

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM № H304408**

**CHARLES ANDERSON, EMPLOYEE**

**CLAIMANT**

**vs.**

**WHITE HALL SCHOOL DISTRICT,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**ARKANSAS SCHOOL BOARDS ASSOC., TPA**

**RESPONDENT**

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**OPINION & ORDER FILED 7 FEBRUARY 2025**

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This claim was heard before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe on 14 November 2024 in Pine Bluff, Arkansas.

The claimant was represented by the Wren Law Firm, Mr. Daniel E. Wren.

The respondents were represented by Worley, Wood & Parrish, Ms. Melissa Wood.

**STATEMENT OF THE CASE**

The parties participated in a prehearing conference on 27 August 2024. A Prehearing Order was entered the same day. On the day of the hearing, that Order was entered into the record without objection as Commission's Exhibit № 1. As outlined in the Prehearing Order, the parties agreed to the following:

**STIPULATIONS**

1. The AWCC has jurisdiction over this claim.
2. The self-insured employer/employee/TPA relationship existed at all relevant times, including 3 April 2023, when the claimant suffered an accepted compensable injury to his back.
3. At the time relevant to this matter, the claimant was earning an average weekly wage of \$820.20 per week, which would entitle him to compensation rates of \$547 and \$410 per week for Temporary Total Disability (TTD) and Permanent Partial Disability (PPD), respectively.

4. The claimant has been assigned a permanent disability rating of 7% to the body as a whole.

### ISSUES

1. Whether the claimant is entitled to permanent and total disability benefits or, in the alternative, wage loss disability benefits.<sup>1</sup>
2. Whether the claimant is entitled to an attorney's fee.

All other issues are reserved.

### CONTENTIONS

The claimant contended that he "is not able to return to his current employment and therefore is entitled to wage loss."

The respondents contended that "all appropriate benefits have been and are continuing to be paid with regard to this matter."

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the record as a whole, including the evidence summarized below, and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The stipulations as set forth above are accepted.
3. The claimant has proven by a preponderance of the evidence that he is entitled to permanent and total disability benefits.
4. The claimant has proven by a preponderance of the evidence that he is entitled to an attorney's fee under A.C.A. § 11-9-715 on the indemnity benefits awarded in this Opinion.

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<sup>1</sup> The Prehearing Order indicated that the claimant intended to seek only wage loss disability benefits at the hearing. Before going on the record, and then again once on the record, Claimant's counsel stated that between the entry of the Prehearing Order and the hearing, the claimant's circumstances had changed. He notified the respondents that he intended to seek permanent and total disability benefits at the hearing and that wage loss benefits would be sought in the alternative. The respondents did not object to that amendment of the issues.

SUMMARY OF THE EVIDENCE

The claimant and Cecilia Brunson, a vocational consultant called by the respondents, testified at the hearing.

The record consists of the hearing transcript and the following exhibits: Commission’s Exhibit № 1 (the Prehearing Order); Claimant’s Exhibit № 1 (three index pages and 43 pages of medical records); Respondents’ Exhibit № 1 (an index page and three pages of medical records); and Respondents’ Exhibit № 2 (an index page and 14 pages of non-medical records, including Cecilia Brunson’s resume’ and reports that she authored).

TESTIMONY

*Claimant Charles Anderson*

The claimant is fifty-eight years old. He has a high school diploma, a drywall certificate from 1996, and general knowledge of electrical, plumbing, HVAC, painting, and roofing work. He testified that he worked for the respondent-employer for about six months as a maintenance man. His duties included maintaining the school district’s buildings and structures, with regard to “electrical, plumbing, painting, drywall, HVAC... whatever came up.”

On 3 April 2023, the claimant injured his back while leaning into the rear of a van to lift a box of ceiling tiles. He has been unable to work since. The respondents accepted his back injury claim as compensable and began providing benefits.

The claimant received treatment with Trent Tappan, PA-C, at OrthoArkansas and was eventually diagnosed with a herniated disc. His care included some injections, which he said provided some temporary relief. Surgical options were discussed, but the claimant was reluctant to undergo any operation based on his understanding of friends and family with back problems that did not have good post-surgical outcomes. According to the clinic notes, Mr. Tappan agreed with his decision not to attempt corrective surgery.

The claimant eventually underwent a Functional Capacity Evaluation (FCE). He testified that he did not tolerate the physical exertion of the testing well. Unrelated to his back injury, the claimant underwent treatment for cancer in his stomach around the same time. Part of that treatment included medication for pain. His primary cancer treatments concluded on 27 August 2024; but he testified that he continues to receive treatment every two months to reduce the risk of recurrence. He attributed some ongoing fatigue to his cancer treatments.

The claimant's cancer doctor ordered a rollator, which he still uses on occasion. He appeared at the hearing with a cane, which he uses on a daily basis. The claimant testified that his back injury causes constant pain. On a scale of zero to ten, his pain can go up towards a ten. He is most comfortable when laying down and must lay down frequently throughout the day to reduce his pain. He described the baseline pain he experiences when even laying down as a six out of ten. He also described experiencing some numbness and weakness in his legs that he relates to his back injury. Sudden weakness in his legs has caused him to fall on occasion.

According to the claimant, he needs some help getting dressed in the mornings before moving to a recliner. He denies being able to do most household chores or mow his yard. After about 30 minutes of sitting in his recliner, he becomes uncomfortable and needs to move around or change positions. He is able to find relief at times sitting in a chair at his kitchen table, but he often needs to lay down in bed due to pain and discomfort. According to his testimony, the claimant often spends about half of the day lying in bed. He has recently been unable to perform his ordinary duties as a deacon in his church because he cannot sit and move about the church during the services, which usually last two-and-a-half hours or so. The claimant testified that he began treating with a pain management doctor the day before the hearing.

Before he began working for the respondent-employer, the claimant worked as a maintenance supervisor at Saracen Casino. In that role he managed the work assignments of a crew of twelve workers and provided as-needed assistance in their assigned tasks throughout the day. The claimant explained that he used a computer-based workflow management system to direct assignments to his employees. He denied, however, that he is generally knowledgeable of computers. Before leaving Saracen, he also worked as a food and beverage supervisor, managing the stocking and service at some of the bar areas. The claimant explained that his general electrical knowledge includes wiring sockets and replacing light fixtures, while his plumbing experience includes working under sinks, drain cleanouts, and the like. His other jobs include working as a maintenance supervisor at a drug distribution company and working as a self-employed handy man.

The claimant stated that he has worked in physical maintenance jobs for his entire career; but he is not licensed in any of the manual labor fields in which he has worked. He also testified that he has never worked in an office or in a sedentary job setting. He would like to be working. The claimant became visibly upset when trying to explain how being unable to return to work and being unable to earn a living since his injury have impacted his life. Not being able to work has worn on his mental state and caused tension in his marriage.

At some point between his deposition and the hearing, the claimant began receiving Social Security Disability benefits. On his application for those benefits, he listed his back injury and cancer as the reasons for his disability. He denied any other sources of income.

*Respondent's Witness Cecilia Brunson*

Ms. Brunson testified that she is a vocational consultant who, among other things, compiles job reports and labor market surveys. She also assists injured workers with

getting back into the workforce. The respondents offered her as a vocational expert, and the claimant agreed to the same.

The claimant and Ms. Brunson met over the telephone to discuss his injury, work history, education, and his treatment plan, along with his daily living activities. She subsequently authored two reports related to her opinion on his ability to return to work and potentially suitable job opportunities. Ms. Brunson said that jobs in the sedentary classification would require sitting for six out of eight hours per workday. She believed that the claimant could find work in “sedentary jobs that involve a high school diploma, little or no work experience, with on-the-job training and working with the public.” [TR at 52.] She testified that his being able to speak and get along well with others were among the transferable skills he carried from his previous career. Ms. Brunson also felt like the claimant had basic computer skills. She acknowledged, however, that the claimant’s age would likely make for “significant” vocational adjustments in learning new skills.

Ms. Brunson offered to help the claimant with building a resume’ and interviewing skills, but he had not taken her up on that offer at the time of the hearing. She explained that she assumed there was no need to follow up with him because she knew that the claim was progressing towards a hearing.

On cross-examination Ms. Brunson said that they did not discuss whether the claimant could actually sit for six hours out of the day.

Q: And if he can’t sit six hours out of a day, that would eliminate these sedentary jobs that you have listed, is that correct?

A: That’s correct.

Q: Okay. And if he had to get up, move around, and take frequent unscheduled breaks because of his pain, would that eliminate these jobs and any other jobs in the national economy?

A: Okay. So let me add this, an accommodation—if an accommodation was approved, if he needed to sit and stand, then, it would be up to the employer. It’s possible that they would put those in place.

Q: If he got an accommodation?

A: Absolutely, if he got an accommodation.

Q: But without an accommodation, he couldn't work any jobs in the national economy, if he had to take frequent and unscheduled breaks due to pain?

A: That is correct.

Q: Okay. And can attendance affect a person's ability to have—maintain a job?

A: Yes.

Q: In your deposition, I asked if a person was to miss more than one day per month, more than 12 days per year, do you know of any jobs Mr. Anderson—if her were to miss 12 days of work per year, because of his pain, are there any jobs in the national economy that he could do?

A: Would this be... unscheduled leave?

Q: This would be calling in sick.

A: Okay.

Q: More than once a month. Are there any jobs in the national economy he could take?

A: No.

[TR at 57.]

Q: If he needs to sit or recline—or recline throughout the day, are there any jobs in the national economy he can have unless an employer makes a special accommodation?

...

A: No jobs.

[TR at 64.]

Ms. Brunson testified that she had not spoken with the claimant since their telephone meeting, but at the time they spoke he was taking hydrocodone his oncologist prescribed to help with his pain. She was aware that he was being referred to a pain management doctor for chronic pain care and had not yet had that appointment at the time of their call. She testified that some jobs could allow the use of narcotic pain medication while working. Ms. Brunson further testified that she recalled the claimant had just ended his chemotherapy when they spoke and that he did not feel ready to go back to work at that time.

*Further Testimony from the Claimant*

The claimant disagreed with Ms. Brunson's understanding of his computer competency and explained that his familiarity with computers is mostly limited to the

workflow functions he was taught to use for his job at Saracen. That involved opening a screen that listed the day's work needs, assigning employees to the tasks, reviewing completed work, and printing off a daily report for his supervisor. He denied more general familiarity with using computers and stated that his grandchildren had made unsuccessful attempts to teach him to learn more about computers so he could navigate the internet and entertain himself throughout the day.

The claimant explained that he was not ready to consider new employment when he spoke with Ms. Brunson.

A: Because at that time, I also had—kind of was finishing up on my cancer, plus I had my back issues; so I—at that meeting, I made that statement, because [I was], actually, sick and I wouldn't want to try to get a job and know I wouldn't be able to perform that job. I mean, even if I said that I can do this or my qualifications, they want to hire me, you know, but as far as doing—actually, doing the job and I know that state I'm in, because I had cancer... and finishing up, then, I still go this back problem to deal with.

[TR at 80.]

...

Q: Do you feel like you have barriers to keep you from trying to find a job in that sedentary class now?

A: Yes, because I can't do regular household work.

Q: Right.

A: You know, I can't sit too long, stand too long. Just like now, I have to do certain movements just to get some relief, but it's not completely relief; so I really wouldn't want to waste nobody else's time to try to go and know I can't, the problems I'm having at home on a day-to-day basis.

[TR at 81.]

The claimant disagreed with the FCE qualifying him for sedentary positions and with Mr. Tappan's return-to-work release. He also explained that he was only benefitting from temporary relief from injection therapy at the time of his release without any restrictions and last visit with Mr. Tappan. In the absence of effective treatment options for his back injury, his overall condition has deteriorated in the time since his release.



*Medical and Documentary Evidence*

The claimant first saw Mr. Tappan at OrthoArkansas on 12 July 2023. The note from that visit provides:

ASSESSMENT/PLAN

I have reviewed the X-rays of the lumbar spine, which were mild degenerative changes.

I had a long visit [with the claimant]. This poor man is miserable. He has had a lot of severe pain in his back and leg for 3 months. He has not been able to work because of the degree of pain. He has difficulty ambulating in the exam room. I told him I would give him some more pain medication to have on hand. I prescribed to keep him off work for now until he returns. I would recommend an MRI of his lumbar spine for further evaluation. Hopefully we can get this done sooner rather than later. I suspect he has a disc herniation and if he does I also suspect he is going to need this treated likely with surgery based on his presentation. Hopefully we get this done soon for him to get the MRI so that we can get him on the path to recovery. He says that he has not been able to work in 3 months [and cannot pay his bills].

[Cl. Ex. № 1 (emphasis added unless noted otherwise).]

The findings from a 14 July 2023 MRI scan included:

L1-L2: Broad disc protrusion with bilateral subarticular and left greater than right foraminal component. Effacement of the exiting left L1 nerve root from foraminal disc protrusion. Likely effacement of the traversing left L2 nerve root from subarticular disc protrusion. No spinal canal stenosis. Severe left neural foraminal stenosis. Mild right neural foraminal stenosis.

L2-L3: Mild broad disc protrusion with bilateral subarticular and left greater than right foraminal components. Mild bilateral facet osteoarthritis and ligamentum flavum thickening. No spinal canal stenosis. Moderate left and right neural foraminal stenosis.

IMPRESSION

1. At L1-L2, there is a broad disc protrusion with bilateral subarticular and left greater than right foraminal components. Effacement of the exiting left L1 nerve root from foraminal disc protrusion. Likely effacement of the traversing left L2 nerve root from subarticular disc protrusion. Recommend correlation for radiculopathy.

2. At L2-L3, there is moderate left and mild right neural foraminal stenosis.

3. Diffusely heterogeneous marrow signal, nonspecific. This can be seen with anemia or marrow conversion/myeloproliferative disorders. Clinical correlation is recommended.

On 14 July 2023, Mr. Tappan noted a herniation of the nucleus pulposus and the following:

ASSESSMENT/PLAN

I reviewed the X-rays of the lumbar spine which reveal degenerative changes. I reviewed the MRI which reveals disc herniation at L1 to the left in the foramen with L1 nerve root impingement.

I suspect Mr. Anderson is symptomatic from a disc herniation at L1-2 on the left. He has a bit of L1 distribution pain in his left groin and thigh and down his anterior thigh as well. Unfortunately, I do not think this is going to be an easy solution. I would say with a reasonable degree of medical certainty that this disc herniation was rendered symptomatic from the injury involved at work. However, unfortunately it is in the foramen, so I told him I do not think surgery would be very straightforward. I suspect he [would] need a complete facetectomy to decompress the nerve root and interbody posterior fusion to address the instability from the facetectomy. I also told him I think that would be a bit complicated at the level L1-2 right below the thoracolumbar junction. We discussed more specific nonoperative treatment. I would recommend a transforaminal epidural steroid injection at L1-2 on the left. I am hopeful maybe this will calm down his inflammatory symptoms. I am also going to release him to light sedentary office work. They may not be able to accommodate this. But I would like for him to be able to get out of the house and at least return to some kind of employment for the time being. We will get this set up and I will see him back when the injection is complete.

The claimant then returned to see Mr. Tappan on 18 August 2023.

ASSESSMENT/PLAN

I had a very long visit with Mr. Anderson today about his symptoms and images. I think he remains very symptomatic [from] the L1-2 level of his lumbar spine. We had a long conversation about further treatment options. [They discussed (1) no more treatment, (2) trying more injections, or (3) attempting a fusion surgery.] He really does not want to have surgery. He wants to try to avoid a fusion, and I think that is understandable. However, he is also very symptomatic. He is doubtful that he is going to be able to return back to his regular occupation despite the treatment offered him and I think that is actually somewhat understandable. He wants to consider disability, and I told him that is up to him and his option. I do not want to put him through aggressive treatment or surgery if it's not going to change the overall outcome of his quality of life. And especially if he just does not

want to go that route. He wants to try another injection, which I think is fine. As for now, I am going to keep him on his current work restrictions. We will set up a second injection at L1-2 on the left. I told him I would plan to see him back after the injection and placement at maximum improvement and release him at that time.

The claimant returned to OrthoArkansas and Mr. Tappan again on 2 November 2023. The note from that visit provides:

ASSESSMENT/PLAN

Mr. Anderson returns after getting another transforaminal epidural steroid injection at L1-2 on the left. This did help him quite a bit. He is doing better today. He still has some pain, but he is improved quite a bit I believe from where he began although he is still symptomatic. We had a long visit about further options. I think he is being rendered symptomatic from this disc herniation at L1-2 on the left. This was likely the result of this work-related injury. We discussed some further treatment options. I told Mr. Anderson that I think if he had surgery, he would likely need a facetectomy and a fusion. He really does not want to have surgery, and I would agree with that. I do not think it would be the overall best care homerun for him. It would be an option [...] but I agree with him right now. I [would leave] this alone. He is improving and I think this will continue to improve. I do not think there is any need to repeat any more injections at this point. I plan to just release him and to place him at maximal medical improvement and release him to work without restrictions. But I will calculate an impairment rating based on the disc herniation and a letter to follow. I will just see him back as needed.

Mr. Tappan authored a letter on 3 November 2023 that assigned a seven percent (7%) impairment of the whole person based on the disc herniation at L1-2.

The claimant underwent an FCE on 19 April 2024. His effort was evaluated as reliable, as he passed 46 of 46 consistency measures. He presented for the testing with a cane and utilized his cane throughout the testing. Although he was prescribed pain medication at the time of his evaluation, he advised the evaluator that he had not taken the medication on the day of his testing because it made him drowsy. The report indicates the claimant's expressed inability to do housework or yard work and his difficulty with standing, lifting, and bending, among other things. He was assessed as being able to work in a sedentary job classification.

The vocational evaluation and job market reports compiled by Ms. Brunson were included in Respondents' Exhibit № 2. Her evaluation and report include the following:

#### EMPLOYMENT HISTORY

Building Maintenance Repairer (DOT #899.381-010 – a skilled occupation classified in the medium category of physical work demands) [...] He reported his job duties included reviewing work orders, performing electrical repairs to buildings and equipment, roofing repairs, landscaping, plumbing repairs, carpentry, ceiling repairs, painting, and some HVAC repairs.

Mr. Anderson reported working as a Building Maintenance Repairer at Jefferson Regional Medical Center from 1990 to 1991 and at the Excelsior Hotel from 1997 to 1998. He reported the job duties were the same as stated above.

...

Maintenance Supervisor (DOT #891.137.010 – a skilled occupation classified in the light category of physical work demands) Mr. Anderson reported he was employed at Saracen Casino from August 2019 to October 2022. He reported his job duties included reviewing work orders, assigning work orders to employees, supervising up to ten employees, input work orders into the computer system, input status updates of work orders, assisting employees with the completion of work orders involving some HVAC, plumbing, landscaping, and other maintenance concerns that would arise.

Mr. Anderson reported working as a Maintenance Supervisor at Pine Bluff Nursing Home, Arkansas Convalescent, and Davis Nursing Home at various times between 1980 and 2020.

#### ANALYSIS, GOALS, AND RECOMMENDATIONS

Based on Mr. Anderson's transferable skills, functional ability, records reviewed of his injury and past work history, he is capable of working within the sedentary category of physical work demands. Recommendations for vocational rehabilitation services will include drafting a resume', completing a follow-up meeting to provide interview skills training and preparation, assist him with any online job application for which he needs assistance, and begin completing regular job market research in his local area. The job market research will identify current job openings for which he can apply with the eventual goal of returning to the workforce to a new occupation.

The job market research reports of 25 August 2024 and 18 September 2024 included, among some others, job openings for administrative assistants, customer service representatives, administrative specialists, and receptionists.

## ADJUDICATION

As noted above, the claimant seeks a finding that he has been rendered permanently and totally disabled as a result of his compensable back injury. In the alternative, he seeks an award of wage loss disability benefits.

The stipulated facts are outlined above and accepted. It is settled that the Commission, with the benefit of being in the presence of a witness and observing their demeanor, determines a witness' credibility and the appropriate weight to accord their statements. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999). A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

As an initial matter, I find the claimant to be a very credible witness. He presented as sincere in testifying about his physical limitations and about the difficulty he experiences getting through most days.

A. THE CLAIMANT IS ENTITLED TO PERMANENT AND TOTAL DISABILITY BENEFITS.

It is not disputed that the respondents have accepted the claimant's back injury as compensable and have already paid some associated benefits, including permanent partial disability benefits on his seven percent (7%) rating to the whole person. The claimant now seeks permanent and total disability benefits for that injury. Under Arkansas law,

“permanent total disability” means an “inability, because of a compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.”

A.C.A. § 11-9-519(e)(1). The burden of proof is on the employee to prove his inability to earn any meaningful wages in the same or other employment. *Id.* § 11-9-519(e)(2). Permanent total disability must be determined in accordance with the facts. *Id.* § 11-9-519(c).

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Milton v. K-Tops Plastic Mfg. Co.*, 2012 Ark. App. 175, 392 S.W.3d 364. Those factors include the claimant’s age, education, work experience, and other matters reasonably expected to affect his future earning capacity. A.C.A. § 11-9-522(b)(1). A claimant’s motivation to return to work may also be considered. *Milton, supra*.

The law provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

A.C.A. § 11-9-102(4)(F)(ii). A “major cause” is more than fifty percent (50%) of the cause and must be established by a preponderance of the evidence. A.C.A. § 11-9-102(14).

Here, the claimant is a fifty-eight-year-old man with a high school diploma who has been unable to return to work since his 3 April 2023 injury. He has labored most of his life in physical maintenance jobs, but he is not actually licensed in any of the trades for which he has basic working knowledge. He has some supervisory experience, but those roles included working alongside the tradesmen and maintenance crews he was tasked with

supervising. His current physical limitations render him unable to perform basic household chores, let alone any number of tasks expected of someone working in physical building maintenance.

Per Tappan, the MRI revealed the claimant to have suffered a disc herniation at L1-2 with nerve impingement. The medical records clearly relate the claimant's condition to his accepted compensable back injury. I credit Mr. Tappan's opinion on the nature and origin of the claimant's symptoms. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

Mr. Tappan noted that the claimant was rendered miserable by his symptoms. He also agreed with both the claimant's concern about his ability to return to work and the claimant's reluctance to attempt surgical repair, as the benefits were not likely to outweigh the risks ("I do not want to put him through aggressive treatment or surgery if it's not going to change the overall outcome of his quality of life"). While the claimant's injury is significant, he is not a good candidate for surgery. Mr. Tappan hoped that the claimant's condition might improve with some injection therapy; but those benefits did not materialize. The claimant's initial relief from injection therapies was only temporary; and he is now seeking ongoing pain management care for his chronic back pain. The claimant's release with a seven percent (7%) whole-body impairment rating was consistent with his disc herniation diagnosis; but his ability to function with that condition is more profound than the numerical rating implies. That the claimant was released without physical *restrictions* belies that his injury and resultant condition has rendered him with significant physical *limitations*.

The breadth of the claimant's limitations is illustrated in the FCE report, which essentially found that while he could not work in any capacity that required moving about, lifting, bending, twisting, or carrying things (all required activities for one working in

building maintenance), he could possibly work from a mostly seated position. At the outset of the FCE, however, the claimant rated his pain while sitting for 30 minutes as “severe.” He also rated his ability to sit through a workday as being with “much difficulty.” While he was assessed as being able to sit at the “constant” level in his evaluation, the observational portions of the report frequently note that he was only sitting in order to take a break from the various tasks and activities being evaluated. His ability to sit continuously and work for any extended period of time does not appear to have been explicitly observed. The reliability of his effort in the testing (passing 46 out of 46 consistency measures) as judged by his evaluators, is not inconsistent with his reliability as a witness in this matter as judged by me.

The claimant testified that when he spoke with Ms. Brunson, towards the end of his cancer treatment, he did not feel well and was not yet in a position to return to working. He reported dealing with significant fatigue during his primary course of treatments. While his fatigue has mostly resolved since the completion of those treatments, his overall fitness to return to work has not improved. He continues to suffer from severe back pain (more so in the absence of any prescription pain medication since his cancer treatments ended) and struggles to find a comfortable position throughout the day, frequently adjusting how he is sitting or where he is sitting; but he most often must resort to lying down in order to seek relief from the constant pressure on his herniated disc. And even when lying down, he still rates his pain at a six out of ten. This is understandable given the nature and nerve involvement of his lumbar disc injury.

The claimant’s prospects for re-entering the workforce in a new career field are marginal at best. At nearly 60 years old with little education, profound mobility limitations, and bare computer competency, he is not likely to be able to transition into even a sedentary administrative assistant or receptionist role, similar to those presented in the job



market reports. He has never worked in an office and is unfamiliar, even, with what such work typically entails. His relatable skill deficits aside, the respondents' own vocational expert credibly testified that the claimant's inability to work from even a seated position for an extended period of time, his requiring frequent and unscheduled breaks, and his potential (if not likely) need for absences due to pain intolerance essentially render him not hireable even in sedentary jobs. She also acknowledged that his advanced age makes for a significant retraining barrier. At the time that they spoke, he knew that his cancer treatment was an additional barrier to beginning any new job. With those difficulties behind him, the claimant still faces an unmanageable barrier in the pain and immobility caused by his compensable back injury.

I find the claimant's preference for being able to return to work and earn a wage to be sincere. I also find, however, that the preponderance of the evidence shows that his compensable back injury has rendered him unable to do so and that his compensable back injury is the major cause of his disability. He has, therefore, established his entitlement to permanent and total disability benefits.

**B. THE CLAIMANT IS ENTITLED TO AN ATTORNEY'S FEE.**

The respondents have controverted the claimant's entitlement to the permanent and total disability benefits awarded herein. They are, therefore, liable for the allowable fees associated with this litigation. The claimant is entitled to an attorney's fee under A.C.A. § 11-9-715 on the indemnity benefits awarded in and consistent with this Opinion.

**CONCLUSION AND AWARD**

The claimant has proven his entitlement to permanent and total disability benefits as a result of his compensable back injury. The respondents are directed to provide benefits accordingly. All accrued amounts shall be paid in a lump sum without discount, and this

award shall earn interest at the legal rate until paid. A.C.A. 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

The claimant's attorney is entitled to a twenty-five percent (25%) fee on the benefits awarded herein. One-half (1/2) of the fee is to be paid by the claimant, and one-half (1/2) of the fee is to be paid by the respondents, consistent with A.C.A. §11-9-715. See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2012).

**IT IS SO ORDERED.**

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**JayO. Howe**  
**Administrative Law Judge**