

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F005412**

<b>MELANIE KELLEY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>COOPER ENGINEERED PRODUCTS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CROCKETT ADJUSTMENT, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 9, 2006**

Hearing before Administrative Law Judge J. Mark White on February 23, 2006, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Floyd M. Thomas, Jr., Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Michael Dennis, Attorney at Law, Pine Bluff, Arkansas.

**STATEMENT OF THE CASE**

On February 23, 2006, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on November 7, 2005, and a Prehearing Order was entered that same day. A copy of the November 7, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/self-insured employer

relationship existed at all relevant times, including February 7, 1999; that on February 7, 1999, the claimant sustained a compensable injury to her back and neck; that respondents accepted the February 7, 1999, injuries as compensable and paid benefits; and that this claim was the subject of prior Opinions by the Commission, including an Administrative Law Judge Opinion filed March 9, 2004 and affirmed and adopted by the Full Commission on July 12, 2004, and an Administrative Law Judge Opinion filed May 7, 2003.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether the claimant is entitled to additional permanent partial disability benefits; whether the claimant has sustained wage loss in excess of her permanent anatomical impairment rating; enforcement of the Commission's prior Orders; and controversion and attorney's fees.

The claimant contends that in the Commission Order of May 7, 2003, she was awarded temporary total disability benefits from May 15, 2000 through a date yet to be determined; that she reached the end of her healing period on August 1, 2005; that she is entitled to additional temporary total disability benefits through the end of her healing period; that the respondents have failed to pay the Order of May 7, 2003; and that she has permanent partial disability of twenty-five percent (25%) to

the body as a whole.

Respondent contends that it has paid all payments which have been due under previous Orders of the Commission and that all benefits accrued to date have been paid; that claimant has received a permanent partial impairment of six percent (6%) to the body as a whole as a result of the compensable injury; and that respondents have not intended to controvert the claimant's entitlement to permanent partial disability benefits in the amount of six percent (6%) or to benefits awarded in prior Commission Opinions.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant's healing period ended as of August 4, 2003.
4. The claimant has proven by a preponderance of the evidence that she was within her healing period and totally incapacitated from earning wages from May 15, 2000, through August 4, 2003.
5. The claimant has therefore proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from May 15, 2000, through August 4, 2003, subject to a credit for the temporary disability benefits already paid by respondents within that timeframe.
6. The claimant has proven by a preponderance of the evidence that she has sustained permanent impairment of 14% to the body as a whole as a result of her compensable injury; that this determination is supported by objective and measurable physical findings; and that her compensable injury is the major cause of her impairment.
7. The claimant has proven by a preponderance of the evidence that she is entitled to permanent partial disability benefits in the amount of 14% to the body as a whole, subject to a credit for permanent benefits already paid by the respondents.
8. The claimant has proven by a preponderance of the evidence that she has sustained, as a result of her compensable injury, wage loss of 86% over and

above her permanent anatomical impairment rating of 14% to the body as a whole, for a total impairment of 100%.

9. The claimant has therefore proven by a preponderance of the evidence that she is permanently totally disabled.
10. The respondents have controverted all benefits sought herein.

## **DISCUSSION**

### **I. History**

This claim is the subject of two prior administrative law judge opinions, each setting forth the relevant history and facts. The most recent opinion, filed March 9, 2004, concerned a surgical procedure, percutaneous discectomy, recommended by Dr. Thomas Hart. The procedure was found not to be reasonably necessary in connection with the compensable injury. The Full Commission affirmed and adopted that decision on July 12, 2004.

After entry of the administrative law judge opinion, but prior to the Full Commission's decision, the claimant underwent a lumbar epidural steroid injection by Dr. Hart on May 5, 2004. The results of that injection are not reflected in the record. On August 30, Dr. Hart performed the percutaneous discectomy he had recommended, which was billed to Medicare. The claimant returned to Dr. Hart on

March 7, 2005. Dr. Hart's notes quote the claimant as saying "she really did not get any significant benefit and still has continuing back pain complaints." Nothing else in the medical record suggests the claimant received any relief from the percutaneous discectomy, though the claimant testified at the hearing she received some relief.

Dr. Hart recommended a second discogram, which was performed July 25, 2005. Based on the results of the discogram, Dr. Hart declared that the percutaneous discectomy had "healed" the L5-S1 disc, despite the fact the procedure brought little or no symptom relief to the claimant. Since that time, the claimant has treated with a number of other physicians. She continues to take narcotic pain medication, muscle relaxers, and other medications, and she has received additional injections in her back. Electrodiagnostic testing performed August 24, 2005, confirmed the existence of bilateral, chronic radiculopathy at L5-S1.

Subsequent to the hearing, the claimant submitted into evidence a letter from Dr. Richard Jordan dated February 13, 2006. In that letter, Dr. Jordan assigned the claimant a permanent impairment rating of 14% to the body as a whole and opined that she is not capable of returning to work. The claimant's counsel stated in his cover letter that he did not receive Dr. Jordan's letter until after the hearing. The respondents then wrote the Commission to state they had no objection to Dr.

Jordan's letter being admitted into evidence. Therefore, the February 13, 2006, letter from Dr. Richard Jordan is hereby admitted into evidence, to be blue-backed and placed separately in the Commission's file.

## **II. Adjudication**

### **A. Temporary Total Disability Benefits**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the prior opinion filed herein on May 7, 2003, the claimant was awarded temporary total disability benefits from May 15, 2000, through a date yet to be determined. But from the payment records, it appears the respondents did not begin payment of TTD benefits until September 2001, and it does not appear that the respondents have ever paid the claimant for the TTD benefits owed beginning May 15, 2000, as awarded in the prior opinion.

The end point of the claimant's entitlement to TTD benefits is the end of her healing period, as the medical records are clear that the claimant was unable to work throughout her healing period. After the 2003 award, the claimant was extensively treated for her compensable injuries. When she saw Dr. Hart on August 4, 2003, he opined that no other treatment would be helpful except for a percutaneous discectomy. That procedure was found by the Commission not to be reasonably necessary. The claimant underwent the percutaneous discectomy anyway, but it appears from the medical records the procedure did nothing to alleviate her symptoms. She has undergone other treatment, including additional injections, but the treatment after the percutaneous discectomy was geared primarily towards managing her condition.

Given the lack of success of the percutaneous discectomy and subsequent treatment, and Dr. Hart's opinion that no other treatment was indicated, I find that the claimant's healing period ended as of August 4, 2003. Given this finding, I find that the claimant has proven by a preponderance of the evidence that she was within her healing period and totally incapacitated from earning wages from May 15, 2000, through August 4, 2003. The claimant is therefore entitled to temporary total disability benefits from May 15, 2000, through August 4, 2003, subject to a credit for the temporary disability benefits already paid within that timeframe.

## B. Permanent Benefits

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether her earning capacity is diminished or not. *Id.* Any determination of permanent physical impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Benefits for permanent impairment may be awarded only upon a showing that the compensable injury was the major cause of the impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a).

As of February 13, 2006, Dr. Jordan opined the claimant had sustained permanent impairment of 9% to the body as a whole for her cervical impairment, and 5% to the body as a whole for her lumbar impairment, resulting in a combined impairment of 14% to the body as a whole. Dr. Jordan had previously opined the claimant sustained 10% to both the cervical and lumbar spines, but the more recent ratings of 9% and 5% appear to be more consistent with the criteria of the *AMA Guides*. There is no other competing impairment rating contained within the record.

There is no evidence the claimant exhibited any back or neck problems prior to her compensable injuries, and the record identifies no other causal factor for her impairment or need for treatment. The ratings are supported by objective findings of injury, including her cervical surgery and the electrodiagnostic evidence of radiculopathy at L5-S1.

Therefore, I find that the claimant has proven by a preponderance of the evidence that she has sustained permanent impairment of 14% to the body as a whole as a result of her compensable injury; that this determination is supported by objective and measurable physical findings; and that her compensable injury is the major cause of her impairment. The claimant is entitled to permanent partial disability benefits in the amount of 14% to the body as a whole, subject to a credit for permanent benefits already paid by the respondents.

In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the

claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant is 37 years of age. She has her high school degree and several years of college. She has worked as a lab technician for several employers, and she most recently worked as an engineer for the respondent-employer, which position required a combination of paperwork and physical labor. Dr. Jordan has expressly opined that the claimant "will never be able to retain gainful employment." The claimant has undergone extensive medical treatment, including cervical fusion surgery. She testified that she still suffers from frequent headaches, constant neck pain radiating into her arms and shoulders, constant low back pain radiating into her legs, and muscle spasms. She requires several medications, including narcotic pain medication. She is presently receiving Social Security Disability benefits.

Given the evidence of record, I find that the claimant has proven by a preponderance of the evidence that she has sustained wage loss of 86% over and above her permanent anatomical impairment rating of 14% to the body as a whole, for a total impairment of 100%. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is permanently totally disabled.

I recognize that the parties did not identify permanent total disability as an issue to be considered herein. Nonetheless, the evidence required and issues

presented for a determination of permanent total disability are the same as those for wage-loss disability. *Cf. Palazzolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994). I also note that in a similar case, where a claimant was found to have wage loss of 100%, the Full Commission explicitly found the claimant to be permanently totally disabled even though permanent total disability was not identified as an issue therein. *Cox v. DeQueen Sand & Gravel Co.*, A.W.C.C. F011701 (Sept. 28, 2005).

#### **AWARD**

The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from May 15, 2000, through August 4, 2003, subject to a credit for the temporary disability benefits already paid within that timeframe; that she is entitled to permanent partial disability benefits in the amount of 14% to the body as a whole, subject to a credit for permanent benefits already paid by the respondents; and that she is permanently totally disabled. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Floyd M. Thomas, Jr., is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann.

§ 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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 Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge