

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E901881

PAULA MCKINNEY, Employee	CLAIMANT
PLASTICS RESEARCH & DEVELOPMENT, Employer	RESPONDENT
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED NOVEMBER 24, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by ROBERT MONTGOMERY, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

\_\_\_\_\_ This case comes on for review following a remand from the Full Commission.

The claimant is a 38-year-old woman who worked for the respondent which manufactures plastic fishing lures. The parties have stipulated that claimant suffered a compensable injury to her right arm on February 13, 1998, as a result of using a molding machine to manufacture fishing lures. Claimant initially was evaluated by Dr. Cheyne and was eventually referred to Dr. Sherrill, an orthopaedic surgeon, who performed surgery to remove a cyst from the claimant's elbow area. Following this surgical procedure, the claimant continued to complain of pain and sensitivity in her right arm and elbow area. As a result, claimant was referred to Dr. Fisher for pain management. After some initial treatment, claimant underwent a scar revision surgery which was performed by Dr. Kelly on November 16, 1999. Since that surgery claimant has continued to have problems and has continued to receive medical treatment from Dr. Fisher. Dr. Fisher's treatment has included various modalities which were unsuccessful and most recently Dr. Fisher implanted a spinal cord stimulator in an attempt to control claimant's pain.

The claimant's claim has been the subject of three prior hearings involving a variety

of issues. Prior to the hearing on October 27, 2003, the most recent hearing occurred on May 13, 2002. Following that hearing, this administrative law judge filed an opinion dated June 12, 2002, finding that claimant's condition had not stabilized and awarding claimant temporary total disability benefits beginning July 25, 2001 and continuing through a date yet to be determined. That opinion was appealed to the Full Commission which in an opinion and order filed June 7, 2003 reversed that decision. The Commission found after considering all the evidence that claimant's healing period ended on November 29, 2000; therefore, claimant was not entitled to any additional temporary total disability benefits subsequent to that date. The claim was then remanded back to this administrative law judge for a determination of whether or not claimant is entitled to any additional permanent benefits in excess of her permanent physical impairment rating.

A pre-hearing conference was conducted on September 10, 2003, and a pre-hearing order was filed on September 11, 2003. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The opinion of the Full Commission filed July 7, 2003 is final and res judicata.
2. Respondents paid permanent partial disability benefits based upon a 10% rating to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Wage loss.
2. Attorney fee.

The claimant contends she is permanently totally disabled as a result of her compensable injury.

The respondents contend that it has paid claimant all benefits to which she is entitled.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled. Instead, as a result of her compensable injury, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

2. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole.

#### ADJUDICATION

In order to prove that she is permanently totally disabled, claimant has the burden of proving by a preponderance of the evidence that she has the inability because of her compensable injury to earn any meaningful wages in the same or other employment. A.C.A. §11-9-519(e)(1) and (2). In determining the degree to which an employee's future wage earning capacity is impaired, the Commission may consider in addition to the impairment rating itself various factors including the claimant's age, education, work experience, and any other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

I find after my review of the relevant wage loss factors presented in this case that claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury. Instead, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

At the time of the most recent hearing the claimant was 38 years old. The claimant is a high school graduate, but has no additional education or training. Claimant can read, but has difficulty writing due to the injury to her right arm. In addition to her employment with the respondent, claimant worked at the Bonanza Steakhouse for approximately three years as a salad bar attendant and at Callahan's Steakhouse as a hostess for approximately one to two years. Claimant also worked at a daycare facility taking care of children for approximately nine months.

According to claimant's testimony, she still has a great deal of pain, burning, and swelling in her right arm. Claimant testified that she cannot fully extend her arm and that she cannot use her arm to lift heavy items or press down. Claimant testified that her arm is sensitive to the touch and that she cannot stand to have clothes or other items touching her arm. Claimant testified that the spinal cord stimulator helps her pain but does not alleviate all of it.

As a result of her compensable injury, the claimant has been assigned a permanent physical impairment rating in an amount equal to 16% to the right upper extremity or 10% to the body as a whole. This impairment rating has previously been accepted and paid by the respondent. Claimant's first surgical procedure to her right arm occurred on March 12, 1998 when Dr. Sherrill removed a cyst. Because of claimant's continued complaints of pain she was referred to Dr. Fisher who has been claimant's primary treating physician since that time. Claimant also underwent a scar revision surgery performed by Dr. Kelly on November 16, 1999.

At a prior hearing the deposition of Dr. Fisher was admitted into evidence. Dr. Fisher testified that he diagnosed the claimant as suffering from "neuropathic pain post-traumatic right antecubital fossa." Dr. Fisher also testified during his deposition that he believes the cause of claimant's problem is damage to a sensory nerve which occurred during the course of her surgery. Dr. Fisher used various treatments in an attempt to

alleviate claimant's symptoms. This included use of various patches, topical gel, stellate ganglion blocks, freezing the claimant's arm with nitrous oxide, various medications, scar revision surgery, and finally the implementation of a spinal cord stimulator.

During his deposition Dr. Fisher also testified that claimant's injury included not only her right elbow and arm, but also her shoulder, trapezius, and neck. Because claimant's compensable injury was affecting parts of her body other than her upper extremity, a finding had been made in my opinion filed March 27, 2001 that claimant's injury was a non-scheduled injury, not a scheduled injury.

As previously noted, the Full Commission determined that claimant's healing period ended on November 29, 2000. A review of Dr. Fisher's medical reports subsequent to that date reveals that on several occasions Dr. Fisher opined that claimant was disabled from working. However, because claimant's healing period had ended, she was not entitled to additional temporary total disability benefits. Moreover, even though Dr. Fisher opined that claimant was disabled from working on some occasions subsequent to November 29, 2000, I find from my review of his medical reports that this was a temporary condition, not a permanent condition. I find insufficient evidence that Dr. Fisher or any other doctor has opined that claimant is permanently totally disabled from working. Introduced into evidence at the hearing on May 13, 2002, was a physician's statement of disability form Dr. Fisher completed in connection with claimant's personal insurance. Although Dr. Fisher indicated that at that time the claimant was totally disabled from working, he indicated that it was indefinite when claimant would be able to resume work. Significantly, Dr. Fisher did not state that claimant would never be able to return to work even though that option was available on the form.

Also submitted as evidence at the most recent hearing is a note from Dr. Fisher's office signed by his nurse indicating that Dr. Fisher had opined that claimant had a permanent restriction of one-handed work. Significantly, Dr. Fisher did not opine that

claimant was permanently disabled from working.

I also believe it is important to note that Dr. Kelly, the physician who performed the initial surgical procedure on the claimant, opined in his office note dated April 5, 2000 that claimant had “exaggerated and excessive pain behavior.”

Finally, I believe it is important to note that claimant has filed for social security disability benefits. Also, since the end of her healing period the claimant did attempt to return to work for respondent for a period of time but was unable to continue her employment due to pain. Other than talking to someone at the daycare center where she had previously worked, claimant has made no effort to look for employment since she last worked for respondent on July 12, 2001.

After consideration of all the relevant wage loss factors presented in this case, I find that claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled. Claimant’s treating physicians have not opined that claimant is permanently totally disabled from working. Dr. Fisher has opined that claimant is limited to work with her left hand. The claimant is relatively young at 38 years old and she is a high school graduate. Claimant is able to read and according to her testimony is capable of driving an automobile. While claimant will not be able to use her dominant hand in future employment, I do not find that she is permanently totally disabled under these circumstances. Instead, I find that claimant has suffered a significant loss in wage earning capacity in the amount of 60% to the body as a whole.

#### AWARD

Claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled. Instead, after consideration of all relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole as a result of her compensable injury.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE