

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306708

RONDA OSBORN

CLAIMANT

DOLLAR GENERAL STORE, EMPLOYER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

**DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 3

ORDER AND OPINION FILED DECEMBER 12, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

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

Respondent No. 1 represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on October 5, 2005. A prehearing conference was held on July 19, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked into evidence as Commission Exhibit No. 1 without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on November 19, 2002.
2. The compensation rates are \$160/154.

3. Respondent No. 1 accepted and paid a 10% permanent impairment rating.

The claimant contends that she has sustained admittedly compensable injuries and has been rendered permanently and totally disabled. Alternatively, claimant requests wage loss benefits over and above the impairment rating. The claimant contends the end of the healing period is December 19, 2004. Claimant further requests attorney's fees.

Respondent No. 1 contends the end of the healing period is March 2, 2004, when the claimant was assessed a 10% impairment rating. Respondent No. 1 further contends the claimant is not permanently and totally disabled nor has she sustained wage loss disability. Alternatively, Respondent No. 1 contends that if the claimant is found to have wage loss disability or permanent and total disability that it would be due to a combination of her conditions and the responsibility of the Second Injury Fund. Respondent No. 1 also contends that if permanent and total disability is found, Respondent No. 1 is entitled to credit toward the \$75,000 maximum for the permanent impairment rating paid.

Respondent No. 2 contends the end of the healing period was March 2, 2004, when the impairment rating was assigned. Respondent No. 2 contends that if any wage loss benefits are owed, it is due to the compensable injury and not any combination of conditions.

Respondent No. 3 contends that December 19, 2004, is the end of the healing period. Respondent No. 3 further contends that Respondent No. 1 is not entitled to any credit toward the maximum \$75,000 limit for the permanent impairment benefits it has

paid.

ISSUES TO BE LITIGATED

1. Permanent and total disability/wage loss.
2. End of the healing period.
3. Second Injury Fund liability.
4. Attorney's fees.
5. Credit for the permanent impairment rating toward the \$75,000 maximum liability of Respondent No. 1.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable injury on November 19, 2002.
2. The compensation rates are \$160/154.
3. Respondent No. 1 accepted and paid a 10% permanent impairment rating.
4. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
5. The claimant has proven by a preponderance of the evidence that she has sustained a 40% diminished wage earning capacity for which Respondent No. 1 is

responsible.

6. The preponderance of the evidence provides the end of the claimant's healing period is December 19, 2004.

7. The Second Injury Fund has no liability.

8. The claimant's attorney is entitled to the maximum attorney's fee provided by Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rule 10.

DISCUSSION

The claimant, 42 years of age, had worked for the respondent employer, performing stocking about a year before the November 19, 2002, injury when she hurt her neck. The claimant underwent a cervical fusion by Dr. Anthony Russell on July 1, 2003. Since Dr. Russell retired, the claimant now sees Dr. Michael Calhoun and last saw him about one month before the hearing. The claimant described her symptoms now:

Well, I get sharp shooting pains in it, and it feels like somebody has got their hand on the back of my neck, just mashing down. And I get throbbing, aching pain. (T., p. 60, lines 12-14.)

A [Witness] My shoulders and my left arm bothers me a lot. It felt like my fingers were on fire and like I'd stuck them in a hot pan of grease. That's what I told them.

Q [Mr. Davis] What about your right arm?

A My fingers – the tips of my fingers go numb.

Q Does that happen every day?

A Probably like maybe four days out of the week.

Q Are you a right-handed person?

A Yes, sir. (T., p. 61, lines 13-21.)

The claimant testified that she used to paint before her injury and now cannot because it bothers her neck. The claimant further testified that she can no longer sweep or mop her house, tend to her flowers or keep her grandchild. She also avoids driving.

According to the claimant, she would not be able to return to her former job because it involved a lot of lifting, to include dog food, cat litter, as well as other boxes. The claimant testified that after the functional capacity evaluation, she felt awful and had to go home and just lay down. She further testified that she did the best she could on the functional capacity evaluation.

The claimant contends that she is permanently and totally disabled or, alternatively, entitled to wage loss benefits. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning capacity is impaired. In addition to medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors, such as the worker's age, education, work experience, and any other matters which may affect the worker's future earning capacity. Ark. Code Ann. §11-9-522; *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). 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, he is entitled to compensation for permanent and total disability. *Minor v. Poinsett*

Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

After considering all the credible evidence, I find the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. The claimant was assessed a 10% permanent impairment rating by Dr. Anthony Russell on February 25, 2004, although Dr. Russell did not indicate the claimant had reached the end of her healing period. Dr. Russell recommended the claimant see a pain management specialist. The claimant was evaluated by Dr. J. K. Smelz on November 19, 2004 and she recommended the claimant undergo physical therapy for four to six weeks and after that the claimant would reach maximum medical improvement. Apparently, the December 19, 2004, end of healing period date identified by the claimant stems from this recommendation. I find the evidence more persuasive that the claimant's end of healing period is December 19, 2004, rather than the March 2, 2004, date proposed by Respondent No. 1 and Respondent No. 2. Simply because the doctor assigned the permanent impairment rating was not sufficient in light of Dr. Russell specifically indicating the claimant had not reached the end of the healing period. Dr. Russell was the authorized treating physician and he recommended further pain management care before the claimant would be at maximum medical improvement.

The claimant is 42 years old with a high school diploma but inability to read and write. The claimant testified that she was just passed through school and was in special education. The claimant relies on her husband to assist her with any reading tasks, to include completing employment applications. The claimant has undergone three vocational assessments with a March 10, 2004, assessment by the Arkansas Rehabilitation Services, an October 5, 2004, assessment by Heather Naylor with Rehabilitation Management, Inc., and a September 5, 2005, assessment by Bob White with White & Rowland, Limited. While each of these assessments identified literacy problems, each indicated that the claimant could work in a semiskilled area where hands-on demonstrations were provided for training. Dr. J. K. Smelz opined on November 19, 2004, that the claimant had no work restrictions arising from her injury and Dr. Scott Schlesinger also opined on December 15, 2003, that the claimant had no restrictions prohibiting her from returning to work. However, Dr. J. Michael Calhoun opined on March 2, 2005, that the claimant did have permanent restrictions on her ability to work. Finally, a functional capacity evaluation was performed on May 23, 2005, by Tim Atkinson, Certified Disability Analyst and he provided that the claimant put forth inconsistent effort and demonstrated inconsistent illness responses. He further provided that the claimant's true limitations were unknown but she did not demonstrate the ability to handle material over 10 pounds.

The claimant has a limited work history but it includes being a sacker at a grocery store and being a stock person in more than one setting. The claimant remained off work for a number of years while raising her children. However, the claimant did work consistently for the past two and one-half years performing stocking

responsibilities.

After considering all the credible evidence, to include the claimant's testimony and all the wage loss factors, I find the claimant has sustained a diminished wage earning capacity in the amount of 40% to the body as a whole in addition to her permanent impairment rating. The claimant testified to having pain and the medical evidence supports the claimant's history of complaints of pain; however, the claimant has failed to even attempt any employment avenues since her surgery. I was not persuaded that the claimant's motivation to return to work was as diligent as needed to find gainful employment. While I acknowledge the claimant had cervical surgery, has pain associated with possible lifting limitations and has literacy problems, the vocational assessments all revealed the claimant has available to her some semiskilled employment opportunities which she must avail herself in order to find gainful employment.

In order for the Second Injury Fund to have liability, there must be a combination of injuries or disabilities that cause the current disability. In *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set forth a tripartite test for Second Injury Fund liability. The test requires that:

1. The employee must have suffered a compensable injury at his present place of employment.
2. Prior to that injury the employee must have had a permanent partial disability or impairment.
3. The disability or impairment must have combined with the recent compensable injury to produce the current disability status.

Mid-State, 295 Ark. at 5.

In the present case, the claimant had some prior neck pain, but not to a degree that it created any problems with employment. The claimant did, however, have a learning disability which resulted in her inability to read and write. This condition did not prevent her from being gainfully employed, as the claimant had worked for two and one-half years before her injury in a stock person capacity. The vocational assessments have indicated the claimant is still employable in a semiskilled capacity, which is the same type work she was performing before her injury. I find the preponderance of the evidence does not provide that the claimant's current diminished wage earning capacity is the result of the combination of her disability and her current injury, but is the result of her on-the-job injury. I find the Second Injury Fund has no liability in this case.

Since permanent and total benefits were not awarded, the credit for the permanent impairment toward the \$75,000 maximum liability will not be discussed.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. The claimant has proven by a preponderance of the evidence that she has sustained a 40% diminished wage earning capacity for which Respondent No. 1 is responsible. The preponderance of the evidence provides the end of the claimant's healing period is December 19, 2004. The Second Injury Fund has no liability.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**