

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F101716**

**MARILYN HAMILTON, EMPLOYEE** **CLAIMANT**

**BOARS HEAD PROVISION COMPANY  
INC., EMPLOYER** **RESPONDENT**

**ZURICH AMERICAN INSURANCE COMPANY,  
INSURANCE CARRIER/TPA** **RESPONDENT**

**OPINION FILED JANUARY 9, 2004**

Hearing before Chief Administrative Law Judge David Greenbaum on December 12, 2003, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael R. Mayton, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted December 12, 2003, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this matter on November 12, 2003, and a Prehearing Order was filed on November 13, 2003. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employee/employer/carrier relationship existed

at all relevant times, including August 23, 2000; that the claimant sustained a compensable injury on said date; that she earned sufficient wages to entitle her to compensation rates of \$235.00 per week for temporary total disability and \$176.00 per week for permanent partial disability; that claimant's healing period ended July 2, 2001; that she was assessed an eight percent (8%) permanent impairment by Dr. Jerry Engelberg which was accepted and paid; and that respondents had controverted claimant's entitlement to permanent disability in excess of her impairment.

By agreement of the parties, the sole issue to be presented for determination concerned the extent of claimant's permanent disability.

Claimant contended, in summary, that she sustained permanent disability, substantially in excess of the eight percent (8%) impairment in an amount to be determined by this Commission. Conversely, respondents maintained that the claimant was limited to the eight percent (8%) permanent impairment assessed by Dr. Engelberg and that the claimant did not sustain any wage-loss disability.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the December 12, 2003, hearing containing numerous exhibits.

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 claimant and to observe her 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. A preponderance of the credible evidence of record proves that the claimant has sustained wage-loss disability in excess of her eight percent (8%) permanent impairment.
4. The claimant has proven, by a preponderance of the evidence, that she is entitled to an overall permanent partial disability of twenty-five percent (25%) to the body as a whole, specifically, an eight percent (8%) permanent impairment, together with a seventeen percent (17%) wage-loss disability.
5. Respondents have controverted all permanent disability in excess of eight percent (8%) to the body as a whole.
6. Issues not addressed herein are specifically reserved.

DISCUSSION

\_\_\_\_\_The facts in this case are basically undisputed. The claimant, Marilyn Hamilton, is forty-four (44) years old. The claimant has a high school

education. She described herself as an average student. She denied obtaining any vocational or job training beyond her formal schooling. The claimant's work experience has consisted primarily of manual labor in factory-type settings. The claimant worked for the employer herein for approximately four (4) years, the last two (2) as a machine operator, requiring the lifting of up to thirty-five (35) pounds, occasionally, and up to ten (10) pounds, frequently, and involved substantial standing, as well as constant use of both upper extremities. The claimant sustained an admitted, compensable injury to her cervical spine on August 23, 2000. Following an extensive course of unsuccessful, conservative treatment, the claimant ultimately underwent cervical surgery which was performed by Dr. Jerry Engelberg, a neurosurgeon at the Semmes-Murphy Clinic in Memphis, Tennessee. The record reflects that the claimant sustained disc herniations at two (2) levels which required discectomy as well as fusion. Dr. Engelberg's June 19, 2001, report is set out below:

This is a 41 y/o lady that was seen after a workman's comp injury in September 2000. She was seen January 19, 2001. She had neck, right shoulder and arm pain. She was managed conservatively. MRI showed a central herniated disc at cervical 4 and a small one at cervical 5. On April 2, 2001, the patient underwent anterior cervical 4 and 5 discectomy, allograft, fusion and plating. She is 3 months out now. Her postoperative films look quite good. She complains of some neck, shoulder and arm pain. Her exam is unremarkable. She has no motor or sensory changes. I have told her that she could take the collar off. We are going to give her a work release for July 2, 2001. What this

indicates is that there is nothing more to be done surgically. There is nothing more I think that can be done for this lady. She needs to get together with the people where she works and discuss how they are going to proceed. (Resp. Ex. A, p.1)

As reflected by the stipulations, Dr. Engelberg assessed an eight percent (8%) whole body impairment which respondents accepted and paid. Despite performing a significant, evasive procedure, Dr. Engelberg released the claimant to return to work three (3) months post-surgery. For unexplained reasons, the claimant was released to return to work without restrictions despite the short recovery period and significant impairment. (Resp. Ex. A, pp.2-3)

I feel compelled to point out that in a confusing, subjective history obtained in a functional capacity evaluation performed August 10, 2001, it was noted under subjective history that the claimant reported that when Dr. Engelberg released her, he stated that he was required to, by law, at three (3) months.

The record reflects that the claimant, in fact, returned to work for the employer herein performing her regular job following her release by Dr. Engelberg, and that she worked approximately two (2) to three (3) weeks while taking various medications, including the pain medication, Oxycontin. The claimant ultimately resigned her job because of her continued, physical problems. The claimant reported her on-going problems to the human resource department and was sent back to the company doctor, Dr. Sudhir Kumar, for

follow-up treatment. Although, as will be reflected further below, Dr. Kumar initially indicated that he was going to refer the claimant back to Dr. Engelberg for reevaluation, instead, Dr. Kumar referred her for a functional capacity evaluation. (Tr.10-14)

The medical records reflect that the claimant actually saw Dr. Kumar on June 30, 2001, prior to her release to return to work, with continued complaints of neck pain and shoulder pain. Dr. Kumar continued the claimant on medication, indicating that he would send the claimant back to Dr. Engelberg while noting that the claimant might require surgery. Dr. Kumar reexamined the claimant on July 20, 2001, at which time he considered sending the claimant to a pain clinic, and again on August 6, 2001, at which time he recommended a follow-up MRI, which was never performed. Instead, Dr. Kumar, for some unexplained reason, referred the claimant to Physiotherapy Associates in Memphis, Tennessee, for a functional capacity evaluation (F.C.E.). (Cl. Ex. A, pp.2-4)

The claimant underwent a F.C.E. on August 10, 2001. Rather than conduct an exhaustive analysis of an eight (8) page report, suffice it to say that, in summary, the clinic coordinator concluded that the claimant displayed the ability to perform work activities equivalent to the sedentary to light-work range while, at the same time, opining that the claimant self-limited the activities in the F.C.E. to the extent that the data recorded from subjective and

objective measures could not be used to conclude any definite labels of physical capabilities. She felt that the claimant could display much greater physical capacities than she was willing to do. (Resp. Ex. A, pp.5-12)

#### WAGE-LOSS DISABILITY

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, 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 concerning 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 a 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 vs. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross vs. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 living at that time, she is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manf. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

\_\_\_\_\_ Respondents apparently rely primarily on a June 19, 2001, office note from Dr. Engelberg releasing the claimant to return to work without restrictions as a basis for controverting all wage-loss disability. The record as a whole does not support respondents' position. First, I find it inherently inconsistent to release a patient without restrictions three (3) months post-surgery with a substantial, permanent impairment. Further, the record reflects that the claimant was taking various medications, including muscle relaxers and pain medication while being permitted to work around machinery, which is a formula for disaster. Further, the record reflects that the claimant continued to voice significant complaints to her employer following her attempt to return to work, and, in fact, received subsequent medical treatment, indicating that the work activities were causing a recurrence of symptoms. I did not find Dr. Engelberg's release to return to work without restrictions to be credible. The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Maverick Transportation vs. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

The record reflects that the claimant is physically able to return to gainful

employment. In fact, the claimant has worked various, odd jobs since voluntarily terminating her employment in August, 2001, although the claimant was not working at the time of the within hearing. The claimant acknowledged that she was able to perform jobs that were not physically demanding while, at the same time pointing out that employers were reluctant to hire her because of her prior injury and limitations whether real or self-limiting. In my opinion, the claimant's limitations are greater than those imposed by Dr. Engelberg, but not as great as the claimant perceives. After reviewing the evidence in this case impartially, and after consideration of the claimant's age, education, and work experience, together with her anatomical disability, as well as other factors which may reasonably be expected to affect the claimant's future earning capacity, I find that the claimant has sustained wage-loss disability in the amount of seventeen percent (17%) to the body as a whole.

I feel compelled to comment on two (2) areas of concern which were brought to light during the hearing, and which may require further development. First, the claimant's testimony concerning the wages that she earned while working for the respondents herein appears inconsistent with the stipulations of the parties. It must be further noted that a cursory review of the Commission file failed to reflect the filing of a Commission Form AR-W as required by Commission Advisory 88-1 and Commission Rule 29. Also, the record reflects that the claimant continued to take prescription medications

while maintaining that the insurance carrier quit paying for her medications after she was released by Dr. Engelberg. Clearly, respondents remain responsible for maintenance medication so long as it is causally related to her injury and reasonably necessary. However, by agreement of the parties, the sole issue presented for determination concerned claimant's entitlement to wage-loss disability, if any. The aforementioned observations are made only with the hopes that the parties will attempt to amicably resolve any further disputes rather than require additional, protracted litigation.

#### AWARD

Respondent, Zurich American Insurance Company, is hereby directed and order to pay, to the claimant, permanent partial disability benefits at the rate of \$176.00 per week beginning July 3, 2001, and continuing for 112.5 weeks, representing an overall permanent partial disability of twenty-five percent (25%) to the body as a whole.

All accrued benefits shall be paid in lump sum and without discount, and respondents may claim credit for the eight percent (8%) permanent impairment previously paid.

Additionally, claimant's attorney, Mr. Kenneth A. Olsen, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715; *Coleman vs. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and *Chamness vs. Superior Industries and*

Sedgwick James of Arkansas, Inc., Arkansas Workers' Compensation  
Claim #E019760, (March 5, 1992).

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge