

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102626

STACY M. FALCINELLI,  
EMPLOYEE

CLAIMANT

RIVERVIEW HIGH SCHOOL,  
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED JUNE 14, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Searcy, White County, Arkansas.

The claimant was represented by HONORABLE TIMOTHY MYERS, Attorney at Law, Fayetteville, Arkansas.

The respondents were represented by HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on April 27, 2004 in Searcy, Arkansas. A prehearing order was entered in this case on February 26, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the April 27, 2004 hearing and are hereby accepted:

1. Employee/employer relationship existed at all

relevant times and on or about February 27, 2001.

2. That the claimant sustained compensable injuries arising out of an automobile wreck on February 27, 2001.

3. That this was a compensable injury that the respondents accepted as compensable and the claimant received treatment.

4. That surgery was performed and impairment rating given. That the claimant has received payment for certain impairment ratings at this time.

5. The claimant's average weekly wage during the relevant period was \$511.00, entitling her to a temporary total disability rate of \$341.00 and a permanent partial disability rate of \$256.00. The respondents previously underpaid the claimant's indemnity benefits at a temporary disability rate of \$302.00 per week and permanent partial disability benefits at a rate of \$209.00 per week. The parties stipulate that the respondents are liable for the indicated underpayment in benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited in the prehearing order to the following:

1. Correct compensation rate (as applied to TTD and PPD) [which was resolved by stipulation 5 above].

2. Wage loss disability benefits.
3. Controverted attorney's fee.

#### **DISCUSSION**

With regard to an injured worker's scheduled injuries, an award of permanent disability benefits for a scheduled injury is limited to the benefits provided for under Ark. Code Ann. § 11-9-521 for that scheduled injury, absent a finding of permanent and total disability. See, e.g., Federal Compress & Warehouse v. Risper, 55 Ark. App. 300, 935 S.W.2d 279 (1996); Anchor Construction v. Rice, 252 Ark. 460, 479 S.W.2d 573 (1972). Therefore, an injury scheduled under Ark. Code Ann. § 11-9-521 is payable without regard to subsequent earning capacity. Consequently, an award for a scheduled injury cannot be increased by considering wage loss factors, unless the claimant proves that she is permanently and totally disabled. See, e.g., Risper, supra, Rice, supra.

For unscheduled injuries, an injured worker'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 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 workers' future earning capacity. Such other matters may include, but are not limited to, 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 & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

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

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

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

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

In the present case, the claimant is a life-long resident of Searcy, Arkansas who was 41 year old at the time of the hearing. Ms. Falcinelli is trained as and has been licensed as a licensed practical nurse since 1984. Ms. Falcinelli also holds a commercial driver's licence.

With regard to her work experience as a nurse, Ms. Falcinelli has been under contract with the respondent, Riverview High School, for the past 17 years as a school nurse (and as a computer lab aide for at least some portion of that time). Prior to joining Riverview High School, Ms. Falcinelli worked as a geriatric nurse in a nursing home and as an LPN monitoring critical care at White County Hospital. With regard to her commercial driving licence, Ms. Falcinelli had a contract to drive a school bus for the

school district, in addition to her school nurse/computer lab aide contract, when she was involved in the work related automobile accident on February 27, 2001 which caused the injuries involved in this case.

Ms. Falcinelli was primarily treated for two injuries in her upper extremity after the accident. One injury was a right humerus fracture in the mid-shaft. This injury ultimately required an open reduction internal fixation surgery with grafting on July 26, 2001 to promote healing. The second injury occurred within the right shoulder, and Ms. Falcinelli underwent arthroscopy with repair of a Bankart lesion on December 3, 2001. In addition to these injuries treated by Dr. Jimmy Tucker, Dr. Safman in May of 2003 found evidence of a brachial plexus injury with motor loss for the C5, C6, and C7 nerve roots, as well as some degree of elbow dysfunction.

Dr. Safman assigned the claimant a 20% permanent anatomical impairment to the right upper extremity, equivalent to a 12% rating to the body as a whole, which the respondents accepted and paid, for Ms. Falcinelli's permanent anatomical impairment. Of the 20% rating assigned, 4% related to loss of shoulder rotation, 1% related to elbow function abnormality, and 15% related to

motor loss for brachial plexus injury to the C5, C6, and C7 nerve roots. There appeared to be no dispute at the hearing that the Commission may consider the impairment and any vocational restrictions associated with the unscheduled shoulder and brachial plexus injuries in determining permanent disability in excess of permanent anatomical impairment under Ark. Code Ann. § 11-9-522, but the Commission may not consider the elbow or humerus fracture injuries to the arm itself, which represent scheduled injuries under Ark. Code Ann. § 11-9-521.

With regard to the claimant's return to work after the accident, the record indicates that the claimant had an unusually lengthy and arduous recovery from her injuries. The humerus fracture did not heal without surgery. The shoulder injury went undiagnosed and untreated for a lengthy period prior to surgery, and in addition, Dr. Safman in 2003 appears to have been the first physician to have recognized through electro-diagnostic testing the existence of the brachial plexus injury in the claimant's cervical nerve roots.

During the course of her recovery, the claimant and Riverview High School negotiated new contracts for the claimant to return to work as a school nurse, and the

claimant appears to have successfully returned to work as a school nurse. However, the claimant's testimony and Dr. Tucker's records persuade me that the claimant and the school district were unable to put the claimant under contract for her prior bus route because permanent disability in the claimant's upper extremity prevents the claimant from operating the door mechanism on the bus assigned to the claimant's pre-injury bus route. While the school district has buses with door mechanisms which would accommodate the claimant's disability, those buses are assigned exclusively to other routes.

At the time of her 2001 injury, the claimant received \$15,700 per year, for approximately 9 months of work from 7:30 a.m. until 3:00 p.m. from her school nurse/computer lab contract. She received \$4,206 per year, for approximately 9 months driving approximately 25 minutes in the morning and 25-30 minutes in the evening, from her bus driver contract. Again, subsequent to her injuries she has returned to work as a school nurse, she has been unable to return to work as a bus driver, and she has supplemented her income somewhat with summer work through the school, but has not sought any new work away from the school.

The respondents suggested at the hearing alternative contentions as to why the claimant should not receive any permanent disability compensation in excess of the 12% permanent anatomical impairment accepted and paid by the respondents. For example, to the extent that the claimant has lost the ability to manipulate her bus' door mechanism, the respondents argue that this dysfunction is caused by muscle weakness attributable to the claimant's scheduled humerus fracture, and not attributable to her unscheduled shoulder or her unscheduled brachial plexus injuries. The respondents also seemed to suggest that the claimant might be able to completely eliminate her lost income from bus driving by terminating her school nurse contract and seeking employment at other facilities as an LPN.

However, I do not find these arguments persuasive in the present case for the following reasons. First, to the extent that the respondents attempt to attribute the claimant's inability to operate a bus door to muscle atrophy associated with the humerus fracture, I fail to see where Dr. Tucker or Dr. Rosenzweig ever attributed that vocational disability to muscle atrophy associated with a humerus injury. In fact, Dr. Tucker indicated that the humerus fracture ultimately healed, and Dr. Safman assigned the 12%

rating which the respondents paid with no reference to either the humerus fracture or to muscle atrophy. I fail to see any sufficiently credible evidence indicating to me that the claimant's relevant physical impairment causing vocational disability is associated with the scheduled humerus fracture (for which Dr. Safman assigned no impairment rating) instead of the unscheduled shoulder injury and unscheduled brachial plexus injuries (for which Dr. Safman assigned significant anatomical impairment ratings). Under these circumstances, I find that the claimant has established by a preponderance of the evidence that her unscheduled injuries are the major cause of the permanent disability at issue in this claim.

To the extent that it was suggested by the respondents at the hearing that the claimant could recoup her lost driving income by simply quitting her job as a school nurse and getting a real LPN job somewhere else, I first note that the claimant is a 17 year veteran at Riverview High School who, for the majority of her working life, has invested her LPN license in functioning as a school nurse for the respondent employer, and has likewise participated in the respondent employer's retirement system for the majority of her working life.

Second, my calculations indicate that, by working 25 minutes in the mornings and approximately 25 minutes in the afternoons approximately five days per week approximately nine month (39 weeks) per year to perform her bus driving contract, the claimant would invest approximately 162.5 hours of labor to earn \$4,206.79 at the time of her injury, for a compensation rate of almost \$26 per hour under the bus driving contract. By working from 7:30 a.m. until 3:00 p.m. (and assuming 30 minutes off for lunch) those same days under her other contract, the claimant would need to work a total of 1365 hours to earn \$15,700 at the time of her injury, for a compensation rate of only approximately \$11.50 per hour under the school nurse/computer lab aide contract. There is simply no evidence in this record to support the respondents' suggestion that the claimant could replace her lucrative \$26 per hour bus driving income or her 17 years invested in the respondents' retirement system with alternative LPN work available in the Searcy area.

Third, I note that the claimant currently works in an adolescent environment (i.e., not an environment where patients require assistance getting out of bed, using the restroom, etc.). While my assessment of the claimant's vocational restrictions outside the school setting may be

somewhat limited by the lack of a functional capacity evaluation in the record indicating her specific weight restrictions for lifting, pushing, pulling etc. due to her shoulder and brachial plexus injuries, I do note that Dr. Tucker has characterized the claimant's injury as "severe". Dr. Rosenzweig has described the claimant's physical limitations as an inability to generate sufficient force to reach, push and pull. Therefore, if the claimant is ever constrained to leave the sedentary school nurse/computer lab environment to engage in actual patient care, I point out that her shoulder restrictions will likely limit her ability to engage in patient lifting, pushing, pulling, etc., because of her documented dysfunction.

On the other hand, I also note that the claimant's anatomical impairment has apparently not restricted her ability to perform her duties as a school nurse or as a computer lab aide. The claimant since her accident has also found some other part-time or temporary school work at times for replacement income, although by my calculations at nowhere near the \$26 hourly wage rate she earned as a bus driver before her injury. Finally, I note that, if the claimant retains her CDL license, if a bus route contract involving an appropriate model of bus came open, and if the

claimant won the contract, the claimant could conceivably return to work in the future making the same or greater income as a bus driver for the district as she was earning at the time of her injury.

After considering the claimant's relatively young age, her education and licenses, her work experience, the nature and extent of her unscheduled injuries and associated impairment, and all other relevant factors, I find that the claimant has sustained a 7% permanent disability rated to the body as a whole associated with her unscheduled injuries in excess of the permanent anatomical impairment accepted and paid by the respondents.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Employee/employer relationship existed at all relevant times and on or about February 27, 2001.
2. The claimant sustained compensable injuries arising out of an automobile wreck on February 27, 2001.
3. This was a compensable injury that the respondents accepted as compensable and the claimant received treatment.
4. Surgery was performed and impairment ratings given. The claimant has received payment for certain impairment ratings at this time.

5. The claimant's average weekly wage during the relevant period was \$511.00, entitling her to a temporary total disability rate of \$341.00 and a permanent partial disability rate of \$256.00. The respondents previously underpaid the claimant's indemnity benefits at a temporary disability rate of \$302.00 per week and permanent partial disability benefits at a rate of \$209.00 per week. The respondents are liable for the indicated underpayment in benefits.

6. The claimant has sustained a 7% permanent partial disability rating to the body as a whole attributable to her unscheduled injuries in excess of the permanent anatomical impairment accepted and paid by the respondents.

**AWARD**

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued benefits shall be paid in a lump sum without discount thereon.

The claimant's attorney is entitled to the maximum statutory attorney's fees on the additional benefits identified in findings 5 and 6, one-half of said fee to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-

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715(1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge