

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F210763**

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| <b>MARY J. NICHOLS, EMPLOYEE</b>                           | <b>CLAIMANT</b>   |
| <b>BEVERLY ENTERPRISES<br/>(AEGIS THERAPIES), EMPLOYER</b> | <b>RESPONDENT</b> |
| <b>CONSTITUTION STATE SERVICE<br/>COMPANY, CARRIER</b>     | <b>RESPONDENT</b> |

**OPINION FILED JANUARY 16, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on October 22, 2003, at Little Rock, Pulaski County, Arkansas.

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

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of additional permanent partial disability benefits and attorney's fees.

At issue is whether or not the claimant has sustained a loss of earning capacity as defined by Ark. Code Ann. §11-9-505, §11-9-522, and §11-9-102(4)(F)(ii)(a).

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on July 19, 2002, at which time the claimant sustained a compensable back injury at a compensation rate of \$201.00/\$154.00. Medical expenses, temporary total disability benefits and a 5% impairment rating to the body as a whole, as assessed by Dr. Adametz in his report of March 10, 2003 have been accepted. Some medical expenses have been paid by Blue Cross Blue Shield.

The claimant contends she is physically unable to return to work and seeks permanent and total disability benefits. Alternatively, the claimant is willing to explore vocational rehabilitation if the respondents will pay for an evaluation.

The respondents contend the claimant is physically capable of returning to work at commensurate pre-injury wages (\$7.76 per hour).

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant and her daughter, whose testimony was corroborative, were the only witnesses to testify at the hearing. Both ladies seemed sincere in their testimony.

The claimant, age 61 (D.O.B. January 19, 1942) has a high school education and work experience as a substitute teacher, teacher's aide, clerical worker, and caregiver to the handicapped and elderly in assisted living facilities. Her health history includes diabetes. As a widow, she receives Social Security survivor's benefits. The claimant has not worked since she was terminated on February 10, 2003.

Aegis Therapies is a subdivision of the Beverly Enterprise nursing home. The claimant's job duties as a physical rehabilitation technician involved lifting and transporting patients, and getting supplies (medicine, towels, sheets and hot packs) ready for the therapist. She also took a 36 hour course to receive certification in recreation and activities for the elderly.

The claimant was injured on July 19, 2002, when she slipped and fell on her "tailbone" and struck her head. Initially, she was concerned about a concussion with neck and shoulder pain but now her symptoms are primarily in her low back.

The claimant was treated conservatively for a compression fracture and assessed a 5% rating to the body as a whole by neurosurgeon, Dr. Adametz. She remains symptomatic and under the care of Dr. Russell who prescribes pain medication and muscle relaxers. The claimant has also seen Dr. Bruffett who suggested chiropractic treatment, acupuncture, or more physical therapy. The claimant's persistent pain interferes with her ability to sit or stand for long periods of time, drive, perform housework or lawn care.

The claimant does not feel she would be able to return to work full time at her regular duties because of her pain. She spoke with human resource manager, Debbie Pearl, and the insurance

adjuster, Cynthia Humphries about returning to work but she felt she was “getting the run around.” It is the claimant’s understanding that she could not return to work without a medical release and updated health card. She would have to submit to a drug test and be willing to float among various jobs as needed. She has spoken with various people at Aegis (Cathy Sullivan, Robert and Holly) and was told there was no job available. Debbie Pearl sent her a job description for a Rehab Aide III which was her original job at the time of the accident.

The claimant is concerned that she could not work a full time week, could not safely lift and transport patients, and could not pass a drug test or drive using her prescription medications. She is, however, willing to try to return to work or explore vocational rehabilitation.

### **MEDICAL EVIDENCE**

After the fall at work, the claimant was seen by general practitioner, Dr. John Russell and diagnosed with contusions, sprains and a fractured sacrum based on x-rays. She was prescribed medication and physical therapy and excused from work until July 22, 2002. Dr. Russell then allowed her to return to work with restrictions.

The claimant remained symptomatic and Dr. Russell ordered an MRI on October 9, 2002. The claimant was diagnosed with multi-level degenerative disc disease, disc protrusions or herniations at L5-S1 with bilateral foraminal narrowing more prominent on the right. Dr. Russell excused the claimant from work and referred her to neurosurgeon, Dr. James Adametz in November 2002. Dr. Russell took the claimant off work on December 31, 2002 for an undetermined period of time.

Dr. Adametz opined that the claimant was not a surgical candidate and released her on March 10, 2003 with a 5% rating “due to the small disc and the injury to her tailbone.” He prescribed no specific work restrictions.

Dr. Russell completed what appears to be an Americans with Disability (ADA) questionnaire (undated) indicating the claimant was unable to work because of severe back pain. The impairment substantially limited major life activities, such as walking for more than 20 minutes, stooping,

bending, moving and twisting, for a six month period after January 18, 2003. It is unclear if these restrictions are permanent.

### **JOB DUTIES**

The respondents' exhibit packet includes a job description for a Rehab Aide. The physical tasks include transporting patients to physical therapy sessions, setting up equipment that will be needed for the therapy session, taking inventory and restocking supplies, disposing of used supplies, and keeping the rehab area clean (in tandem with the housekeeping department).

The job requires that the employee be able to stand, push, pull, reach, bend, walk, perform heavy lifting (no amount is specified) and handle physically aggressive patients. The job also requires the employee to submit to drug testing and a physical examination and provide their own transportation to the job sites. No testimony was offered by the respondents waiving the drug testing requirement for the claimant.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

Wage loss is the degree to which a compensable injury has affected the claimant's ability to return to the work force, earning wages commensurate with their pre-injury rate of pay. In assessing wage loss, the Commission may take into consideration the claimant's age, education, work experience, physical impairment, work restrictions, and motivation. 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 (1984), Grimes v. North American Foundry, 42 Ark. App. 137, 856 S.W.2d 309 (1993), Ark. Code Ann. §11-9-522.

To be entitled to wage loss, the claimant must also prove that the compensable injury is the major cause of her impairment, Ark. Code Ann. §11-9-102. Wage loss can be mitigated if the respondents prove the claimant has returned to work, or has a job offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident, or if the claimant unreasonably refuses vocational rehabilitation or job placement assistance, Ark. Code Ann. §11-9-

522, §11-9-505.

The evidence of record shows the claimant suffers from chronic pain as a result of her compensable injury and relies on prescription medication and frequent breaks to perform activities. Her age is also a deterrent to successful rehabilitation or re-employment. Therefore, I find that she has suffered a loss of earning capacity. However, the claimant has a modest impairment rating and it is not clear that she has any permanent work restrictions. Therefore, I find she is not permanently and totally disabled.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 19, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$201.00/\$154.00. Medical expenses, temporary total disability benefits, and a 5% rating has been paid.
2. After considering the claimant's age (61), her education (high school), her work experience (teaching, clerical work, caregiver) and her impairment rating (5%), I find the claimant is entitled to wage loss in the amount of 10% for a total of 15% in permanent partial disability benefits.
3. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct.

App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge