are *moot*.
6. The claimant has failed to satisfy the required burden of proof that he is entitled to permanent and total disability and, in the alternative, has also failed to satisfy the required burden of proof for wage-loss.
7. The issue of attorney fees is *moot*.
8. That all other issues are reserved.
9. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

### **REVIEW OF TESTIMONY AND EVIDENCE**

The Prehearing Order along with the responses to the prehearing questionnaires and amended response of the claimant were admitted into the record without objection. The claimant submitted three (3) exhibits that were admitted without objection: (1) 111 pages of medical reports; (2) 21 pages consisting of the payroll register, emails, and payments; and (3) 38 pages of correspondence and payroll records. The respondents also submitted three (3) exhibits that were submitted without objection: (1) 43 pages of

medical reports; (2) The AR - C Form and correspondence; and (3) 1 page consisting of the Wade letter.

The claimant testified that he was born on July 11, 1948, was driving a truck for the respondent on August 21, 2015, and had been employed with them for eleven (11) or twelve (12) years. While working for the respondent, he fell approximately 20 or 25 feet from the “bubble of the truck” attempting to remove the antenna from the truck. He testified when he hit, he injured his ear, head, and neck. His ear and right posterior head was lacerated, and the insurance girl took him to Dr. Warnock. He returned to the doctor the next day complaining of headaches and pain in his ear. He had an open wound in regard to his right ear, a shoulder bruise, and a contusion on his right buttock and a bruise on his right hip. The claimant agreed he had a burning sensation in his right ear and consequently could not wear his glasses. He denied having headaches or mental status problems prior to the fall. (Tr.p. 17-22)

The claimant admitted having problems with his memory and confusion after the fall and stated it had gotten worse. The claimant stated he was having visual changes, low back pain, and numbness after he sat for a while. He agreed that when taking a shower and closing his eyes, he would lose his balance and needed balance training and that he had pain shooting down his left neck and into his head, along with pain in his lower back and into his right leg while attending physical therapy in November of 2015. The claimant also agreed he had neck pain on the left side with mid-back pain and was treated with Tramadol. (Tr.p. 23-27) The claimant testified that he returned to Dr. Warnock multiple times and that his right ear still hurt. He felt that at night his pain sometimes got so bad that he cried. The claimant was referred to Dr. Seale while he was still having

neck and back pain, with pain radiating down the left shoulder and left arm. Additionally, pain was radiating down his left buttock and leg. Dr. Seale performed a cervical fusion on his neck and released him to return to work. The claimant returned to the respondent and performed the same job for about a year. He quit working for the respondent due to the pain returning. He had problems navigating the truck where the road had changed and had difficulty backing the trailer. The claimant was sent to Dr. Dan Johnson, a clinical neuropsychologist, by the respondent. He had not returned to work since Dr. Johnson issued his report. He testified he had problems with his back and his mobility and difficulty turning to the left along with neck problems and left leg problems similar to when the accident first happened. The claimant denied being seen by a psychiatrist but agreed he was still having memory problems. (Tr.p. 28-34)

Under cross-examination, the claimant agreed he was sixty-seven (67) years old at the time of the accident and was on social security retirement since the age of sixty-six (66), and still had his CDL for local driving. He also agreed the last doctor who treated him for his injuries was Dr. Baskin. He currently had been treated by the VA for high cholesterol, diabetes, blood work, and they had also provided a depression pill. He agreed that after the injury, he had been released by Dr. Seale to full duty in March of 2016, and had team driven. He also had passed a DOT physical after the accident. He also agreed that Dr. Seale had given him an impairment rating after his surgery which had been paid. He passed another DOT physical in July of 2018, and drove 55,036 miles in 2018 and 77,975 miles in 2019, which was three or four years after the accident and would drive to the west coast. He also agreed he received a short-term disability payment

from a policy he had provided. Additionally, no one had recommended any additional medical care in relation to his work injury. (Tr.p. 35–41)

He had a CT scan and an MRI of his brain. The claimant was not aware that Dr. Warnock had opined his mental status change had resolved. He agreed that Dr. Seale had given him a zero percent (0%) impairment rating for his back. He also agreed after his neck surgery, he received a percentage rating for his neck. The claimant admitted that he was seventy-one (71) at the time of the evaluation by Dr. Johnston and that he saw Dr. Baskin once. (Tr.p. 42–46) The claimant also testified he had not looked for any work after he left the respondent, but had received his social security. (Tr.p. 47-48)

On redirect, the claimant agreed he would have continued to work if he had not been taken off work By Dr. Baskin. The claimant also agreed Dr. Baskin was not treating him and no physician/patient relationship had been established. (Tr.p. 48-49) The claimant admitted that after the surgery by Dr. Seale, and after being released by him, he started treating him again and that he opined the patient had no history of pain in the low back or down the leg prior to his work injury, and therefore, “It is within a certain degree of medical certainty that at least fifty-one (51%) of the patient’s current symptoms and need for surgery are directly related to the injury.” (Tr.p. 50) On recross, the claimant agreed that Dr. Seale was referring to the neck. (Tr. 51)

The claimant then called Patricia Johnson, his wife, who testified that they had been together forty (40) years and she was aware of his injury on the date that it occurred. She testified that the claimant complained of his head, ear, neck, back, and hip hurting. He had not complained of headaches prior to the accident and she was not aware of him

seeking treatment for back or neck pain and not aware of the claimant having issues prior to the accident. She stated he was a different man now. (Tr.p. 54-58)

Under cross-examination, Ms. Johnson agreed the claimant had worked the same type of schedule as before the accident, and that when he returned to driving, it sounded correct that he drove about 62,323 miles. (Tr.p. 59-60)

Teddy Townsend was called by the respondent after an objection by the claimant at the start of the hearing. He testified that he was an environmental health and safety coordinator, that he monitors workers' compensation claims, and was familiar with the claimant. He testified that the top of the truck was only about twelve (12) to thirteen (13) feet because you can't get under an overpass at twenty (20) feet. The claim for the neck and hips was accepted as compensable. He was also aware that after the treatment by Dr. Warnock, the claimant returned to work and was assigned to team driving and had a DOT physical in March of 2016. He ended up having neck surgery by Dr. Seale who then released him and he returned to work, driving long-haul. After being released by Dr. Seale, the claimant was required to have another physical and drug screen because he had been out so long, which he passed successfully, and he then went out on the road again. He testified that the claimant drove a little over 55,000 miles in 2018, and 77,975 miles in 2019. He also agreed that the claimant received short-term disability which was paid for by the respondent for about six (6) months. After the report by Dr. Johnston, the claimant was not allowed to return to work and that was when he received the short-term disability. (Tr.p.64-69)

Under cross-examination, Mr. Townsend testified he had no knowledge of the claimant ever being reprimanded for disorientation or backing into trucks or trailers and

he was not aware of any complaints from his team driver. He saw the claimant on the day of his injury and had no reason to dispute the medical records that provided the claimant had a right ear and head laceration and also that the claimant was complaining of memory loss, dizziness, and confusion. He was not aware of any of these complaints prior to the work injury. He also agreed the claimant indicated that he wanted to return to work. (Tr.p. 70-71)

Under redirect, Mr. Townsend stated he would not have allowed the claimant to return to driving if he had suspected a cognitive deficit or brain injury, nor did he suspect one in 2016, 2017, 2018, or 2019. He also agreed that the claimant had passed two (2) DOT physicals during that time, and that if he had complained to the physician performing the DOT physical, he would not have passed. (Tr.p. 72-73)

In regard to medical records, the claimant presented to PrimeCare Medical & Wellness Clinic and was seen by Dr. Wornock on the day of the accident, August 21, 2015, and then returned on August 22, 25, 28, in 2015. The assessment on August 21 provided for an open wound of the ear which was closed with stiches and a head injury. On the August 22, 2015, visit, the report provided the ear looked good, with a bruise over the right deltoid, no bruise over the buttocks, and with a good range of motion of the hip and shoulder. A head injury was mentioned under the chief complaint. On August 25, 2015, the claimant mentioned numbness of the right hip. On the August 28 follow-up, the report provided for a mental status change and a CT scan was recommended. (Cl. Ex. 1, P.1-8) The CT scan of the brain on August 28, 2015, provided for a negative scan of the brain, and showed left maxillary sinusitis. (Cl. Ex. 1, P. 9) The claimant returned to Dr. Wornock on September 1, 2015, and the report provided that the mental status change



was now resolved. (Cl.Ex.1, P.10-11) The next visit to Dr. Wornock occurred on November 20, 2015, for a follow-up. The report provided that the sixty-seven (67) year old claimant was suffering from visual changes and that his legs go numb when he tries to sit, that he has a hard time starting to walk, and if he closed his eyes while showering, he lost his balance. He was assessed with bilateral low back pain without sciatica, blepharitis (inflammation of the eyelids) on the right, and cervicalgia. (Cl.Ex.1, P. 11-12)

The claimant then made multiple visits to Reaper Physical Therapy from November 23, 2015, through December 29, 2015. (Cl.Ex.1, P.13-15) He then returned to Dr. Wornock on January 8, 2016, and the report provided there had been an improvement and the claimant felt great while in physical therapy, but that pain comes and goes at the base of his neck on the left side, mild back pain, and that he suffered headaches like his head was blowing off, along with white spots on the right ear. His neck range of motion was pretty good but he suffered a lot of pain when he turned his head to the left. He was again diagnosed with cervicalgia and was referred to Dr. Sprinkle in regard to returning to work. The report also provided if the claimant received clearance, he would be referred to Serena McKnight for cognitive testing. (Cl.Ex.1, P. 16-17) The claimant returned to Dr. Wornock on January 26, 2016, with the complaint of pain on the left side of his neck with radiation of the pain to the left shoulder, with the pain sometimes being sufficient to make him cry. The claimant was also advised not to drive. (Cl.Ex.1, P. 18-20) The claimant returned to Dr. Wornock on February 2, 2016, who again diagnosed cervicalgia with a limited range of motion and again stated that the claimant could not drive and that he would be seeing a specialist. (Cl.Ex.1, P. 20-24)

On March 7, 2016, the claimant presented to Dr. Seale at Arkansas Specialty Orthopedics. The report provided the claimant had sixteen (16) visits of physical therapy, had full range of motion without pain or tenderness of the lumbar spine, and his bilateral shoulders showed a full range of motion. He had a limited range of motion to the left in his cervical spine. The claimant suffered from degenerative disc disease of the C5-6 with left sided pain to the shoulder along with L5-S1 severe degenerative disc disease with back pain and bilateral leg pain. The report allowed the claimant to return to commercial driving with no restrictions. An X-ray of the cervical spine provided for moderate disc space narrowing and a view of the lumbar spine revealed severe disc space collapse with bone spurring. (Cl.Ex.1, P.25-28)

The claimant returned to Dr. Seale on May 9, 2016, and the report provided that the claimant was at MMI and he was assessed with C5-6 degenerative disc disease with left sided neck pain to the shoulder and L5-S1 severe degenerative disc disease, back pain, and bilateral leg pain. The patient's impairment rating was zero percent (0%) due to no objective findings of injury and that the problems were pre-existing. The claimant was allowed to return to work full-duty with no restrictions. (Cl.Ex.1, P. 29-30) The claimant returned to Dr. Seale approximately nine (9) months later on February 13, 2017. The report provided the claimant had a full range of motion without pain, tenderness, or signs of instability. The cervical spine was limited with pain worse on extension and extension of the lumbar spine resulted in severe low back pain. The plan provided for core strengthening and stretching, as well as possible traction and education. Restrictions for no commercial driving and no lifting over twenty (20) pounds were given. (Cl.Ex.1, P. 31-35) The claimant then returned to Reaper Physical Therapy on March 29,

2017, and then again presented to Dr. Seale on April 24, 2017, and also June 5, 2017, and a MRI of the cervical and lumbar spine was recommended along with additional physical therapy. (Cl.Ex. 1, P. 36-40) After additional physical therapy, the claimant received an epidural steroid injection by Dr. Walker at the C 6-7 epidural space on July 31, 2017. The diagnosis was for cervical radiculopathy with disc degeneration at C5-6 and C6-7. (Cl. Ex. 1, P. 41, 42) The claimant then returned to Dr. Seale on October 18, 2017, and was assessed with C5-6 and C6-7 degenerative disc disease with left-sided neck pain to the left shoulder and arm and severe degenerative disc disease, back pain, and bilateral leg pain at L5-S1. The report went on to provide that the symptoms had been ongoing since a work-related injury over two (2) years ago and that, “it is within a certain degree of medical certainty that at least 51% of the patient’s current symptoms and need for surgery are directly related to their work injury.” (Cl.Ex.1, P. 43-45) The claimant then returned to Dr. Seale on December 12, 2017, and the report again referred to severe neck pain since a work-related injury two (2) years ago and, “Therefore it is within a certain degree of medical certainty that at least 51% of the patient’s current symptoms and need for surgery are directly related to their work injury.” (Cl. Ex. 1, P. 46, 47)

An anterior cervical fusion at the C5, C6, and C7 levels was performed at St. Vincent on December 12, 2017, by Dr. Seale. The post-op diagnosis was degenerative joint disease and stenosis at C5-6 and C6-7. (Cl. Ex.1, P 48-52) The claimant returned to Dr. Seale for an office visit on February 28, 2018, and the claimant was placed on restrictions with no commercial driving and a functional capacity exam was discussed. (Cl. Ex. 1, P. 53-56) On July 11, 2018, Dr. Seale opined that the claimant had reached

MMI and could return to work without restrictions. His impairment rating was eleven percent (11%) based upon a single level cervical fusion with decompression with residual pain being zero percent (0%) with an additional one percent (1%) for the second level. He was allowed to work with no restrictions. (Cl. Ex. 1, P. 59-61)

A Neuropsych consult was performed by Dan Johnson, PHD, on March 12, 2020, when the claimant was seventy-one (71) years of age. The report provided that given the claimant's severe short-term memory deficits, as well as deficits in visual motor capacity, processing speed, and visual spatial/depth perception from a neuropsych/neurocognitive perspective, the claimant's capacity to successfully, and reliably navigate the demands of employment were extremely guarded, and he should be considered one hundred percent (100%) disabled at that time with no work recommended. (Cl.Ex.1, P. 62-65)

The claimant presented to AR Care on June 30, 2020, for assistance in obtaining short-term disability. The claim form provided that the disability began on March 12, 2020, and the claimant's short-term memory loss could not be reversed. (Cl.Ex.1, P. 66-71) A Health Care Provider Statement dated August 20, 2020, provided that the claimant had a permanent long-term condition that might not require treatment but required the supervision of a health care provider, with the date of leave starting on March 12, 2020, and going for the claimant's lifetime. (Cl.Ex.1, P. 79-81)

On May 27, 2021, the claimant presented to Dr. Barry Baskin for an Independent Medical Exam. The exam provided that the claimant's chief complaint was neck pain, neck stiffness, right ear pain, headaches, poor balance and occasional falls, low back and hip pain bilaterally, and severe memory deficits. The exam appeared to be a thorough

review of the claimant's medical history from the time of the accident. The opinion referred to Dr. Seale's findings that although the claimant had some pre-existing conditions in regard to his cervical spine, Dr. Seale opined that greater than fifty-one percent (51%) of the claimant's neck problems were related to the work injury and he recommended cervical fusion at C5-6 and C6-7. However, Dr. Baskin felt that the claimant's cognitive decline was more difficult to relate to the accident, due to the interval of time between the fall and his exam, approximately six (6) years later. Dr. Baskin also referred to the records of Dr. Wornock who was following the claimant acutely with the records providing the claimant manifested memory deficits almost immediately after his injury. He went on to provide that there were many well documented studies outlining accelerated cognitive decline associated with a closed head injury. He felt an MRI would have been helpful in regard to a diagnosis and that this case was difficult due to the claimant approaching six (6) years post-injury. He also provided that, "Dr. Johnson, based on the patient's history, did not seem to think the patient's cognitive issues were related to the injury." Dr. Baskin felt there was additional medical out there. (Cl.Ex.1, P. 82-88)

An addendum to the Independent Medical Evaluation report by Dr. Baskin dated June 28, 2021, provided that the claimant had significant memory issues and it was difficult to know how much of the problem was related to the workers' compensation injury of August 21, 2015, "versus other conditions of aging." Dr. Baskin recommended a non-contrasted MRI of the brain that would possibly provide the etiology of the claimant's ongoing cognitive issues. (Cl. Ex. 1, P. 90-91)

The claimant received multiple weeks of physical therapy starting on July 7, 2021, with the final visit on August 25, 2021. The final report provided that the claimant attended

ten (10) total sessions and made good progress during the structured therapy sessions. The patient had questionable carry-over outside of the therapy settings, putting the patient at risk for decline. The patient had exhibited moderate to severe memory and processing deficits affecting his problem solving. (Cl.Ex.1, P. 93-108)

It has been noted that the claimant sent an email on Tuesday, May 2, objecting to the respondent calling Teddy Townsend as a witness, contending that Mr. Townsend's name was not provided earlier and timely in the discover process. (Cl. Ex. 3, P. 1)

The respondent also submitted multiple medical records. The claimant presented to Tonya C. Roberts, APRN, on November 19, 2015, with the chief complaint being a right eye injury after the claimant had injured his eye after hitting the edge of a pallet. It appeared that he was diagnosed with pink eye disease of the right eye. (Resp. Ex. 1, P. 1-2)

The respondents also provided reports from Reaper Physical Therapy from November 19, 2015, up through January 19, 2016. (Resp. Ex. 1, P 3-19) In addition, the respondents provided a report from the Arkansas Specialty MRI Center dated July 10, 2017, of an MRI of the cervical spine. The report provided that there was disc degeneration with mild disc bulges at C5-6 and C6-7 with moderate bilateral foraminal stenosis at C5-6 and C6-7. (Resp. Ex. 1, P. 20) The respondents also provided a letter from the employer that the claim was accepted as compensable. (Resp. Ex. 2, P. 2) Finally, it was noted that the respondents listed Teddy Townsend as a witness by an email dated may 2, 2022, which was seven days prior to the hearing. (Resp. Ex. 3, P 1)

### **DISCUSSION AND ADJUDICATION OF ISSUES**

The claimant objected to the testimony of Teddy Townsend who was listed as a witness seven (7) days prior to the hearing. It is noted that the claimant had filed an amended response to the Prehearing Questionnaire, with the claimant's counsel believing it was filed on May 1, 2021, and which has been made part of the record. Mr. Townsend's testimony helped clarify the number of miles that the claimant had driven after returning to work in 2018 and 2019, and the testimony helped to clarify the work of the claimant and the applicable payroll records. It is well known that the Commission is given broad discretion in the admission of evidence and shall use a liberal interpretation in regard to the admission of evidence, conducting the hearing in a manner as will best ascertain the rights of the parties. Ark. Code Ann. §11-9-705(a). Consequently, the testimony of Mr. Townsend was admitted.

The claimant's injuries to his right hip and neck on August 21, 2015, when he fell from his truck while attempting to remove an antenna, were accepted by the respondents as compensable, and the claimant received medical treatment which consisted of multiple visits to the doctor, significant physical therapy, and surgery to his neck. In addition, he received an eleven percent (11%) disability rating to the body as a whole due to the accepted compensable neck injury which had been paid in full at the time of the hearing.

The claimant also contends he suffered a head injury and an injury to his back at the time of the accident which should be found to be compensable and he is entitled to reasonable and necessary medical for these injuries, in addition to PPD in regard to his back injury from August 21, 2015, to a date to be determined. The claimant also contends he is entitled to permanent and total disability or, in the alternative, wage-loss along with attorney fees. The respondents contend that claimant's problems related to his head and

back are not work-related and compensable and there are no objective findings in regard to these claims.

The claimant was born on July 11, 1948, and was driving a truck for the respondent when he attempted to remove an antenna from the truck on August 21, 2015, fell in the process, and was taken to Dr. Warnock on the day of the accident. The medical report provided the claimant's ear had an open wound which was stitched up. The claimant returned to Dr. Warnock on August 22, 2015, and the report mentioned a bruise over the right deltoid, good range of motion of the hip and shoulder, no bruise over the buttock, and additionally mentioned a head injury. The claimant then returned to Dr. Warnock on August 25, 2015, and a mental status change was noted along with numbness of the right hip. A CT scan of the brain was ordered which provided a negative scan of the brain and maxillary sinusitis. The claimant then returned to Dr. Warnock on September 11, 2015, and the report provided that the mental status had resolved. Claimant received physical therapy and Dr. Warnock diagnosed him with cervicalgia with a limited range of motion on February 2, 2016. The claimant stated that he was still suffering from headaches and pain in turning his head to the left.

The claimant was referred to Dr. Seale on March 7, 2016, who assessed degenerative disc disease at the C5-6 and severe degenerative disc disease at L5-S1. On May 9, 2016, the claimant received an MRI of the spine which confirmed the degenerative disc disease. Dr. Seale issued an impairment rating of zero percent (0%) opining that there were no objective findings of injury and the problems were pre-existing. The claimant returned to Dr. Seale on February 13, 2016, and the report provided the claimant had a full range of motion without pain or tenderness. The claimant continued



to have issues and on July 31, 2017, the claimant received an epidural steroid shot by Dr. Walker for cervical radiculopathy, and the report again provided that the problem was due to disc degeneration at the C5-7.

Dr. Seale issued an opinion on October 18, 2017, that was clarified on December 12, 2017, that the severe neck pain was from a work-related injury and, “therefore it is within a certain degree of medical certainty that at least 51% of the patient’s symptoms are directly related to the work injury.” Dr. Seale performed an anterior cervical fusion at the C5, C6, and C7 levels with a post operative diagnosis of degenerative disc disease and stenosis at the C5-6 and C6-7 levels. On July 11, 2018, Dr. Seale applied an eleven percent (11%) impairment rating to the neck injury based upon the cervical fusion, and stated the claimant could return to work.

The claimant returned to work and drove approximately 55,000 plus miles in 2018 and 77,975 miles in 2019, after passing two (2) DOT physicals. The claimant contended he still suffered from back pain and memory issues and a Neuropsych consult was then performed by Dr. Johnson, PHD, on March 12, 2020, when the claimant was seventy-one (71) years of age, and who found that the claimant suffered from severe short-term memory deficits and was one hundred percent (100%) disabled at the time with no work recommended.

An independent medical exam was performed by Dr. Barry Baskin on May 27, 2021. The exam provided that the claimant’s chief complaint was neck pain, neck stiffness, right ear pain, headaches, poor balance, low back pain, and bilateral hip pain, with severe memory deficits. The opinion referred to Dr. Seale’s findings that although the claimant had some pre-existing issues in regard to his cervical spine, that fifty-one

percent (51%) of the claimant's neck problems were related to the work injury. Dr. Baskin also opined that claimant's cognitive decline was more difficult to relate to the accident, due to the interval of time between the accident and the time of his exam, the lack of an MRI of the brain, and the claimant's age. He also interpreted Dr. Johnson's report to find based upon the claimant's history, that claimant's cognitive issues were not related to the work-related injury.

In regard to the issues of compensability of the claimed back and head injuries, the claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to compensation benefits for these injuries under the Arkansas Workers' Compensation Law. In determining whether the claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704. *Wade v. Mr. Cavanaugh's*, 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Under workers' compensation law in Arkansas, a compensable injury must be established by medical evidence supported by objective findings and medical opinions addressing compensability must be stated within a degree of medical certainty. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Liaromatis v. Baxter County Regional Hospital*, 95 Ark. App. 296, 236 S.W.3d 524 (2006). More specifically, to prove a compensable injury, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or

external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16) establishing the injury and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

An injury for which the claimant seeks benefits must be established by medical evidence supported by objective findings which are findings that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102 (16). It is also important to note that the claimant's testimony is never considered uncontroverted. *Lambert v. Gerber Products Co.* 14 Ark. App. 88, 684 S.W.2d 842 (1985).

However, under Arkansas Workers' Compensation law, it is also clear that an employer takes the employee as it finds him and employment circumstances that aggravate preexisting conditions are compensable. *Heritage Baptist Temple v. Robinson*, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

Further, a claimant is not required in every case to establish the casual connection between a work-related incident and an injury with an expert medical opinion. *See, Walmart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). Arkansas courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable

explanation for the injury. *Hail v. Pitman Construction Co.* 235 Ark. 104, 357 A.W.2d 263 (1962)

A compensable injury is one that was the result of an accident that arose in the course of his employment and that it grew out of or resulted from the employment. See, *Moore v. Darling Store Fixtures*, 22 Ar. App 21, 732 S.W.2d 496 (1987) In regard to the claimed back injury, the medical records clearly provide that the claimant suffered from severe degenerative disc disease at L5-S1. Dr. Wornock, the claimant's initial treating physician never opined that the claimant's back problems were work-related. Dr. Seale, who could be considered the primary treating physician, opined that the neck or cervical problems were at least fifty-one (51%) related to the work injury, but never made such a finding in regard to the remainder of the back even after treating the claimant for an extended period of time and performing surgery on the claimant's neck. The claimant returned to the same job for two (2) years. Based upon the available evidence in the case at bar, there is no alternative but to find that the claimant has failed to satisfy the burden of proof to show that his back claim is compensable under the Arkansas Workers' Compensation Act and that consequently, the question of medical and permanent partial disability as well as attorney fees in regard to the back are moot.

In regard to the claim of a head injury, the claimant was born on July 11, 1948, and both Dr. Johnson and Dr. Baskin made no finding in regard to the claimant's memory issues being related to the work injury of August 21, 2015. For that matter, no treating physician opined that the memory issue was related to the work injury. The claimant was injured on August 21, 2015, and both Dr. Baskin and Dr. Johnson inferred that it would be difficult to make a finding of a connection between the memory issue and the accident

due to the passage of time of approximately six (6) years, the lack of an MRI of the brain, and the claimant's age. Consequently, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof that his head injury is compensable under the Arkansas Workers' Compensation Act, and that consequently all other issues relating to the head injury are *moot*.

In regard to the issue of permanent and total disability or, in the alternative, wage-loss, permanent total disability means the inability, because of a 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 proving the inability to earn any meaningful wages is on the employee. Ark. Code Ann. § 11-9-519(e)(2). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). Here, the claimant, after passing two (2) DOT physicals, returned to the same occupation in 2018 and 2019, again driving a truck long-distance. The evidence provides that sufficient memory issues later developed and that he was found to be one hundred percent (100%) disabled due to the fact it was no longer safe for him to drive. There are no evidentiary findings that the memory issues were related to the accident on August 21, 2015. The issue was discussed in the reports of Dr. Johnson and Dr. Basin. Any such finding of permanent total disability would be based upon speculation. Consequently, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof that the claim for permanent and total disability is compensable under the Arkansas Workers' Compensation Act.

In the alternative, the claimant contends that he is entitled to wage-loss disability. The extent of disability is a question of fact for the Commission. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in accessing wage-loss include the claimant's age, education, post injury income, work experience, medical evidence, and other matters that may reasonably be expected to affect the workers' future earning power such as motivation, post injury income, *bona fide* job offers, credibility or voluntary termination. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Hope School District v. Charles Wilson*, 2011 Ark. App. 219, 382 S.W.3d 782 (2011). The award of wage-loss is not a mathematical formula, but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements. *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W.3d 908 (2008)

Pursuant to Ark. Code Ann. §11-9-522(b)(1), when a claimant has an impairment rating to the body as a whole, the Commission has the authority to increase the disability rating based upon wage-loss factors. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App 232, 58 S.W.3d 848 (2001). Objective and measurable physical findings which are necessary to support a determination of "physical impairment" or anatomical disability are not necessary to support a determination of wage-loss. *Arkansas Methodist v. Adams*, 43 Ark. App. 1, 858 S.W.2d (1993). To be entitled to any wage-loss disability benefit in excess of a permanent impairment rating, a claimant must first prove that he or she sustained a permanent physical impairment as a result of a

compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W. 3d 882 (2000).

Here the claimant suffered a compensable neck injury and was awarded an eleven percent (11%) rating to the body as a whole. The claimant was nearly sixty-seven (67) years old at the time of the work-related accident and approximately seventy-five (75) years old at the time of the hearing. After treatment for the neck injury, the claimant returned to work for another two (2) years after passing two (2) DOT physicals and driving in excess of 55,000 miles each year. The claimant was evaluated in regard to his memory issues after driving for two (2) years by Dr. Johnson and also by Dr. Baskin. Dr. Johnson found that the claimant was one hundred percent (100%) disabled due to severe short-term memory deficits. Both Dr. Johnson and Dr. Basking, who performed an IME, felt that there were multiple factors that could have caused the memory loss and never opined that the cause was due to the claimant's compensable injury six (6) years prior. Consequently, there is no alternative but to find that the claimant's proof has failed to show that the compensable injury was in fact the cause of the memory loss and consequently the claimant has failed to satisfy that he is entitled to wage-loss.

After weighing the evidence impartially, without giving the benefit of the doubt to either party, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof that the claim for his back and head injury are compensable and consequently, the claim for PPD in regard to the back injury is *moot* as well as the question of medical and attorney fees for both injures. Additionally, the claimant has failed to satisfy the required burden of proof for permanent and total disability and also

wage-loss, and consequently attorney fees. The respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

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JAMES D. KENNEDY  
Administrative Law Judge