

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E902151**

**TANYA L. BOYD, EMPLOYEE**

**CLAIMANT**

**BROOKSHIRE GROCERY COMPANY,  
SELF-INSURED EMPLOYER**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**OPINION FILED AUGUST 8, 2003**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 29, 2003, at El Dorado, Union County, Arkansas.

Claimant represented by the HONORABLE JAMES N. PRATT, JR., Attorney at Law, Camden, Arkansas.

Respondent No. 1 represented by the HONORABLE PAUL MILLER, Attorney at Law, Texarkana, Texas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted in this claim from which a prehearing order of September 3, 2002 was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as the Commission's Exhibit No. 1.

The testimony of Tanya Boyd Harper, the claimant, coupled with the deposition testimony

of Dr. Yeshwant Reddy, and Dr. Anthony E. Russell, along with medical reports, video cassettes, and other documents comprise the record in this claim.

### DISCUSSION

Tanya L. Boyd Harper, the claimant, with a date of birth of August 9, 1964, commenced her employment with respondent No. 1 in 1987/1988. The claimant is a 1982 graduate of Stephens High School and attended two years of college at Southern Arkansas University- El Dorado, 1983 and 1984.

Although the claimant worked part-time at Curt's Pharmacy, in Stephens, Arkansas during and after high school, she did not secure her first permanent job until the same was had with respondent No. 1 in either 1987 or 1988 when she commenced working in the bakery department of same. The claimant worked in the bakery department for a period of six months before being moved to the meat market department of respondent. The claimant worked in the meat department of respondent through February 9, 1999, when she sustained the injury which is the basis for the present claim.

In describing her duties in the meat department of respondent No. 1, the claimant's testimony reflects:

Wrapped the meat that they cut and then if the lunch meat guy didn't finish, I worked lunch meat and freezer and the seafood counter.

\* \* \*

When they cut the meat, they would cut the meat and put in on a pan and I'd have to pick the pan up, and then boxes of lunch meat, chicken boxes, ham boxes, and just all kinds of boxes of stuff that would come in. (T. 16)

The claimant estimated that the weight of the containers of meat that she lifted during the course of her employment with respondent could range from 5, 10, 25, up to 100 pounds. The claimant added that an occasional lifting up to 100 pounds during the course of her employment with respondent was unusual.

In testifying regarding the injuries that she had received in her employment with respondent No. 1 as well as medical treatment received relative to same and the dates that she returned to work, the claimant prepared a notebook which she utilized to help refresh her recollection. (T. 17-18) The testimony of the claimant reflects that in January 1991, she suffered her first injury in the employment of respondent when, while picking up a ham box she experienced a sudden pain in her back which went down into her left leg. After initially being seen by Dr. Carl Raymond Sanders relative to the January 1991 injury, the claimant was eventually referred to Dr. Edward Saer, a Little Rock orthopedic physician. On June 10, 1991, the claimant underwent surgery under the care of Dr. Saer at St. Vincent Medical Center, in Little Rock. Surgery was performed at the L5, S1 level by Dr. Saer. The claimant estimated that she was off work for three to four months following the surgery. Claimant returned to the employment of respondent on September 8, 1991. Further, claimant received a 10% rating as a result of the surgery by Dr. Saer and received permanent partial disability benefits to correspond with the rating.

When the claimant returned to the employment of respondent on September 8, 1991, she returned to the meat department of same. The claimant's testimony reflects that she continued to discharge her employment duties with respondent until she suffered a second injury at work on January 6, 1993. The claimant explained, with respect to the 1993 injury claimant offered:

I guess the other side ruptured and it broke into

pieces, too. (T. 21)

The claimant did not remember what she was doing at the time of the 1993 incident. The claimant returned to Dr. Saer for treatment relative to the 1993 complaints and underwent surgery under the care of same at the L5/S1 level. Following the second surgery, the claimant was assessed with a permanent physical impairment in the amount of 5% to the body as a whole, and the rating was paid by respondent No. 1.

The claimant returned to the employment of respondent No. 1 following her 1993 surgery, and resumed her employment duties in the meat market of same. On February 9, 1999, the claimant's testimony reflects that she suffered a third injury while discharging employment duties in the employment of respondent No. 1:

I was wrapping some meat and the – it's a big, tall rack and they slide the meat in trays on the rack and it was on the very bottom and I reached down to pull it out and wrap it and I felt a sudden pain again in my lower back. (T. 23)

The claimant noted that the tray of meat contained roasts which weighed two to three pounds each or a total approximately ten pounds. Further, the claimant added that she was sliding the tray of meat into the rack near the bottom.

In addition to the pain in her low back, the claimant also testified that she felt pain down her left leg during the February 9, 1999 incident. The claimant returned to Dr. Saer for treatment relative to the injury and on October 11, 1999, underwent surgery under the care of same. In describing the surgical procedure conducted on October 11, 1999, the claimant testified that Dr. Saer went in through her stomach to fuse a disc in her back. The claimant did not return to the employment of respondent subsequent to the October 11, 1999 surgery as she had done previously. Indeed, the

claimant has not worked since her February 9, 1999 injury.

The February 9, 1999 injury of the claimant was accepted as compensable by respondent No. 1, and claimant was paid temporary total disability benefits and medical benefits relative to same. The claimant continued to treat with Dr. Saer subsequent to the October 11, 1999 surgery until she was referred by him to Dr. Yeshwant Reddy, a pain management physician located in the same building as Dr. Saer.

The claimant's testimony reflects that she was initially seen by Dr. Yeshwant Reddy on February 24, 2000, pursuant to the referral of Dr. Saer, for treatment relative to the February 9, 1999 injury. The claimant's testimony reflects that she was prescribed physical therapy by Dr. Reddy and furnished prescriptions for pain medication. The testimony of claimant reflects that on September 26, 2000, she was seen by Dr. Reddy pursuant to a previous scheduled appointment. The claimant noted that she has seen Dr. Reddy on four occasions at the time of the September 26, 2000 visit. The claimant testified that following the September 26, 2000 visit to Dr. Reddy, she was released from the care of same and not given a return appointment. The claimant testified that Dr. Reddy indicated to her that he had done all that he could do for her. Further, the claimant testified that during the September 26, 2000 visit, Dr. Reddy told her that he had seen video tapes of her that indicated that she was picking things up and moving around without difficulty. Finally, the claimant's testimony reflects that Dr. Reddy provided her with an impairment rating of 10% to the body as a whole during the September 26, 2000 visit.

The claimant was not paid permanent partial disability benefits to correspond with the 10% impairment. Further, the claimant's testimony reflects that following the September 26, 2000 visit to Dr. Reddy, respondent No. 1 ceased the payment of temporary total disability benefits.

Specifically, claimant's testimony reflects that she received a November 10, 2000 letter from respondent No. 1 reflecting that all benefits were being stopped, that her employment was terminated because she had not been honest, and that fraud charges would be pursued against her. (T. 27-28)

The claimant testified that physically, at the time she received the November 10, 2000 letter from respondent No. 1, she was in more pain than she was when she started. As a consequence of the afore, the claimant sought and obtained treatment under the care of Dr. Anthony Russell, a North Little Rock neurosurgeon, for complaints or residuals of the February 9, 1999 injury. The claimant was initially seen by Dr. Russell on November 16, 2000 at which time a MRI was performed. On December 29, 2000, the claimant underwent surgery under the care of Dr. Russell at Baptist Health, North Little Rock. With respect to the December 9, 2000 procedure, the claimant testified:

He just fused it where it would take hold. . . . (T. 30)

The claimant's testimony reflects that she received relief from pain following the December 29, 2000 procedure under the care of Dr. Russell, particularly with respect to her abdomen area.

On April 23, 2002, the claimant underwent a second procedure under the care of Dr. Russell.

The claimant's testimony reflects, regarding her understanding of the April 23, 2002 procedure:

That the nerve was wrapped around my bone and he took the bone out to give the nerve relief, so the nerve wouldn't swell up. It was the size of my thumbs and it was supposed to be the size of a pencil. (T. 31)

The claimant explained that she received sudden relief from pain following the first surgical procedure under the care of Dr. Russell. The claimant added that while she received relief from her pain also following the second procedure, the pain was returning. The claimant has received a 16% impairment rating from Dr. Russell attributable to the February 9, 1999 injury and subsequent

surgeries.

The claimant's testimony reflects that she has not worked since February 9, 1999, because she is not physically capable of doing so. The claimant testified:

Well, it just – my back hurts and my leg hurts and I'm just not able to work. (T. 35)

Further, the claimant maintains that following the 1999 injury and surgeries, she was bothered every minute of every day until she got it fixed in 2000, under the care of Dr. Russell. The claimant's testimony reflects that she takes four different medications, three of which address her complaint of back pain, Darvocet, Flexeril and Bextra, all of which are prescribed by Dr. Russell. The fourth medication, Skelaxin, is prescribed by her family physician for depression, which the claimant attributes to the fact that she is not able to do what she previously did.

The claimant acknowledges that she has not sought employment since being released by either Dr. Reddy or Dr. Russell. On May 4, 2002, the claimant made application for Social Security disability. On September 6, 2002, the claimant learned that she had been approved for Social Security. The claimant receives a monthly check in the amount of \$907.00 in Social Security disability, benefits.

The claimant's testimony reflects that she attempts to perform housework on a daily basis, however, does not lift heavy objects. Further, the claimant maintains that when she over does her activity she lays down, and takes medication. The claimant, who was married on April 29, 2000, acknowledged that her activities were captured on videotape during surveillance reflecting her bending and picking up and lifting. The claimant testified with regard to the activities in relation to residuals of her injury:

Then I just pushed myself where now I just try to watch what I do and how I do it. (T. 36)

Likewise, the claimant acknowledged that she participated in camping activity with her family and riding on a boat on the lake during the camping outings.

The claimant acknowledged that she continued to have pain in her lower back and left lower extremity following the 1991 injury and surgery. In 1995 the claimant underwent another MRI pursuant to the direction of Dr. Saer. Further, the claimant acknowledged that in discussing the 1995 MRI with Dr. Saer, he disclosed that she had another herniated disc at the L5, S1 level. While the claimant did not undergo surgery following the 1995 MRI and diagnosed herniated disc at L5, S1 level, she did undergo some steroid injections, which she maintained did not improve her condition. The claimant also acknowledged that she continued to take medication for pain relative to her low back, hip, and left leg through 1998. Indeed, there is a January 25, 1999 correspondence from Dr. Saer contained in the record, attempting to clear up some confusion about some pain medication that the claimant had been prescribed which was refilled in December 1998 and was related to her workers' compensation injuries of 1991 and 1993.

The claimant's testimony reflects that in October 1999 Dr. Saer performed the fusion at L5, S1 level. The claimant testified regarding the procedure performed by Dr. Saer on October 11, 1999:

Right. I could tell the day after I had surgery that something was wrong. (T. 91)

The claimant explained the procedure performed by Dr. Russell at the fusion site:

He went in there and bolted down so it would fuse, and what he done relieved my groin and stomach pain and I was better.

\* \* \*

Right. He had to go in there and put two more rods and bolt it down to my tail bone, and stick another rod in there, or a bolt or whatever, to make it take a hold, you know. (T. 90)

In addition to the testimony of the claimant and medical reports, the record also reflects the deposition testimony of Dr. Yeshwant Reddy, which was obtained on October 15, 2001, and that of Dr. Anthony E. Russell, which was obtained on May 6, 2002. The claimant's activity was obtained on video surveillance by respondent and Dr. Reddy had an opportunity to review the videotape. Dr. Reddy authored correspondence regarding his observation of the claimant as reflected in the videotape. Further, Dr. Reddy addressed the afore during his October 15, 2001 deposition. (JX1) Dr. Reddy assessed the extent of the claimant's anatomical impairment as 10% to the body as a whole as of September 26, 2000. (Respondent No. 1, Exhibit No. 1, p. 50) Dr. Reddy noted during his deposition that his medical records reflect that on October 31, 2000, the claimant contacted his office and requested a prescription for pain medication, which was furnished. The afore represented the last contact that Dr. Reddy or his office had with the claimant. (JX1)

Dr. Anthony E. Russell, a North Little Rock neurosurgeon, testified that he initially had contact with the claimant on November 16, 2000. During the November 16, 2000 visit the claimant relayed a history of work-related injuries and treatment received relative to same. The claimant had undergone three surgical procedures under the care of Dr. Edward Saer at the time she was initially seen by Dr. Russell, to include two operative procedures in the form of decompression and discectomy, and the third being an anterior interbody fusion. Dr. Russell further testified regarding the claimant's complaint during the November 16, 2000 visit:

...She described what my notes indicate as a dead leg on the right – or a weak, numb leg with radiation into

the foot. She was also having left hip pain with radiation to the ankle and pain was quite severe and aggravated by positional changes.

\* \* \*

Yes. She had an absent right ankle reflect which is indicative of S-1 nerve root compression. Otherwise, I didn't find any major weakness, no atrophy. She did have well healed scars from the previous surgery. (CX2, p. 6)

At the time of his June 6, 2000 deposition, Dr. Russell testified that the claimant had not reached maximum medical improvement. The claimant had in fact undergone two surgical procedures while under his care with the last being April 23, 2002 nerve decompression. (CX2, p. 14-15)

The pertinent medical records relative to the claimant were provided to Dr. Jim J. Moore, a Little Rock neurosurgeon for review. Dr. Moore authored a report of July 22, 2001 setting forth his opinion relative to the December 29, 2000, surgical procedure performed by Dr. Russell. Dr. Moore set forth an opinion relative to the claimant's permanent impairment as a result of the procedures she had undergone as of the date of his July 22, 2001 review of the medical records. (Respondent No. 1, Exhibit No. 1, p. 55-56)

Finally, in a report dated February 12, 2003, Dr. Russell opined that the claimant had reached maximum medical improvement effective October 23, 2002. Further, Dr. Russell assessed the extent of the claimant's anatomical impairment as 16% to the body as a whole based upon the AMA Guidelines. (CX1, p. 31)

From all the evidence, I make the following:

### **FINDINGS**

\_\_\_\_\_1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On February 9, 1999 the relationship of employee-employer-carrier existed among the parties.

3. On February 9, 1999 the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$357.00/\$268.00 for total disability/permanent partial disability benefits.

4. On February 9, 1999 the claimant sustained an injury arising out of and in the course of her employment, which caused internal or external harm to the body which required medical services and resulted in disability and is supported by medical evidence supported by objective findings, per A.C.A. §11-9-102(16), establishing the injury and caused by a specific incident which is identifiable by time and place of occurrence.

5. The claimant was temporarily totally disabled for the periods beginning February 10, 1999 through September 26, 2000, and continuing through October 23, 2002.

6. The claimant's healing period ended October 23, 2002.

7. The claimant has a permanent physical impairment in the amount of 16% to the body as a whole relative to the February 9, 1999 compensable injury.

8. Claimant has suffered a loss of earning capacity or wage loss in the amount of 60% in addition to her anatomical impairment growing out of the February 9, 1999 compensable injury.

9. Claimant suffered a compensable injury in the employment of respondent No. 1, on February 9, 1999; claimant suffered previous injuries in the employment of respondent No. 1 in January 1991 and January 6, 1993, which resulted in permanent physical impairments in the amount of 10% and 5% to the body as a whole respectively; and the permanent impairments have combined with the February 9, 1999, compensable injury to produce the claimant's current disability status. Respondent No. 2 is liable for the payment of claimant's wage loss or permanent partial disability

in excess of anatomical impairment growing out of the February 9, 1999, compensable injury.

10. Respondent No. 1 shall pay all reasonable hospital and medical expenses arising out of the injury of February 9, 1999.

11. Respondent No.1 has controverted the claimant's entitlement to workers' compensation benefits relative to the February 9, 1999, compensable injury, subsequent to September 26, 2000.

12. Respondent No. 2 has controverted liability in this claim.

### **CONCLUSIONS**

The claimant was employed by respondent no. 1 from 1987/1988 through February 9, 1999. With the exception of a six month period, the entirety of the claimant's employment was in the meat department of same. There is no dispute regarding the duties discharged by the claimant in the meat department of respondent No. 1. (T. 16)

In January 1991 the claimant suffered an injury to her low back while discharging employment duties for respondent No. 1. The claimant came under the care and treatment of Dr. Edward H. Saer, on March 14, 1991 for her low back injury. Following diagnostic studies, to include MRI, which disclosed a disc herniation at L5-S1 on the left, she underwent surgery in the form of a laminectomy and disc excision on June 10, 1991. The claimant ultimately returned to her regular employment duties in the employment of respondent No. 1 following her surgery. On December 5, 1991, the claimant was assessed with a 10% anatomical impairment by Dr. Saer relative to the January 1991 injury. Respondent No. 1 accepted and paid appropriate workers' compensation benefits to and on behalf of the claimant, to include the 10% impairment rating.

As the claimant continued to discharge her employment duties with respondent, to include

a resumption of her regular job duties, she developed pain in the right lower extremity, as well as low back pain. The claimant attributes her progression of symptoms and ultimate need for subsequent surgery to the discharge of her employment duties with respondent No. 1. As claimant's symptoms progressively worsened, work-up was performed by Dr. Saer, to include an MRI, which disclosed evidence of recurrent disc herniation at L5-S1, predominantly right side. After becoming very symptomatic the claimant underwent surgery on January 6, 1993, under the care of Dr. Saer, which consisted of disc excision. The claimant reached the end of her healing period relative to the January 6, 1993 surgery, on August 30, 1993, and was assessed an additional 5% impairment related to the recurrent herniation. Respondent No. 1 accepted and paid workers' compensation benefits relative to the claimant's 1993 injury and surgery, to include the 5% impairment.

The claimant resumed her employment duties with respondent No. 1 after being released to return to work following the 1993 surgery. On February 9, 1999, while discharging employment duties in the employment of respondent No. 1, the claimant experienced a sudden onset of pain in her low back and down her left leg while bending with a tray of meat weighing approximately ten pounds and sliding the tray into a rack within the course and scope of her employment with respondent No. 1. The injury was reported to appropriate supervisory personnel of respondent by the claimant, and the claim accepted as compensable. Respondent No. 1 paid temporary total disability benefits to the claimant through September 26, 2000 along with medical benefits on behalf of the claimant through said date. The claimant has not worked since February 9, 1999. On or about November 10, 2000, respondent No. 1 terminated the claimant's employment with same.

### **COMPENSABILITY**

Although the February 9, 1999 claim of the claimant was initially accepted as compensable

by respondent No. 1, respondent No. 2, the Second Injury Fund, in its October 17, 2002 amended response to the prehearing questionnaire challenged the compensability of the claimant's claim of February 9, 1999. Compensability is defined in Arkansas Code Annotated §11-9-102(4)(A).

The present claim is one governed by the provision of Act 796 of 1993, in that the claimed injury occurred subsequent to the effective date of the afore statutory provision. To prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, 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. Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

It is undisputed that the claimant continued to experience residuals of her 1991 and 1993 injury subsequent to August 30, 1993. Additionally, the claimant continued to receive medical treatment relative to the afore complaints, although she was continuing to discharge her employment duties. On January 6, 1993, the claimant underwent surgery under the care of Dr. Saer in the form of a disc excision for a diagnosed recurrent disc herniation at L5-S1, predominately right-sided. In a August 30, 1993 report Dr. Saer noted:

I did not obtain x-rays today. Her persistent

symptoms do appear to be related to her disc herniation and at this point I do not anticipate any further surgical intervention. Certainly if she has another procedure she will need to have a fusion in conjunction with any other procedure and that's certainly a much larger deal than what she's been through to this point. I'd like her to continue on a home exercise program and basically continue to use good body mechanics, posture and so forth. I'll see her on a 6 month basis or as needed. I think she has reached the end of her healing period from her surgery in January and has sustained an additional 5% impairment. (RX1, p. 3-4)

The claimant did have additional diagnostic studies subsequent to returning to the employment of respondent No. 1, to include an MRI of her lumbar spine on January 5, 1995:

CONCLUSION: Post op changes of a laminectomy at L5/S1. There is disc degeneration with a broad based moderate sized disc herniation that is slightly larger on the right side and which abuts the right S1 nerve rootlet as it emerges from the thecal sac.

At L4/L5 there is evidence of disc degeneration and posterior disc bulge along with a posterior annular tear. (RX1, p. 10)

The claimant's disc complaint was treated with epidural steroid injections by Dr. Saer on May 23, 1995. The claimant was seen by Dr. Saer and received treatment in 1996 and 1997 relative to her low back. When seen on April 10, 1998, Dr. Saer noted, regarding the claimant's radiograph report that x-rays showed significant narrowing at L5-S1. The report concluded:

She is developing symptoms that are very similar to what she had before when she had her disc herniation. She has had some improvement with epidural steroid injections in the past and I think that is the reason why I opted to try to avoid having any further surgery. She is agreeable to that. We will try to get that set up. I will see her back in a year, but I would like for her to

get back with me sooner, if she continues to have problems. (Respondent No. 1, Exhibit No. 1, p. 15)

The evidence discloses that in December 1998 the claimant was prescribed medication for her low back complaint by Dr. Saer. The January 25, 1999 correspondence from Dr. Saer relative to the afore concluded that the medication refills should be considered medication related to the claimant's workers' compensation injury. (Respondent No. 1's Exhibit No. 1, p. 16)

On February 9, 1999, while discharging employment duties for respondent No. 1, the claimant experienced a sudden onset of pain in her low back and down her left lower extremity when she bent with a tray of meat weighing ten pounds to slide it into a rack. The claimant has not worked since the February 9, 1999 incident. The claimant received medical treatment following the incident under the care of local providers and was ultimately returned to the care and treatment of Dr. Edward Saer. On February 23, 1999, the claimant underwent an MRI of her lumbar spine, in El Dorado, Arkansas, pursuant to the direction of Dr. Thomas Pullig. The x-ray report generated relative to the afore diagnostic study concluded:

At L5-S1 there is evidence for a prior S1 laminectomy and central discectomy. There is now evidence of a central recurrent and right and left lateral small disc herniation that do not appear to encroachment significantly on the thecal sac but do encroachment on the right and left intervertebral foramina. (Respondent No. 1's Exhibit No. 1, p. 17)

On April 1, 1999, the claimant was seen by Dr. Edward Saer, relative to the February 9, 1999 injury. A review of the April 1, 1999 report of Dr. Saer reflects that the claimant relayed a history of the work-related injury of February 9, 1999. The April 1, 1999 report of Dr. Saer, relative to the claimant, further reflects:

**DIAGNOSTIC STUDIES:**

I have reviewed the MRI films. She does seem to have a syndrome herniation/protrusion at L4-5. She had a small annular tear on the last MRI and this looks different from that. The changes at L5-S1 are noted too.

**DISCUSSION:**

Hopefully we can get by without having any surgery. It's hard to say whether this new injury caused changes at L4-5, L5-S1, or both. In any event, I think and epidural steroid injection would probably be helpful and also a course of physical therapy. I'm going to give her a prescription for Celebrex. (Respondent No. 1's Exhibit No. 1, p. 20)

On October 11, 1999, the claimant underwent a laparoscopic anterior fusion at L5-S1 under the care of Dr. Saer and Dr. Patrick N. Osam. (Respondent No. 1, Exhibit No. 1, p. 25-27)

The evidence in the record reflects that the claimant has sustained her burden of proof by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with respondent on February 9, 1999, which resulted in internal harm to the body and required medical services and resulted in disability. Further, the medical evidence establishing the injury is supported by objective findings. Finally, the injury was caused by a specific incident identifiable by time and place of occurrence.

**TEMPORARY TOTAL DISABILITY BENEFITS**

It is undisputed that the claimant has not worked since the February 9, 1999 compensable injury in the employment of respondent No. 1. The claimant underwent surgery relative to the February 9, 1999 compensable injury on October 11, 1999, in the form of a laparoscopic anterior fusion at L5-S1. The claimant was ultimately referred by Dr. Saer to Dr. Yeshwant Reddy, a pain medicine specialist. (Respondent No. 1's Exhibit No. 1, p. 38). On February 24, 2000, the claimant

was evaluated by Dr. Yeshwant Reddy, a pain medicine specialist, pursuant to referral of Dr. Saer. After giving a detailed summary of the claimant's injuries and medical treatment relative to same, the February 4, 2000 report of Dr. Reddy concludes:

We are in a difficult situation with Ms. Boyd's lumbar spine condition. She is about five months status post L5-S1 anterior fusion surgery. There has been no improvement in her symptomatology, and she has not progressed with physical therapy rehabilitation program, and she continues to be out of work. It is quite possible that the L4-5 internal disk disruption may be contributing to her symptomatology as noted by Dr. Saer prior to the L5-S1 fusion. Although the lumbar diskogram did show a posterior annular tear at L4-5, this was not thought to be the painful level as she had atypical back pain on provocation. For the last six to seven years she had problems at L5-S1 and each time with surgery she improved. But the latest surgery has not resolved her symptoms. The question I have in my mind is "Should we go ahead and treat the L4-5 internal disk disruption or wait for a year from the time of her L5-S1 fusion?" I will address this issue in further detail at her next visit. In the meantime she certainly needs better pain management. I have started her on Lortab 7.5 mg p.o.q. 6 hours for pain. She should continue with Amitriptyline for insomnia. I do not think that at this point in time enrolling her in any physical therapy is beneficial. She should continue with her present out-of-work status. I have also raised the issue of considering partial permanent disability. Ms. Boyd is going to think it over, and at the next visit she will let me know her decision. I do feel that Ms. Boyd does require further treatment in the future. (Respondent No. 1., Exhibit No. 1, p. 41-42)

Thereafter, the claimant was seen in follow-up by Dr. Reddy on a monthly basis through July 25, 2000. During the July 25, 2000 visit the claimant related to Dr. Reddy complaints of low back, left leg and bilateral groin pain. Further, she disclosed that on bad days she was taking three or four

Lortabs and that on good days she takes one Lortab for pain. (JX1, p. 33-34)

On September 12, 2000, the claimant was again seen by Dr. Saer, having last seen him in January 2000. The September 12, 2000 office note of Dr. Saer reflects, in pertinent part:

She is back today to see if she is at MMI. Dr. Reddy really has not wanted to do much until she is at MMI.

She has been to therapy and has had non-operative treatment. She is taking some medication including Amitriptyline at night.

She reports that she is still quite symptomatic. She has pain in the back and down the left leg. She has had sensation of swelling in the right foot. She has had numbness in the right foot for some time, related to her disc herniation. She reports that this is a different sensation.

\* \* \*

**PHYSICAL EXAMINATION:**

She walks pretty well. There is very little limp. She has very little back motion. Forward bending of any degree causes significant back pain. She reports mild diffuse discomfort. She does not appear to have any acute spasm.

Right ankle reflex is absent and patellar reflexes are equal. Straight-leg raising causes pain in the back bilaterally and causes pain down the left leg with elevation of the leg.

**RADIOGRAPH REPORT:**

AP Ferguson, standing lateral, and lateral flexion-extension views were obtained today. Cages are in good position. She has slight narrowing at L4-5. There is no significant motion noted at L5-S1. There is no evidence of radiolucency around her cage.

**DISCUSSION:**

I think her fusion is solid and from the standpoint of

her last surgery done last year, she is at MMI. I explained that I do not think she needs any further surgery on her back. She obviously does need some treatment and I will defer to Dr. Reddy about that. (Respondent No. 1, Exhibit No. 1, p. 48)

The claimant was scheduled to be seen by Dr. Reddy on September 26, 2000, pursuant to her last visit of July 25, 2000. Prior to the September 26, 2000 visit, Dr. Reddy was furnished a surveillance video of the claimant by respondent No. 1. Dr. Reddy committed his thoughts regarding the claimant's activity in the video in a September 25, 2000 memorandum:

My overall impression of this video surveillance is that she could walk, bend, lift weights without any problems. Her endurance was good. She was never seen to rest or show signs of back pain or problems during the two weekend activities on the lake. She behaved as a normal person. I feel that watching this video was very informative. Ms. Boyd has recovered from her fusion surgery quite nicely. (Respondent No. 1's Exhibit No. 1, p. 53-54)

On September 26, 2000, the claimant was seen in follow-up by Dr. Reddy. The September 26, 2000 office note relative to claimant's visit to Dr. Reddy reflects:

Ms. Boyd states that she continues to have low back pain and is unable to perform any activities. Upon repeated questioning she admits to not taking any medications except for Celebrex. She occasionally uses Amitriptyline. I do not think she has used much of the Lortab for quite some time.

Her symptoms continue to be increasing back pain with minimal activities. In addition her complaints of sensory disturbance, which appear to be non-dermatomal.

**PHYSICAL EXAMINATION:** Once again Ms. Boyd demonstrates very minimal lumbar spine flexion. Neurological evaluation revealed normal strength,

intact sensation, and symmetric reflexes.

At the conclusion of the September 26, 2000 visit, the claimant was released from the care of Dr. Reddy. Dr. Reddy did observe in his September 26, 2000 report that the claimant, in the future, may require medical management, which would include pain medication, sleep medications, and nonsteroidals anti-inflammatory medications. Dr. Reddy indicated that he did not think the claimant would require any further physical therapy for the injury. The report concluded that the claimant could obtain maintenance medications from local physicians in the area of her residence. (Respondent No. 1's Exhibit No. 1, p. 50)

The claimant asserts that she continued to experience pain and symptoms attributable to the February 9, 1999 compensable injury subsequent to her discharge from the care of Dr. Reddy on September 26, 2000. Respondent terminated the payment of temporary total disability benefits to the claimant as of September 26, 2000.

During the course of his October 15, 2001, deposition Dr. Reddy was questioned whether he really made the decision that the claimant had reached maximum medical improvement as of September 26, 2000, after viewing the video tape:

I also waited a month from a year from her fusion.  
That was the usual time you give something.

\* \* \*

And also one more thing. She has been under my care and I was not doing much for her apart from prescription medication, putting her in some kind of physical therapy and keeping her encourage. At that time I decided - - I have been six of seven months - - I have been following. I need to make a decision whether she's getting better, whether she's not getting better, anything else to be done. (JX. 1, p44)

Although the claimant was not again seen by either Dr. Reddy or Dr. Saer subsequent to the September 26, 2000, visit, there is evidence that she did contact the office of Dr. Reddy subsequent to said date. Dr. Reddy testified:

No. September 26, is our last encounter with her.

I noticed one thing. On October 31, some medications were given to her by our nurse and it does happen if we just discharge people until they get to another doctor. We do have the leverage of continuing medications and it happened once I think. (JX1, p49)

Following her discharge from the care of Dr. Reddy on September 26, 2000, the evidence disclosed that claimant secured medication for complaints of pain from the office of Dr. Reddy on October 31, 2000. Thereafter, claimant contacted the office of Dr. Anthony Russell, a North Little Rock neurosurgeon, for treatment relative to her February 9, 1999, compensable injury. Claimant was initially seen by Dr. Russell on November 16, 2000. After reciting a history of the claimant's injuries and medical treatment relative to same, the November 16, 2000, clinic note of Dr. Russell, relative to the claimant, reflects:

. . . When she returned from the third procedure it was elected to do an anterior lumbar interbody fusion. Unfortunately, Ms. Harper's pain continues. She describes a "dead leg" on the right with numbness involving the leg and foot. The majority of her pain involved the left hip with radiation down the left thigh to the left ankle and foot as well. This pain is aggravated by multiple positional changes. She pain at rest as well.

On physical exam, the right ankle reflex is absent. There is no evidence for atrophy in either calf muscle. Motor testing is relatively normal. There are well-healed scars in both the abdomen and lumbar region.

Apparently, Ms. Harper has been under surveillance and has received correspondence from the workers' compensation insurance carrier that indicates that they feel she has been untruthful. Apparently, the tape indicated that she was lifting, twisting, turning, etc. Because of this, the letter indicated that she was in danger of problems related to insurance fraud.

The bottom line is she has been told that there is nothing that can be done for her. I am not a strong believer of the value of videotaping in most of these cases. My major concern here is whether or not Ms. Harper has a potentially treatable lesion that has gone undetected at this time. We will plan to have Ms. Harper undergo a followup MRI scan. She will be seen back afterwards for further evaluation. (CX. 1, p12)

On November 29, 2000, claimant was seen in followup by Dr. Russell. Dr. Russell's

November 29, 2000, clinic note reflects:

Ms. Boyd returned today to review the findings of her MRI scan and flexion/extension lumbar spine films. The flexion/extension films appear to indicate continued movement across the disc space as evidenced by a widening of the disc space with flexion and narrowing with extension. This continued movement may be responsible for muscle spasm and the subsequent pain that she is experiencing. She also has degenerative changes which may be causing nerve root irritation. Ms. Boyd continues to be in severe pain. At this point, further conservative measures likely have very little to offer. It is possible that the continued movement across the disc space could be responsible for her continued pain and for that reason I propose that we re-operate posteriorly and add pedicle screws and rods to the construct. At the time of surgery, we would plan to do a wide decompression around the nerve roots in order to alleviate any possible nerve root compression. . .(CX. 1,p14)

The November 29, 2000, x-ray report of Dr. Joseph M. Gaddy relative to the lumbar spine

obtain on the claimant reflect that Dr. Gaddy's impression that the recent lumbar fusion at L5-S1 without evidence of any motion on flexion/extension images. (CX. 1, p15). During the course of his May 6, 2002, deposition, Dr. Russell was questioned regarding his assessment of movement based on his review of the lumbar spine series of November 29, 2000:

Well, the flexion/extension films appeared to indicate that she had continued movement across the disc space and this was evidence by a widening of the disc space with flexion and narrowing with extension. In other words, the width between the two bone could widen out when she leaned forward and then it would narrow down with she leaned back. (CX 2, p7)

At another point Dr. Russell elaborated that he had in fact look at the lumbar series films of the claimant which was obtained on November 29, 2000, as opposed to relying on the radiologist report:

Well, a lot of times the radiologist are considering motion - - when they consider motion, they've considering translation. In other words, the forward movement of one bone on the other. I didn't necessarily see that. What I saw was the spaces itself went from being, you know, let's say four millimeters in width to six or seven millimeters in width and the closed back down. That's still an indication of lack of complete fusion even without transnational movement. Sure, I would rather see it slip forward one on top of the other. But after having had the fusion that she had, I really didn't expect to see that. I was mainly concerned with whether the space itself showed evidence for stability. And it opened and closed, and that told me that it wasn't. (CX 2,p26-27)

Dr. Russell further testified that when he did in fact perform the fusion surgery on December 29, 2000, he did not find anything that altered his opinion regarding his assessment or movement of lack of stability with respect to the previous fusion:

She had evidence for ongoing degeneration at those

segments which you wouldn't normally see with a complete fusion. There are actually physician out there that would testify that a Ray Cage procedure can't stand along as a procedure for fusion. I believe it can and obviously, Dr. Saer believes it can. But there are other orthopedics in this town that think any time you do a Ray Cage procedure you have to do a pedical screw procedure to stabilize it. (CX. 2, p27-28)

Dr. Russell testified regarding the results of the claimant's December 29, 2000, surgery, which was the forth surgical procedure she had undergone:

She did fairly well. She had some unusual pain complaints pre-op that his resolved. She was real pleased with the results noted that her pain was a three on a one to ten scale, compared to a ten previously. And that the redicular pain that she was having going down the legs was resolved as well as that abdominal pain I was talking about. That's that unusual pain. I think she was most happy about that period. (CX. 1, p10)

The pertinent medical records of the claimant were submitted for review to Dr. Jim J. Moore in July 2001, to include the December 29, 2000, operative records of Dr. Russell. Dr. Moore is a Little Rock neurosurgeon. Dr. Moore's July 22, 2001, report reflects, in pertinent part:

. . .I reviewed with special attention to the flexion/extension study of 11-29-00. These films in my opinion do not show any significant motion and I do see evidence of the bone plug construct from the anterior lumbar fusion. I don't see any motion at all.

\* \* \*

I have been asked to comment upon my opinion so far as the last operative procedure. Obviously this was a judgment call by Dr. Russell and in his opinion apparently there was justification. I gather that predominantly this was based upon the patient's

subjective complaints and the findings that Dr. Russell interpreted as showing motion at L5/S1. I do not believe that such exists and, therefore, I do not believe that the surgery was necessarily justified. (Respondent #1, Exhibit #1, p56)

As previously noted, Dr. Russell actually viewed the film and explained, during the course of his May 6, 2002, deposition, the basis for his opinion regarding movement at the site of the previous fusion procedure by Dr. Saer. Additionally, Dr. Russell testified that upon performing the procedure the same was consistent with his assessment of movement at the site of previous fusion. (CX. 2)

The evidence preponderates that there was movement at the site of the claimant's previous fusion, at the time she came under the care and treatment Dr. Russell. Further, upon performing the procedure strengthening the fusion on December 29, 2000, claimant received appreciable relief of symptoms which had existed since the October 11, 1999 fusion procedure under the care of Dr. Saer.

On April 3, 2001, claimant underwent a myelogram and CT scan. Dr. Russell's testimony reflects that the afore diagnostic study were products of claimant's continued complaints of radicular pain following the December 29, 2000, second fusion procedure. On March 23, 2001, claimant was seen in followup with Dr. Russell. Dr. Russell testified:

Well, if you'll look in the initial paragraph on the 23<sup>rd</sup>, she still has some radicular type pain that's unchanged. And although we had resolved a good portion of her pain, it has not reached the point where she felt that it was acceptable or she was willing to tolerate for a long - - you know - - long-term. For that reason I wanted to look at things again. We were far enough out from the surgery that we should be able to assess it again and find out if there was anything going on that would account for the pain. And that was the reason behind scheduling her for the

myelogram and CT scan.

\* \* \*

According to the radiologist's report of 04/03/2001, under Impression, she had a "small central right paracentral disk herniation at L4-5. In addition, there was a fairly prominent bone spur on the left at L4-5 adjacent to the facet joint." And, of course, they were able to see the post-operative changes from the Ray cages and the pedicel screws that we put in previously.

\* \* \*

Well, the unfortunate thing is that when you do a fusion on someone and eliminate one of their disk spaces it shifts all of the stress to the next space up. And it's not unusual unfortunately for those patients to develop a herniation at that level or an accelerated deterioration at that level.

\* \* \*

Yes. I believe that L4-5 was worse as a consequence of the surgery and the previous injury in that she was at least partially symptomatic from that.(CX2, p11-12)

On April 23, 2002, claimant underwent an additional procedure under the care of Dr. Russell.

Dr. Russell's testimony reflects, with respect to the basis for the April 23, 2002, procedure:

Well, when I saw her in March she has complained to left hip and leg pain. And although she had improved after our initial operative procedure, she gradually and increasing pain in a nerve root pattern in the months leading up to that visit in March. We did follow-up studies including an MRI and myelogram and Ct scan and there was some spurring at L4-5 previously but we really didn't see any clear-cut nerve root compression there. On the other hand, I was concerned that the previous movement across L-5, S-1 may have led to the build-up of a spur there and that

correlated better with her symptoms. And I recommended at that point, at least for consideration, that we do a decompression, re-explore the L-5, S-1 spaces where we had previously operated to determine if there was any ongoing nerve root compression there. (CX. 2, p13)

Dr. Russell testified regarding the nerve root decompression:

Well, the nerve exits through a little opening in the side of the spine called the foramen which is shaped like a keyhole and that is surrounded by bone. The idea here was to go directly to the space in her back, taken a drill and drill all of that bone away down to the nerve so that we can follow the nerve completely out the side of her back. Once you do that fusion, you can do that..The main worry with that before a fusion is that they will slip or have problems from instability. Once the fusion is solid you can pretty well remove the bone as needed in order to decompress the nerve and that's what we did. We took a drill and drilled away all the bone around the nerve root, explored the nerve root proximally to make sure there wasn't anything compressing it, and then left it at that (CX. 2, p14-15)

Dr. Russell's testimony reflects that in his opinion claimant benefitted from both the December 29, 2000, surgical procedure strengthening the fusion and the decompression of April 2002. (CX. 2, p15). Likewise, claimant presents testimony that she benefitted from the procedures performed by Dr. Russell. At the time of the May 5, 2002, deposition of Dr. Russell claimant had not reached maximum medical improvement.

Temporary disability is determined by the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that she is within her healing period and totally incapacitated from earning wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark.

224 (1981). The healing period is defined as that period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12)(Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of the injury will permit. When the underlying condition causing the disability becomes stable and other further in the way of treatment will improve the condition, the healing period has ended. Conversely, so long as the underlying condition causing the disability has not become stable and further medical treatment will improve the condition, the healing period has not ended. Mad Butcher, Inc., v Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the instant claim, the evidence preponderates that the claimant had not reached the end of her healing period as of September 26, 2000, when discharged from the care of Dr. Reddy. Indeed, Dr. Reddy candidly acknowledged that as of October 31, 2000, his office furnished medication to the claimant for treatment relative to her compensable injury. Additionally, on November 16, 2000, claimant came under the care and treatment of Dr. Anthony Russell and underwent further surgical procedures, all geared toward the treatment of her February 9, 1999 compensable injury. Claimant underwent the last surgical procedure under the care of Dr. Russell on April 23, 2002. In a February 12, 2003, report Dr. Russell concluded that the claimant had reached maximum medical improvement effective October 23, 2002, six months post-surgery relative to the April 23, 2002, procedure. Respondent #1 has controverted claimant's entitlement to temporary total disability benefits subsequent to September 26, 2000.

### **MEDICAL BENEFITS**

\_\_\_\_\_ Respondent #1 accepted as compensable the February 9, 1999, compensable injury of the claimant. Respondents paid medical and indemnity benefits to the claimant through September 26,

2000, relative to the February 9, 1999, compensable injury. The credible evidence in the record reflects that at the time claimant was discharged from the care and treatment of Dr. Reddy on September 26, 2000, she continued to experience complaints attributable to the February 9, 1999, compensable injury. Further, the credible evidence reflects that although claimant was released by Dr. Edward Saer on September 12, 2000, as having reached maximum improvement, Dr. Saer did not in fact rule out the absence of movement at the fusion site. Specifically, the September 12, 2000, office note of Dr. Saer reflects that he did not see “significant motion” at the L5-S1 site.

Claimant was initially seen by Dr. Russell on November 16, 2000. The evidence preponderates that the lumber x-ray series obtained pursuant to the direction of Dr. Russell relative to the claimant on November 29, 2000, showed movement at the site of the previous fusion. The afore was confirmed during the December 29, 2000, surgery by Dr. Russell. The evidence preponderates that claimant benefitted from the December 29, 2000, fusion by Dr. Russell, and that the same alleviated the symptoms experienced by the claimant since the October 11, 1999, fusion procedure under the care of Dr. Saer. Likewise, claimant benefitted from the April 23, 2002, decompression surgery performed by Dr. Russell, which was casually related the February 9, 1999, compensable injury and subsequent surgical procedures. Respondents controverted the payment of medical treatment under the care of Dr. Russell and medical subsequent to September 26, 2000. The evidence preponderates that the same is reasonable, necessary, and related to claimant’s February 9, 1999, compensable injury.

#### **PERMANENT PHYSICAL IMPAIRMENT**

Following the February 9, 1999, compensable injury in the employment of respondent, claimant underwent a fusion under the care of Dr. Edward Saer on October 11, 1999. Thereafter,

claimant's medical treatment was referred to Dr. Reddy by Dr. Saer. Claimant had previously undergone to surgical procedures at L5, S1 relative to previous injuries in the employment of Respondent #1 and had been assessed permanent physical impairment in the amount of 10% to the body as a whole and 5% to the body as a whole.

Respondents deny that the claimant has suffered additional anatomical impairment as a result of the February 9, 1999, compensable injury. It is noted, parenthetically, that the claimant has undergone at least three surgical procedures relative to the February 9, 1999, compensable injury, two of which have been fusions. Arkansas Code Annotated § 11-9-102(16)(A)(ii)(Repl.) 2002 provides:

When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the Court shall pay consider complaints of pain; for purposes of making physical or anatomical impairment rating to the spine, straight leg raising test or range of motion test shall not be consider objective findings.

The Arkansas Workers' Compensation Commission has adopted the AMA Guides to Evaluation of Permanent Impairment, 4<sup>th</sup> Edition with the enactment of Commission Rule 34.

Dr. Reddy in his report of September 26, 2000, noted that the claimant had undergone an anterior lumbar interbody fusion at L5-S1 in October 1999. Dr. Reddy further noted:

According to the AMA Guidelines for permanent impairment rating, she will receive a 10% partial permanent total body impairment rating. This based on L5-S1 fusion. According to Chapter 3, Table 75, she will received the 10% whole-person impairment. . . (Respondent #1 Exhibit #1, p50)

In his July 21, 2001, report relative to reviewing the claimant's medical record, Dr. Jim Moore opined

that even considering the December 29, 2000, surgical procedure of Dr. Russell, under the guide claimant has sustained a 13% permanent impairment to the body as a whole. The afore rating, under Dr. Moore's assessment, would include the 10% impairment assessed relative to claimant's 1991, compensable injury, the 5% assessed relative to the claimant's 1993, injury and surgery and the February 9, 1999, compensable injury and surgeries. (Respondent #1, Exhibit #1, p56). The evidence discloses that claimant underwent a fifth surgical procedure subsequent to the July 22, 2001, report of Dr. Moore. Specifically, on April 23, 2002, claimant underwent a decompression of the nerve under the care of Dr. Russell.

In a report dated February 12, 2003, Dr. Russell noted that the claimant had reached maximum medical improvement on October 23, 2002. Dr. Russell's February 12, 2002, report reflects a history of the claimant's previous lumbar disc surgery under the care of Dr. Saer relative to the February 9, 1999, compensable injury. The report reflects, in pertinent part:

. . . This young lady has undergone previous lumbar disc surgery and recently underwent a follow-up procedure for some residual pain. The patient has had a lumbar fusion at L5-S1 utilizing pedical screws and rods. This is in conjunction with a previous surgical procedure and in conjunction with the loss motor segment as well as an ongoing radicular changes she would be entitled to a 16% impairment rating based upon the AMA Guidelines. . . (CX. p31)

At the time claimant was rated by Dr. Reddy on September 26, 2000, with a 10% impairment to the body as a whole, the AMA Guide to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, was referenced as was the appropriate chapter and table by Dr. Reddy, Chapter 3, Table 75 as the basis for the rating. Claimant has since undergone two additional surgical procedures, to include the placement of hardware and a decompression under the care of Dr. Russell. Utilizing the same

chapter and table of the AMA Guide, the credible evidence reflects that the claimant has in fact suffered a permanent physical impairment in the amount 16% to the body as a whole relative to the February 9, 1999, compensable injury. Respondent #1 has controverted the afore benefits.

### **PERMANENT PARTIAL DISABILITY**

Claimant asserts that as a results of her compensable injury she has been rendered permanently and totally disabled from engaging in gainful employment and is correspondently entitled to the payment of permanent total disability benefits. Claimant has not worked since the February 9, 1999, compensable injury in the employment of respondent.

It is undisputed that the claimant has suffered two prior injuries in the employment of Respondent #1, which were accepted as compensable and for which she was assessed with permanent physical impairment to the body as a whole. Claimant acknowledged that she has not sought employment since being released by Dr. Russell on October 23, 2002, relative to the February 9, 1999, compensable injury. While claimant is a high school graduate and has completed two years post-secondary education at Southern Arkansas University in El Dorado, she maintains that she is functionally illiterate in that she has difficulty reading and understanding. Claimant has been approved for social security disability benefits. The evidence does reflect however, that during the course of the hearing claimant presented to testify from a red notebook with records that she had complied to aid in refreshing her recollection regarding dates, doctor appointments and workers' compensation benefits paid relative to her claim. Claimant likewise testified that she complied the notebook using the computer of her husband.

The evidence in the record reflects the bills, surveillance tapes of claimant's activity, to include bending, walking, and carrying objects. Claimant has undergone two (2) additional surgical

procedures since the surveillance tape of her activities.

It is my opinion, after a through consideration of all of the evidence in this record, that when the claimant's age, education, permanent restrictions and limitations are considered, that the claimant has suffered a loss of earning capacity in the amount of 60% to the body as a whole in addition to her anatomical impairment.

### **SECOND INJURY FUND LIABILITY**

It is undisputed that claimant suffered previous compensable injuries in the employment of Respondent #1, and was assessed with permanent impairment relative to the injuries. As a result of the January, 1991, compensable injury in the employment of Respondent #1, claimant was assessed with a permanent physical impairment of 10% to the body as a whole. Claimant returned to work following the 1991 compensable injury and surgery, and ultimately resumed regular employment duties. On or about January 6, 1993, claimant underwent a second surgical procedure relative to her lumbar spine attributable to employment duties with respondent. As a result of the afore, claimant was assessed with 5% anatomical impairment to the body as a whole. Claimant again resumed her regular employment duties in the employment of respondent following the 1993 injury and surgery.

On February 9, 1999, claimant suffered a compensable injury in the employment of respondent for which she has undergone three surgical procedures and has sustained an additional 16% permanent physical impairment to the body as a whole. The prior injuries and impairments when combined with the most resent injury of February 9, 1999, have produced the claimant's current 60% loss of earning capacity. Second Injury Fund v Stephens, 62 Ark. App. 255, 970 S.W. 2d 331 (1998).

Respondent #2, Second Injury Fund, has controverted claimant's entitlement to permanent disability

benefits in excess of the anatomical impairment.

**AWARD**

Respondent #1 is hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$357.00, for the period commencing February 10, 1999, through September 26, 2000, and continuing through October 23, 2002, as a result of the claimant's compensable injury of February 9, 1999. Said sums accrued shall be paid in lump without discount. Respondent may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondent #1 is further ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$268.00, to correspond with the 16% anatomical impairment sustained by the claimant as a result of the February 9, 1999, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondent #1 is further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel growing out of claimant's compensable injury of February 9, 1999. The afore also include claimant's treatment under the care of Dr. Anthony Russell, which was reasonable, necessary, and related to claimant's compensable injury.

Respondent #2 is herein directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$268.00, to correspond with the claimant's 60% loss of hearing capacity in excess of the 16% anatomical impairment, sustained as a result of the February 9, 1999, compensable injury. Said sums accrued shall be paid in lump without discount.

Maximum attorney fees are herein awarded to the claimant's attorney the Honorable James

N. Pratt, Jr., on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with Holiday Inn-West v. Coleman, 31 Ark. App. 224, 792 S.W. 2d 345 (1990).

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**Andrew L. Blood**  
**Administrative Law Judge**