

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110454

ONETA HENDERSON

CLAIMANT

**MAGNET COVE SCHOOL DISTRICT
(SELF-INSURED)**

RESPONDENT EMPLOYER NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

ORDER AND OPINION FILED OCTOBER 27, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

The above claim came on for a hearing in Malvern, Arkansas on September 19, 2003. A prehearing conference was held on July 22, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference and prior to the hearing, the parties agreed to the following stipulations:

1. There was a compensable August 24, 2001, injury.
2. The temporary total disability rate is \$123.
3. Respondent No. 1 has accepted a 13% permanent impairment rating and are paying benefits.

The claimant contends that as a result of her admittedly compensable injuries of August 24, 2001, that she has been rendered permanently and totally disabled. Alternatively, claimant contends she is entitled to wage loss benefits. Attorney's fees are requested and all other benefits the claimant may be entitled are reserved. The claimant contends that she reached maximum medical improvement on May 7, 2003, when Dr. Wayne Bruffett assigned the permanent impairment rating.

Respondent No. 1 contends the claimant did sustain a compensable injury with the respondent employer and the claim was accepted and appropriate benefits were paid. Respondent No. 1 accepted the 13% permanent impairment rating. Respondent No. 1 further contends that it would not be responsible for any disability benefits beyond the 13% impairment rating. Respondent No. 1 contends if there is a finding of wage loss disability or permanent and total disability, that finding would be based upon a combination of all the claimant's pre-existing conditions and, therefore, would be the liability of the Second Injury Fund.

Respondent No. 2 contends that it is the burden of Respondent No. 1 to prove by a preponderance of the evidence that the Second Injury Fund has liability in this case and Respondent No. 1 cannot prove such. Respondent No. 2 contends that there is no combination of disabilities or impairment as contemplated by the Workers' Compensation Act and case law. Respondent No. 2 contends there is no proof of any permanent anatomical impairment other than the anatomical impairment attached to the surgery following the 2001 injury in this case and there is no proof of any imposition of physical limitations prior to the 2001 injury. An alternative pleading of Respondent No. 2 is there is no causal connection between the injury and the need for surgery.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable August 24, 2001, injury.
2. The temporary total disability rate is \$123.
3. Respondent No. 1 has accepted a 13% permanent impairment rating and are paying benefits.
4. The claimant has proven by a preponderance of the evidence that she is permanently and totally disabled as a result of her August 24, 2001, compensable work injury.
5. Respondent No. 1 has failed to prove by a preponderance of the evidence that the claimant's pre-existing condition combined with the most recent compensable injury to produce the claimant's current disability status.
6. The Second Injury Fund is dismissed from this claim.

DISCUSSION

The claimant, 64 years old, was a cook for the respondent employer in August 2001, when she sustained a compensable injury. According to the claimant, her job entailed cooking, serving, stocking groceries, paperwork and cleaning. The claimant

testified she was on her feet all day and had to be able to bend, lift, stoop, push and pull. According to the claimant, one case of groceries weighed 42 pounds and tables had to be put down and taken up. The claimant testified that on August 24, 2001, she put up nine tables by herself and she put six cases of food up by herself. According to the claimant, as she was lifting on the tables, she felt pain and warmth going through her leg and spasms from her back on down the leg to the foot. The claimant described the pain as piercing and pain medication helped dull the pain. The claimant testified that when she stands, she has a sharp pain such as a knife sticking her.

The claimant began receiving medical treatment and saw Dr. Bruce White, Dr. William Ackerman, Dr. Wayne Bruffett and Dr. Scott Schlesinger. The claimant underwent back surgery on June 18, 2002, performed by Drs. Schlesinger and Bruffett. Dr. Schlesinger worked on the sciatic nerve and Dr. Bruffett performed the fusion. Dr. Bruffett assigned a 13% impairment rating on May 7, 2003.

The claimant described the pain she was having at the time of the hearing as so much pain she gets sick at her stomach. She has difficulty laying, standing and sitting. The claimant testified that she has spasms in her leg and it feels like the muscle or nerve is being twisted and the bones in the lower back feel like they are splitting.

The claimant also has a heart malady, atrial fibrillation, for which she takes medication and she has had a pacemaker since 1998. The claimant also has some arthritic problems with her hands. The claimant verified that she investigated social security disability benefits while she was checking on her late husband's benefits; however, she did not pursue those disability benefits.

The claimant worked for the respondent employer as head cook or cook for 12 years. The claimant also had another two years of cook experience for other employers. She has an eleventh grade education and 18 months at Pines Vo-Tech in clerical office work.

While the claimant was testifying, she stood up, leaned on her elbow, sat for a while but was constantly changing positions. While waiting to testify, she would sit, stand, lean on the table and repeat the sit, stand, lean positions.

The claimant underwent a functional capacity evaluation at Dr. Bruffett's recommendation. The claimant testified that she understood the outcome of the FCE was that she was not suitable for even sedentary work. The claimant did meet with Gay Signoff, vocational specialist, and after the interview, Ms. Signoff provided the claimant with a listing of jobs she should pursue. The claimant testified that she contacted or completed applications for each job listed and has not been offered any of these. According to the claimant, most of the jobs required lifting or standing or did not meet her limitations. The claimant testified that she goes to church and tries to get out twice a week, but she could not promise a prospective employer that she could be at work every day. The claimant testified that she has not had a pain free day since her injury. The claimant stated that before her injury, she did crafts, fished, camped, had a garden, worked in her yard and kept house. These are things she can no longer handle.

Under cross examination, the claimant verified that she has some vision problems now related to some medications she takes for her heart. The claimant also verified that she completed paperwork for social security disability in May 2001, but

later did not follow through with the application. The claimant contended in that application that her disabling problems were her hands, her right knee and heart.

The claimant verified that she had not sought medical treatment for her hands aside from a burn to the hand received a long time ago. The claimant verified that she has never received a permanent impairment rating for her hands, knee or heart condition, nor has she been placed on restrictions from work, except for 10 days following her pacemaker surgery. The claimant confirmed that before her August 2001, injury, she was paid for 35 hours per week from her employer but actually worked an additional 20 hours per week. The claimant confirmed that she started work the new school term about August 20, 2001, and worked about four days with no back problems before the August 24, 2001, incident.

The claimant testified that she has constant pain at level 7 or 7-1/2 on a 0 to 10 scale and the pain can go higher than 7 on a bad day. The claimant confirmed that her back pain keeps her from working today and that even with her hands, knee and pacemaker concerns she would still be working but for the back problems.

Ms. Gay Signoff, vocational specialist, testified that she interviewed the claimant and identified some potential jobs for the claimant. Ms. Signoff confirmed that five of the nine jobs she identified for the claimant were potential jobs, not actual openings. Ms. Signoff also confirmed that some of the jobs identified fell into the light work category rather than sedentary and Ms. Signoff confirmed she was aware of the Functional Capacity Evaluation providing that the claimant was unable to even perform sedentary work.

Kim Reed, daughter of the claimant, confirmed that her mother was active with shopping, fishing, camping, working in the yard and garden and playing with her grandchildren before the August 24, 2001, injury. Since the claimant's injury, Ms. Reed testified that she assists her mother by cleaning house and shopping and the claimant no longer works in the yard. Ms. Reed verified that her mother sits for a while, stands for a while and holds onto a table or chair and she did not do this before her work injury.

Bill Brooks, a neighbor of the claimant, testified he lives across the street from the claimant and has known her about eight years. Mr. Brooks verified that the claimant was a hard working lady who worked at home as well as her school job. Mr. Brooks verified that the claimant worked in her yard and garden before the work injury and now does not. Mr. Brooks testified that he grocery shops for her because she cannot stand and walk much. Mr. Brooks testified the claimant used to make some craft things and does not do that anymore.

The claimant contends that she is permanently and totally disabled. Since her injury was an unscheduled injury to her body, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which she was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair her earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's

future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, she is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In addition, Ark. Code Ann. §11-9-102(4)(F)(ii) (Supp. 2001) provides:

(ii) (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 pre-existing 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.

The claimant is a 64-year old woman who had been employed by respondent for 12 years as a cook. The claimant suffered a back injury in a lifting incident on August 24, 2001, which eventually required surgical intervention. The claim was accepted as compensable by Respondent No. 1 and appropriate benefits were paid, to include a 13% permanent impairment rating assessed by Dr. Wayne Bruffett on May 7, 2003. Dr. Bruffett recommended a Functional Capacity Evaluation for the claimant and that was completed. The findings after the FCE by the therapist were that the claimant is unable to work in a sitting position longer than 30 minutes before changing positions, unable to work in a standing position for more than 10 minutes before taking a sitting break, unable to lift any weight, and unable to tolerate overhead work, low level work or work in a stooped position. The therapist was unable to recommend even sedentary work for the claimant. The therapist noted in her report that the claimant's demonstrated abilities and limitations during the evaluation appear to accurately reflect her current capacities. Dr. Wayne Bruffett's July 24, 2003, letter acknowledges that the FCE provides the claimant's limitations. He considered these limitations significant and did not place any additional specific limitations on the claimant aside from the FCE limitations.

While some jobs or potential jobs were identified by the vocational specialist, most of the jobs were possible future openings and jobs that exceeded the claimant's restrictions, such as jobs that involved child care and lifting or jobs requiring standing for longer periods. The claimant testified to making applications or contacts with the majority of the employers in the identified jobs with no success in obtaining employment.

After considering the claimant's age, limited work experience, education, the permanent physical impairment arising out of her work-related injury, work limitations and all other relevant facts, I find the claimant has proven by a preponderance of the evidence that she is permanently and totally disabled.

Respondent No. 1 contends that if the claimant is permanently and totally disabled or entitled to wage loss disability, the Second Injury Fund should be liable. The Second Injury Fund becomes liable only after three requirements have been satisfied, as follows:

1. The employee must have suffered a compensable injury at her present place of employment;
2. Prior to that injury, the employee must have had a permanent partial disability or impairment;
3. The disability or impairment must have combined with the recent compensable injury to produce the current disability status.

See, *Mid-State Construction v. Second Injury Fund*, 291 Ark. 1, 746 S.W.2d 539 (1988).

In the present matter, I find that Respondent No. 1 has failed to prove by a preponderance of the evidence that the claimant's pre-existing condition combined with the most recent compensable injury to produce the claimant's current disability status. While it is undisputed that the claimant had pre-existing heart related problems, which included a pacemaker and some arthritis, these conditions had not prevented the claimant from working until she sustained her August 24, 2001, back injury. The claimant's current work limitations and pain are related to her back and back injury from the most recent work injury. The claimant presented credible testimony at the hearing

and during the over two-hour hearing, the claimant was repeatedly sitting, standing, leaning on a table and shifting positions. This behavior continued during her testimony and while other witnesses were testifying. A recess was taken during the hearing so the claimant could move around. I find the Second Injury Fund has no liability in this claim.

ORDER

The claimant has proven by a preponderance of the evidence that she is permanently and totally disabled as a result of her August 24, 2001, compensable work injury. Respondent No. 1 has failed to prove by a preponderance of the evidence that the claimant's pre-existing condition combined with the most recent compensable injury to produce the claimant's current disability status. The Second Injury Fund is dismissed from this claim.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**