

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F102126/F114046

ROSE GONYIER WARNOCK		CLAIMANT
DE STA CO MANUFACTURING COMPANY		RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED MAY 7, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by LAWRENCE FITTING, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claims on March 2, 2004, in Fort Smith, Arkansas. By agreement of the parties, these two claims were consolidated for hearing and decision. The deposition of Dr. Keith Holder was taken on February 18, 2004, and was admitted as Respondent's Joint Exhibit No. 1. The deposition of Rose Gonyier was taken on November 25, 2003, and was admitted as Respondent's Exhibit No. 2. The deposition of Rose Gonyier was taken on March 25, 2002, and was admitted as Respondent's Exhibit No. 3. Subsequent to the hearing, various medical records from the prior hearing were admitted as Claimant's Exhibit No. 2.

A pre-hearing order was entered in these claims on November 18, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Between the date of the entry of the pre-hearing order and the hearing, the Second Injury Fund of the State of Arkansas was added a party respondent.

The issue of Second Injury Fund liability was also added. A copy of the pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Opinion of February 24, 2003, has become final and is res judicata of all issues raised and addressed therein.
2. The respondents have paid all benefits awarded in this Opinion as well as permanent partial disability benefits attributable to a permanent physical impairment of 8% to the body as a whole.

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

1. The claimant's entitlement to permanent disability benefits for permanent physical impairment attributable to her compensable carpal tunnel syndrome.
2. The claimant's entitlement to permanent disability benefits for permanent "disability" or wage loss, due to her compensable back injury.
3. The claimant's entitlement to medical services provided by Dr. Alexander, beginning in late October or early November of 2003.
4. Controversion and appropriate attorney's fee on the temporary total disability benefits from May 15, 2003 through September 2, 2003, the expense of Dr. Capocelli's services on and after May 15, 2003, as well as the currently disputed benefits.
5. Whether the Second Injury Fund has liability for any permanent disability benefits.

In regard to these issues, the claimant contends:

"Claimant injured her low back on January 10, 2001, when she lifted a basket of parts while employed by respondent. This injury was held compensable by Opinion of the Administrative Law Judge dated February 24, 2003. Thereafter, temporary

total disability benefits were paid and on September 2, 2003, Dr. Capocelli rated the claimant with an 8% impairment to the body as a whole as a result of her low back injury. He further recommended vocational retraining and gave her permanent restrictions to sedentary work.”

In regard to these issues, the respondent employer-carrier contends:

“The respondents will contend that they have accepted and paid all appropriate compensation benefits including permanent partial disability benefits attributable to the impairment rating which are being paid at this time. The respondents will contend that the claimant is not entitled to any permanent disability benefits in excess of those attributable to the impairment rating.”

In regard to these issues, the Second Injury Fund contends:

“Claimant’s entitlement to rehabilitation benefits should be determined prior to any hearing on her entitlement to wage loss disability benefits.”

DISCUSSION

I. PERMANENT PHYSICAL IMPAIRMENT ATTRIBUTABLE TO THE CLAIMANT’S BILATERAL CARPAL TUNNEL SYNDROME

_____The first issue to be addressed concerns the claimant’s entitlement to permanent disability benefits for permanent physical impairment attributable to her compensable bilateral wrist/hand injuries, which have been diagnosed as bilateral carpal tunnel syndrome. The burden rests upon the claimant to prove all of the facts necessary to entitle her to such benefits.

Ark. Code Ann. §11-9-704(c)(1)(B) requires that any determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. The term “objective findings” is defined by Ark. Code Ann. §11-9-102(16)(A)(i) as the independent observation of findings which cannot come under the voluntary control of the claimant. Ark. Code Ann. §11-9-102(16)(A)(ii) expressly prohibits

the consideration of pain in determining the existence and extent of permanent physical impairment. Ark. Code Ann. §11-9-522(h) provides that the determination of the existence and extent of permanent physical impairment must be made in a manner that conforms to the official rating guide adopted by this Commission. At the present time, this official rating guide is the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). Finally, Ark. Code Ann. §11-9-102(4)(F)(ii)(a) requires the claimant to prove that her compensable injuries were the "major cause" of any permanent physical impairment she has experienced with her wrists/hands. The term "major cause" is defined by Ark. Code Ann. §11-9-102(14)(A) is more than fifty percent (50%) of the cause.

The Appellate Courts have held that under the present wording of the Act, it is the duty of this Commission and not any particular medical expert to ascertain the existence and extent of permanent physical impairment resulting from a compensable injury. However, this does not mean that expert medical evidence on this issue is to be disregarded. Although no longer conclusively binding on this Commission, expert medical evidence addressing the issue of the existence and extent of permanent physical impairment can properly be considered, if it is stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B).

In the present claim, the medical record is not silent on the issue of the existence and extent of permanent physical impairment, due to the claimant's compensable bilateral wrist/hand injuries. Rather, all of the expert medical opinion offered on this issue is to the effect that the claimant has not experienced any permanent physical impairment as a result of these compensable injuries. These expert medical opinions are stated with clarity and without any equivocation. They are also supported by the other evidence presented. I find these expert opinions to be persuasive.

A review of the evidence further reveals that the claimant has failed to show the presence of any “objective findings” to support an assessment of permanent physical impairment for her compensable bilateral wrist/hand injuries. There is no objective findings, whatsoever, to indicate that the claimant continues to experience any permanent loss of function of this portion of her anatomy on either a neurological or mechanical basis. There are no abnormal findings on electroneurological testing. Repeated physical examinations of the claimant’s wrists and hands have not revealed any muscle wasting or atrophy (particularly of the thenar muscles), which would be indicative of a continuing neurological deficit. Repeated physical examinations have also failed to show objective evidence of any mechanical dysfunction involving the joints in the claimant’s wrist and hands (i.e. crepitus, contracture, swelling, discoloration, loss of passive range of motion, or muscle atrophy).

The only evidence to show the existence of any permanent physical impairment or loss of function of her wrists and hands is subjective in nature. This evidence consists primarily of the claimant’s verbal complaints of increased pain and discomfort when using her wrists and hands and a loss of strength in this portion of her body. Clearly, these subjective complaints are not sufficient to support the assessment of any degree of permanent impairment. In fact, in light of the total lack of any objective findings to support these extensive subjective complaints, the inconsistency of even the claimant’s subjective complaints, and the less than maximum effort exhibited by the claimant during the functional capacity assessment, these subjective complaints are clearly suspect.

A review of the American Medical Association’s Guides to the Evaluation of Permanent Impairment (fourth edition), shows that it does not provide for an assessment of permanent physical impairment based solely on the existence of a diagnosis of carpal tunnel syndrome. Nor, does this guide provide an assessment of permanent physical impairment merely because the patient has undergone surgical correction of carpal tunnel

syndrome. This guide does provide methods to rate permanent physical impairment where there is a residual neurological or mechanical deficit. However, as previously noted, the greater weight of the credible evidence fails to show that the claimant has experienced either of these types of deficits.

In summary, I find that the claimant has failed to prove that she sustained any permanent physical impairment, as a result of her compensable bilateral wrists/hands injuries. Thus, she would be entitled to any benefits under Ark. Code Ann. §11-9-521, as a result of her compensable bilateral wrist/hand injuries.

II. SECOND INJURY FUND LIABILITY

The next issue to be addressed is the applicability of Ark. Code Ann. §11-9-525, in regard to potential liability of the Second Injury Fund for any benefits in this claim. Applicable case law implies that since the respondent employer-carrier reaps the benefit of Ark. Code Ann. §11-9-525, they have the burden of proving the elements necessary to invoke its application.

In order for the provisions of Ark. Code Ann. §11-9-525 to be applicable to the present claim and the Second Injury Fund to have any liability, the claimant must have been experiencing some degree of permanent disability or impairment at the time of the “second” injury (i.e. the injury giving rise to the claim of Second Injury Fund liability). In the present case, this would be the compensable injury to the claimant’s back or lumbar spine on January 10, 2001.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent disability or impairment at the time of her compensable back injury, on January 10, 2001. At the time of this second compensable injury, the claimant had already

sustained the admittedly compensable bilateral wrist/hand injuries of June 2, 1999. She had also undergone a carpal tunnel release for a prior episode of compensable carpal tunnel syndrome that occurred at a different employment in the mid 1980's.

The evidence fails to show that she experienced any permanent physical impairment as a result of her prior carpal tunnel syndrome that occurred in the 1980's. The evidence also fails to show that the claimant had experienced any permanent "disability" or loss of wage earning capacity, as a result of her compensable carpal tunnel syndrome in the 1980's. There is absolutely no evidence whatsoever that this previous carpal tunnel syndrome had any adverse impact on her learning disabilities. In fact, the record reveals that the claimant returned to regular gainful employment without restriction following her difficulties in the 1980's.

The greater weight of the credible evidence fails to show that her compensable wrist/hand injuries of June 2, 1999, have produced any permanent impairment or disability. As previously noted, the evidence fails to prove that her compensable injuries of June 2, 1999, have produced any degree of loss of function or physical impairment. Any continuing restrictions on the claimant's employment or employability, as a result of these injuries, are based solely on the claimant's continuing subjective complaints of weakness in her hands and increase in pain, when she is required to use her hands. I find that the claimant's testimony, in this regard, to lack sufficient credibility to prove that her compensable wrist/hand injuries for this respondent have in any way limited her employment or employability. As previously noted, there are absolutely no objective findings to support any limitations or restrictions on the claimant's employment activities in light of the nature and magnitude of the symptoms and restrictions described by the claimant, some type of objective abnormality would be reasonably suspected (at least some degree of muscle atrophy from mere disuse). However, no such supportive objective abnormality has been noted. Also, as previously indicated the claimant's failure to exert

maximum effort on testing of her physical abilities (involving the use of her hands, wrists, and arms) makes the existence of any degree of limitations and restrictions even more suspect.

At the time of the actual occurrence of the claimant's compensable back injury, she may well have been experiencing some degree of physical limitations or restrictions on the use of her hands, wrists, and arms, due to the effects of her compensable wrist/hand injuries of June 2, 1999. However, the greater weight of the evidence shows that these limitations and restrictions were temporarily imposed during the claimant's healing period from her June 2, 1999 injuries to aid in the conservative medical treatment she was then being provided, in an attempt to avoid the surgery that was ultimately performed by Dr. Martimbeau in August and November of 2001. However, once this surgical correction was performed and healed, such temporary restrictions were no longer medically necessary.

In summary, I find that the greater weight of the credible evidence fails to show that the claimant was experiencing any degree of permanent impairment or disability, from previous compensable injuries or otherwise, at the time of her "second" compensable injury on January 10, 2001. Therefore Ark. Code Ann. §11-9525 would not be applicable to the present case, and the Second Injury Fund would have no liability under the provisions of this subsection.

III. PERMANENT "DISABILITY" OR LOSS OF WAGE EARNING CAPACITY ATTRIBUTABLE TO THE CLAIMANT'S COMPENSABLE LOWER BACK OR LUMBAR INJURY

The next issue concerns the claimant's entitlement to permanent disability benefits for loss of wage earning capacity (in addition to her permanent physical impairment) for her compensable lower back or lumbar injury. As I have previously found that Ark. Code Ann.

§11-9-525 is inapplicable to the present claim and that the Second Injury Fund has no liability, the respondent employer and its carrier would be solely liable for any appropriate permanent disability benefits, in excess of the permanent physical impairment, for the claimant's compensable low back or lumbar injury, Ark. Code Ann. §11-9-522(b).

In resolving this issue, Ark. Code Ann. §11-9-522 mandates that this Commission consider, not only the permanent physical impairment produced by the claimant's compensable low back or lumbar injury, but also such factors as the claimant's age, education, work experience, and all other matters reasonably expected to affect her future earning capacity. Clearly, the claimant's lack of cooperation (as shown by her less than maximum effort on testing to determine the existence and extent of any physical restrictions or limitations due to her compensable low back or lumbar injury) impedes this determination.

The record shows that the claimant is 44 years old. She is a high school graduate. She has two years of junior college courses in horse care and management. She has also had a four or five month business college course in bookkeeping and accounting. Her prior employment history consists of a two year employment with the forest service (picking up trash, painting, and did minor maintenance), an unspecified period of employment for a book binding company in California (putting pages of books together), a one and a half year period of employment for a costume rental business, (in a sales or clerical capacity), a one year period of employment for a restaurant (as a cook and waitress), a five year period of employment in a food processing plant (working in a line position), and a five year period of employment with a garment factory (as a seamstress and inspector). The claimant was employed by the current respondent on October 9, 1996. During this period of employment, she worked as a line worker, as a "team coordinator" (foreman) over three to five line workers, as a robotic arm operator (which required specialized training), and in various quality control positions. At the time of her compensable injury, she was earning

approximately \$395.00 per week.

In her testimony at the hearing and in her various depositions, she describes extensive physical limitations and restrictions on her potential employment activities. Some of these physical limitations and restrictions arise from her compensable lower back or lumbar injury and some she attributes to her compensable bilateral wrist/hand injuries. She testified that as a result of all these physical limitations and restrictions, she does not personally believe that she is capable of performing any type of gainful employment. Although she complied with the eligibility requirements of the Employment Security Division, in regard to seeking employment during the period she drew unemployment benefits, she had made no attempt to continue to seek employment after these benefits terminated. She has applied for social security disability benefits, but her application was denied. This denial is currently on appeal.

A review of the medical evidence fails to show the presence of objective findings of permanent physical damage sufficient to produce physical restrictions and limitations of the magnitude and scope described by the claimant in her testimony. The sub maximal effort and inconsistencies she displayed during her functional capacity assessment also call into question the accuracy of her testimony concerning the magnitude and scope of her physical restrictions and limitations. After consideration of all the evidence presented, I find that I cannot afford any weight or credit to the claimant's description of her physical limitations or restrictions.

As previously noted, I find that the greater weight of the credible evidence fails to prove that the claimant has sustained any permanent impairment or any resulting physical limitations or restrictions to her potential employment activities, as the result of the compensable injuries to her wrists/hands. The Supreme Court has held that where a compensable injury does not carry a specific percentage or degree of permanent physical impairment, it cannot form the basis for any award of permanent "disability" for loss of

wage earning capacity. Clearly, the claimant has failed to prove that her compensable wrist/hand injuries have resulted in an ascertainable degree of permanent physical impairment. For this and other reasons, no consideration has been given to the claimant's described physical limitations and restrictions on the use of her wrists and hands in determining the existence and extent of any permanent partial disability attributable to a loss of wage earning capacity.

For the reasons previously noted, I have given no consideration to the claimant's testimony concerning the physical limitations and restrictions she is experiencing as a result of her compensable lower back injury. However, the claimant's lack of credibility, in this regard, and her apparent lack of motivation to return to employment do not automatically preclude her from an award of permanent partial disability benefits for loss of wage earning capacity, in addition to the permanent partial disability for permanent physical impairment.

Although the claimant's sub maximal effort and inconsistency during her functional capacity assessment have affected the outcome of this test, it does not make it entirely useless. As noted by Dr. Holder, the physical abilities demonstrated by the claimant during this testing are at least the minimum activity she is capable of performing.

The medical evidence clearly shows that the claimant's compensable lower back or lumbar injury has resulted in some degree of permanent injury to her L4-5 intervertebral lumbar disc. This permanent physical damage will never resolve and this portion of the claimant's anatomy will never function at its preinjured state. It is for this very reason that the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition) has assigned a specific degree of permanent physical impairment for this type of discal injury.

This permanently injured portion of the claimant's anatomy would reasonably produce some degree of physical limitations and restrictions on the use of this portion of

the claimant's anatomy. Such restrictions would be necessary prevent continuing injury or exacerbations or symptomology. Individuals with this type of injury are generally medically restricted from repetitive bending or twisting at the waist, prolonged bending over postures, prolonged standing, prolonged sitting, prolonged walking, frequent lifting in excess of 10 pounds, and occasionally lifting in excess of 30 pounds. They are generally considered to be limited to occupations that would be classified by the Department of Labor in either the light or sedentary categories. In determining the existence and extent of any functional disability or loss of wage earning capacity, experienced by this claimant, I have considered only the restrictions and limitations generally and commonly imposed upon individuals sustaining injuries to the lumbar spine of the type and nature shown to have been experienced by this claimant.

Clearly, these restrictions and limitations would prevent the claimant from returning to her preinjury position with this respondent. She would also be prevented from performing a number of employment positions, which she has previously held or for which she would otherwise be qualified.

However, the claimant is of a relatively young age. She appears reasonably intelligent and has an average education. She also has some experience in clerical, sales, and supervisory positions. It is my opinion that there exists, in the area of the claimant's residence, numerous employment positions of a clerical, office, or sales nature that would be within the claimant's physical limitations and restrictions. These positions are sufficiently numerous to provide the claimant with a reasonable expectation of obtaining regular gainful employment, if she desired.

However, most of these positions, particularly at a starting level, would pay less than the weekly wages the claimant was receiving in her preinjury position with the respondent. Most of the employment positions available in this area, which would be within the claimant's physical limitations and restrictions, would (at least at a starting level) likely pay

the minimum wage to perhaps \$7.00 per hour. This would be less than the claimant's hourly wages for the respondent.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that she has experienced a permanent functional disability for loss of wage earning capacity, solely as a result of the disabling effects of her compensable lower back or lumbar spine injury. This permanent functional disability would be in addition to the permanent partial disability attributable to the permanent physical impairment produced by this injury. I further find that the greater weight of the credible evidence shows this permanent functional disability for loss of wage earning capacity to be in the amount of 6% to the body as a whole. Thus, the claimant would be entitled to a cumulative permanent partial disability of 14% to the body as a whole, which would include permanent partial disability for a permanent physical impairment of 8% to the body as a whole and permanent partial disability for permanent functional disability for loss of wage earning capacity in the amount to 6% to the body as a whole.

IV. LIABILITY FOR THE EXPENSES INCURRED FOR MEDICAL SERVICES RENDERED TO THE CLAIMANT BY AND AT THE DIRECTION OF DR. ALEXANDER BEGINNING IN OCTOBER OR NOVEMBER OF 2003

The next issue concerns the question of liability for the expenses incurred as the result of medical services rendered to the claimant by and at the direction of Dr. Eugene Alexander of the Cooper Clinic, on and after November 3, 2003. Dr. Alexander's report and records beginning on November 3, 2003, indicate that the only medical services he has provided the claimant for her compensable lower back injury has been to monitor and refill certain medications, specifically Skelaxin (a muscle relaxer) and Bextra (an anti-

inflammatory). Both of these medications had been previously prescribed for the claimant's compensable lumbar injury by Dr. Capocelli. It further appears from the evidence that the claimant may well have also consulted Dr. Alexander to sign and verify certain forms required by a long term group disability policy, from which the claimant is apparently receiving benefits.

It appears from the record, that Dr. Alexander has been previously recognized as an authorized treating physician for the claimant's compensable lumbar injury. Thus, there is no question that his treatment would be "authorized" within the meaning of Ark. Code Ann. §11-9-514.

Thus, in order to be entitled to the payment of the expenses incurred for the services of Dr. Alexander, the claimant must only prove that these services were "reasonably necessary" for her compensable lumbar injury. Medical services are reasonably necessary when they are related to or necessitated by the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

It is apparent from the November 3, 2003 office notation of Dr. Alexander, that he prescribed the claimant Skelaxin and Bextra to use on an as needed basis for flare ups or exacerbations of her symptoms, primarily back spasms and increased pain. Clearly, these medications are designed for that very purpose and would have a reasonable expectation of successfully accomplishing this purpose. In her deposition, the claimant testified that the medication Skelaxin actually provided her with relief, when she experienced a temporary flare up or exacerbation in the magnitude of her back symptoms.

Clearly, the medications Skelaxin and Bextra have not "cured" the claimant's compensable lower back or lumbar injury or totally resolved her resulting complaints. However, this is not their purpose, and would not be a reasonable expectation for them to have the effect. The claimant has experienced a permanent injury to her lumbar spine and

can be expected to have some degree of residual discomfort for the remainder of her life. These medications are only intended to relieve exacerbations or increase in the degree of the claimant's symptoms and return them to a stable or chronic level. As they appear to be accomplishing this purpose. In this regard, it cannot be said that they are not "doing the claimant any good".

After consideration of all the evidence presented, it is my opinion that the medical services provided the claimant by Dr. Alexander (in the form of prescribing and monitoring medication indefinitely required for her compensable lumbar injury) constitute "reasonably necessary medical services" for that compensable injury, within the meaning of Ark. Code Ann. §11-9-508. Thus, the expense of these services, including the actual expense of the medication, is the liability of the respondents herein.

However, any expenses incurred by the claimant in order to obtain Dr. Alexander's signature on her group disability forms would not constitute "reasonably necessary medical services" for her compensable injury. These services would not be necessary to in any way "treat" the compensable injury. Thus, any charges incurred for this purpose are not the liability of the respondents herein.

V. CONTROVERSION AND APPROPRIATE ATTORNEY'S FEES

The final issue concerns the matter of controversion and appropriate fees for the claimant's attorney. The injuries involved in these claims occurred prior to the amendment of Ark. Code Ann. §11-9-715 by Act 1281 of 2001. Thus, this issue is controlled by the provisions of Ark. Code Ann. §11-9-715, as it existed prior to this amendment.

At the time of the prior Opinion of February 24, 2003, it was determined that the respondents had denied any "compensable injury" to the claimant's low back or lumbar spine and had thus controverted not only the benefits which had accrued as of that date,

but in essence controverted the claimant's entitlement to any and all future benefits for the injury. This previous Opinion has long since become final.

By controverting the low back or lumbar spine claim in its entirety, the respondents required the claimant's attorney to expend an extensive amount of time and effort. To limit him to a fee only on the benefits, which accrued at the time of the prior Opinion, would not represent fair compensation for his services. Thus, even though the respondents have apparently paid ((without necessity of a hearing and a specific award) additional temporary total disability benefits for the claimant's compensable low back or lumbar spine injury for the period of May 16, 2003 through September 2, 2003, these benefits still represent "controverted benefits", within the meaning of Ark. Code Ann. §11-9-715. It is my further opinion that awarding the claimant's attorney a fee on these benefits would only act adequately compensate him for the services he previously rendered the claimant in order to entitle her to any benefits for her low back or lumbar spine injury. Thus, I find that the respondents should pay to the claimant's attorney the appropriate fees on these additional temporary total disability benefits.

However, I find that any attorney's fee on the expenses incurred for additional medical services rendered to the claimant by and at the direction of Dr. Capocelli on and after May 15, 2003, is a different matter. The respondents have not again controverted the claimant's entitlement to the payment of these expenses (as they have the additional expenses incurred for the services of Dr. Alexander).

Ark. Code Ann. §11-9-715(e) provides:

"Fees for legal services rendered by the claimant's attorney with respect to medical services of a repeated or continuing course of treatment controverted by the employer or carrier shall be payable only in connection with such controverted expenses incurred during a two year period beginning on the first date on which such expenses were incurred." (emphasis mine)

The record reveals that the services provided by Dr. Capocelli, on and after May 15,

2003, were a part of a repeated and continuing course of treatment for the claimant's compensable low back or lumbar injury that began when the claimant was initially seen and treated by Dr. Alexander on January 26, 2001. Even though she was first seen by Dr. Capocelli, on July 19, 2002, his services represent merely a continuation of those controverted services initially commenced by Dr. Alexander.

Therefore, I find that the claimant's attorney is not entitled to an attorney's fee on the medical expenses incurred as a result of services rendered to the claimant by and at the direction of Dr. Capocelli, on and after May 15, 2003. These services represent continuing treatment of her initially controverted compensable low back or lumbar spine injury and were clearly rendered more than two years following the "first date" on which these controverted medical expenses were incurred. Unlike the services rendered by Dr. Alexander, on and after November 3, 2003, there is no indication that these services have been again controverted by the respondents.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On or about June 2, 1999 and January 10, 2001, the relationship of employee-employer-carrier existed between the parties.
3. On June 2, 1999, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$235.00 for total disability and \$176.00 for permanent partial disability.
4. On January 10, 2001, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$263.00 for total disability and \$197.00 for permanent partial disability. On June 2, 1999, the claimant sustained compensable injuries to her arms/wrists/hands.
5. On January 10, 2001, the claimant sustained a compensable injury to her low back or lumbar spine.

6. There is no dispute at the present time over the payment of expenses incurred for reasonably necessary medical services, which were related to the claimant's compensable arm/wrist/hand injuries.

7. There is no dispute over the payment of temporary total disability benefits which are attributable to the claimant's compensable arm/hand/wrist injuries.

8. The claimant has failed to prove that she is entitled to any permanent partial disability benefits for permanent physical impairment resulting from her compensable arm/hand/wrist injuries. Specifically she has failed to prove that these compensable injuries were the major cause of any degree of permanent physical impairment to these portions of her body, which would be based upon objective and measurable physical findings and would be capable of calculation in the manner required by law.

9. The greater weight of the credible evidence fails to show that the claimant was experiencing any permanent physical impairment or disability from the compensable injury or otherwise at the time of her "second injury" on January 10, 2001. Thus, Ark. Code Ann. §11-9-525 would not be applicable to the present claims and the Second Injury Fund would have no liability in these claims.

10. The claimant has proven by the greater weight of the credible evidence that her compensable lower back or lumbar spine injury was the major cause of a permanent physical impairment of 8% to the body as a whole and has further proven by the greater weight of the credible evidence that this compensable injury is the major cause of an additional permanent partial disability of 6% to the body as a whole, which is attributable to permanent "functional" disability for loss of wage earning capacity. The respondents De Sta Co Manufacturing Company and Liberty Mutual Insurance Company are liable for the entire permanent partial disability of 14% to the body as a whole.

11. The medical services provided to the claimant by and at the direction of Dr. Alexander (in the form of monitoring and prescribing of medication indefinitely required for

the claimant's compensable low back or lumbar spine injury), on and after November 3, 2003, represent reasonably necessary medical services for the claimant's compensable low back or lumbar spine injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

12. The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company, initially denied the occurrence of any compensable injury to the claimant's low back and lumbar spine and controverted her claim for any and all benefits attributable to such injury in its entirety. Thus, any benefits attributable to the claimant's compensable low back or lumbar spine injury have been controverted by the respondents. The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company have expressly controverted the claimant's entitlement to any permanent disability benefits for permanent physical impairment resulting from her compensable arm/wrist/hand injuries. The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company have again expressly controverted the claimant's entitlement to the payment of expenses incurred for medical services rendered her for her compensable low back or lumbar spine injury by and at the direction of Dr. Alexander, on and after November 3, 2003.

13. The Second Injury Fund of the State of Arkansas has controverted the payment of any benefits for "combined disability" as provided by Ark. Code Ann. §11-9-525.

_____ 14. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all appropriate benefits attributable to the claimant's compensable low back or lumbar spine injury, with the exception of expenses incurred for reasonably necessary medical services rendered to the claimant for this compensable injury by physicians (other than Dr. Eugene Alexander), after January 26, 2003.

ORDER

The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company shall pay to the claimant permanent partial disability benefits equivalent to 14% permanent partial disability to the body as a whole. This includes permanent partial disability benefits for permanent physical impairment, in the amount of 8% to the body as a whole, and permanent partial disability benefits for permanent "functional" disability (loss of wage earning capacity) in the amount of 6% to the body as a whole. Respondents shall be entitled to credit for all such benefits previously paid.

The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company shall be liable for the expenses incurred as the result of reasonably necessary medical services provided to the claimant for her compensable low back or lumbar spine injury by and the direction of Dr. Alexander, on and after November 3, 2003.

The respondents, De Sta Co Manufacturing Company and Liberty Mutual Insurance Company shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional permanent partial disability benefits herein awarded for the claimant's low back or lumbar spine injury and for temporary total disability benefits attributable to the claimant's low back or lumbar spine injury for the period of May 16, 2003 through September 2, 2003. The respondents De Sta Co Manufacturing Company and Liberty Mutual Insurance Company shall not be liable for any attorney's fees on medical expenses incurred for medical services rendered to the claimant for her compensable low back or lumbar spine injury after January 26, 2003, with the exception of the medical services rendered to the claimant for this compensable injury by and at the direction of Dr. Alexander, beginning November 3, 2003. The respondents liability for these latter medical expenses will cease two years from November 3, 2003. One-half of these attorney's fees are the obligation of the respondents in addition to these benefits. The remaining one-half of these attorney's fees shall be withheld by the respondents from benefits herein awarded

and payable to the claimant.

For the reasons heretofore stated in this Opinion, the claimant's request of permanent disability benefits, pursuant to Ark. Code Ann. §11-9-521, for her compensable arm/wrist/hand injuries must be and hereby is denied and dismissed.

For the reasons heretofore stated in this Opinion, any and all claims made against the Second Injury Fund of the State of Arkansas should be and hereby are denied and dismissed in their entirety.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge