

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301857

BRENDA K. RUTHERFORD, EMPLOYEE	CLAIMANT
MID-DELTA COMMUNITY SERVICES, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED SEPTEMBER 14, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on August 4, 2006, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Jesse B. Daggett, II, Attorney-at-Law, Marianna, Arkansas.

Respondents #1 represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear.

STATEMENT OF THE CASE

A hearing was conducted August 4, 2006, to determine whether the claimant was permanently and totally disabled within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on June 28, 2006, and a Prehearing Order was filed on said date. In addition, this claim has been the subject of a prior hearing. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the June 28, 2006, 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 employment relationship existed between the claimant and respondents #1 at all relevant times, including June 13, 2002; that the claimant sustained compensable injuries on said date; that she earned sufficient wages to entitle her to compensation rates of \$193.00 per week for temporary total disability and \$154.00 per week for permanent partial disability; that following a hearing on May 5, 2005, an Opinion was filed on June 8, 2005, by the Administrative Law Judge, finding the claim compensable and awarding medical and related treatment while reserving the nature and extent of claimant's injury; that the decision was affirmed and adopted by the Full Workers' Compensation Commission, Opinion issued October 5, 2005; and that the decision is now final and the law of the case. At the most recent prehearing conference, the parties further stipulated that claimant's healing period ended March 20, 2006; and that the claim had previously been controverted in its entirety for purposes of attorney's fees.

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

Claimant contended, in summary, that she had been rendered permanently totally disabled as the result of her admitted, compensable injury. Conversely, respondents #1 contended that the claimant was not permanently totally disabled within the meaning of the Arkansas workers' compensation laws. Respondent #2

did not take a position on whether the claimant was permanently totally disabled, deferring to the outcome of litigation between the principal parties.

In addition to the claimant, her brother, Henry Meredith, sister-in-law, Brenda Jean Meredith, as well as a vocational expert, Bob White, were called as witnesses in her behalf. The record is composed solely of the transcript of the August 4, 2006, hearing containing two (2) volumes of medical records, sixty-seven (67) pages introduced by the claimant and ninety-five (95) pages introduced by respondents as "Claimant's Exhibit A" and "Respondents' Exhibit A," respectively, together with selected excerpts of the claimant's discovery deposition taken in a third-party claim which was introduced without objection as "Respondents' Exhibit B" and retained in the Commission file in bound form.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and contained in the Prehearing Order filed June 28, 2006, are hereby accepted as fact.

3. The claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled within the meaning of the Arkansas workers' compensation laws.
4. The claimant has proven, by a preponderance of the credible evidence, that her June 13, 2002, compensable accident and resulting injuries are the major cause of her disability.

DISCUSSION

_____The facts in this claim are basically undisputed. As reflected by the stipulations, the claimant sustained various injuries as the result of a June 13, 2002, work-related accident. On that day, the claimant was driving an empty van for Mid-Delta Community Services. While crossing a railroad track near Palestine, Arkansas, the claimant was struck by a Union Pacific Railroad train. The record reflects that the claimant was rendered unconscious. The claimant was subsequently transferred to a trauma center in Memphis, Tennessee. The claimant was hospitalized at the Memphis Medical Center for four (4) days. Despite submitting volumes of medical records, for some unexplained reason, the records of claimant's hospitalization in Memphis were missing from the claimant's medical records. The claimant was subsequently discharged and then hospitalized again after her return to Arkansas. The medical records do reflect that the claimant sustained a severe laceration to the left knee and leg, down into the knee joint, several broken ribs, a punctured lung, multiple bruising all over her body, as well as

a head injury. It is unclear from the record whether respondents specifically dispute that the claimant sustained a brain injury. In March, 2006, the claimant was referred by the carrier's medical case manager for an independent medical evaluation to Dr. Barry D. Baskin in Little Rock, Arkansas. In his evaluation which contained numerous diagnostic impressions, Dr. Baskin stated that it was unclear whether or not the claimant sustained a traumatic brain injury. However, respondents' independent examiner determined that the claimant sustained both physical and mental impairments as the result of the admitted accident.

It is also undisputed that the claimant had a number of prior medical conditions for which she received treatment before the June 13, 2002, traumatic accident and resulting injuries. However, it is undisputed that the claimant's prior physical and mental conditions did not prevent her from being gainfully employed. The claimant has not been unable to return to gainful employment following the motor vehicle accident with a train. Further, the undisputed vocational analysis indicates that the claimant cannot be gainfully employed.

Permanent and total disability is defined as the inability because of a compensable injury or occupational disease, to earn meaningful wages in the same or other employment. *Whitlatch v. Southland Land and Dev.*, 84 Ark. App. 339, 141 S.W.3d 916 (2004); *Minor v. Poinsett Lbr. & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 501 (1962)(citing, Ark. Code Ann. §11-9-519(e)(1)). When an injured worker's condition become stable and no further treatment will improve that condition, the

disability is deemed permanent. *Id.* Further, wage-loss 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); *Eckhardt v. Willis Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). To be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove, by a preponderance of the evidence, that she sustained a permanent physical impairment as a result of the compensable injury. Ark. Code Ann. §11-9-102(F)(ii)(a); see, also, *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996); *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 278 (1998); *Walmart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). If the employee is totally incapacitated from earning a livelihood at that time, she is entitled to compensation for permanent and total disability. See, *Minor, supra*. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Emerson Electric v. Gaston, supra*. Such other matters can also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 633 S.W.2d 946 (1984). *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of

wage-loss. *Id.*

The record as a whole reflects that the claimant has been rendered permanently totally disabled as the result of her June 13, 2002, compensable injury. This conclusion is supported by the medical evidence, the lay testimony, and the expert opinion of a respected vocational rehabilitation counselor and vocational specialist.

As previously pointed out, the claimant sustained multiple, physical injuries as the result of a most traumatic incident. Considering the nature of the accident, the claimant is fortunate to be alive. In addition to the various physical injuries, the claimant sustained admitted psychological injuries including post-traumatic stress disorder. Even respondents' independent medical examiner, Dr. Barry D. Baskin, found that the claimant had sustained multiple impairments. Dr. Baskin examined the claimant one-time only on March 20, 2006, which is the date all parties agreed that the claimant's healing period ended. The fact that the claimant's healing period extended almost four (4) years is extremely significant, reflecting the severity of the claimant's multiple injuries. Dr. Baskin also reviewed various records provided by the parties. His impressions and conclusions are set out, in part, below:

My diagnostic impression on Ms. Rutherford now having examined her and subsequently reviewing extensive medical records pre and post injury 6/13/02 would include:

1. Long standing obesity status post gastric stapling procedure with subsequent reversal.
2. History of tobacco abuse with smoking history and COPD no longer smoking.
3. Long history of major depression and anxiety disorder.

4. History of bilateral severe knee osteoarthritis.
5. History of probable diabetic neuropathy with lower extremity sensory deficits bilaterally.
6. Chronic anemia with iron deficiency.
7. History of GERD.
8. History of hypertension.
9. History of elevated lipids.
10. Scar over the left knee as a result of the laceration sustained in the motor vehicle accident of 6/13/02.
11. Degenerative disc disease of the lumbar spine.
12. History of bilateral chest contusions with multiple rib fractures, small pneumothorax, and pulmonary contusion resulting from above 6/13/02 accident and requiring 3 days hospitalization at the Memphis Medical Center.
13. Questionable history of traumatic brain injury without any evidence of hemorrhage, obvious cerebral contusion, cerebral edema, or significant intracranial findings on post injury CT scan done at Memphis,
14. Neuropsychological testing at Virginia Commonwealth University suggestive of possible low premorbid intellectual functioning and possible residual traumatic brain injury symptoms.
15. Functional capacity evaluation with good consistency performance on 11 of 18 consistency tests, poor endurance and ultimate work determination of a sedentary work category as determined by the U.S. Department of Labor standards.

Having reviewed these records and reviewed the patient, it is my opinion that this patient did sustain blunt trauma to her chest with multiple rib fractures and pulmonary contusions and a complex laceration to the left knee that required surgical debridement and closure and then delayed healing which I believe is likely due to the patient's diabetes and poor wound healing, in addition to the fact that she has a propensity, which she verbalized to me, of picking at the wound. It is apparent that Ms. Rutherford suffered from a significant degree of anxiety and depression and even complaints of memory loss prior to her motor vehicle accident of 6/13/02. She has been diagnosed on more than one occasion by psychological assessment of having post traumatic stress disorder. She was already experiencing a lot of depression and anxiety as noted above prior to her accident and in particular since the death of her husband approximately 1 year prior to the accident. Based on my evaluation and after reviewing the neuropsychological and psychological testing done here in Arkansas, it would be my opinion that Ms. Rutherford probably does have symptoms consistent with post traumatic stress disorder. I do not think that her lumbar spine problems are the result of the accident of 6/13/02. I think they are preexisting. I do not think the arthritis of either one of her knees is due to the accident of 6/13/02 and that both of the knees had preexisting arthritis. The

laceration of the left knee has caused her to undergo some wound care and has cost her some degree of pain, although I think that this patient would likely require total knee arthroplasties regardless of the 6/13/02 accident. Based on my review of the cognitive testing, it is apparent that this patient does not function at a high cognitive level. It is unclear, however, in my opinion, if she has sustained a traumatic brain injury. A PET scan was suggested in the evaluation by her physician on [sic] Forrest City. In my clinic experience and having reviewed the literature, PET scans are more diagnostic of traumatic brain injury when they are done fairly soon after the accident as opposed to being done several years later. I do not think a PET scan would add any credible diagnostic determination as to whether this patient has sustained a traumatic brain injury.

I believe that Ms. Rutherford has impairment of the left knee secondary to the deep laceration and residual pain. I believe that she has impairment as a result of her accident with regards to probably post traumatic stress disorder. I do not find, based on the review of the records, that we can say with reasonable medical probability that she has sustained a traumatic brain injury. I do not think that there is substantial objective data to warrant a diagnosis of TBI. I would certainly be happy to refer Ms. Rutherford to a local neuropsychologist, Dr. A. J. Zolten, for further neuropsychological testing if that is desired by the referring attorneys. This concludes my review and completion of Ms. Brenda Rutherford's independent medical evaluation. This is an extensive case and I am sure there will be questions regarding this IME. I would be happy to address those questions if they are forwarded to me. Any opinions rendered in this independent medical evaluation are done so within a reasonable degree of medical probability. Ms. Rutherford understands that (no) physician patient relationship was established based on this one time evaluation. (Resp. Ex. A, pp.93-94)

It must be noted that Dr. Baskin carefully attempted to avoid addressing the issue of whether the claimant sustained a traumatic brain injury. In his opinion, this issue was unclear because he did not have the benefit of any diagnostic studies taken soon after the accident. As previously pointed out, for some unexplained reason, the records at the Memphis Trauma Center were not provided by either party. However, it is clear that the claimant has significant cognitive deficiencies. I feel compelled to point out that the record reflects that the claimant has been

found incompetent to handle her personal affairs and that her brother has been appointed her personal guardian which is additional evidence that the claimant is permanently and totally disabled.

Sudesh Banaji, an internal medicine specialist in Forrest City, Arkansas, issued a February 23, 2005, report which is set out in its entirety below:

To Whom It May Concern:

I have examined Brenda Rutherford and have strong indications that she has sustained a closed head injury as a result of her car/train collision. Ms. Rutherford would benefit from a PET scan, with interpretation by a neurologist, as well as testing and diagnosis by a neuropsychologist. Due to her financial inability to hire these specialists, as well as the long delay in treatment for these injuries. I would hope that any and all efforts be made to provide her with these much needed services at the earliest possible time. (Cl. Ex. A, p.17)

The claimant was next examined and evaluated by Dr. John P. Howser, a neurosurgeon in Memphis, Tennessee. Dr. Howser's report is set out, in part, below:

My impression after the evaluation was that she had sustained a cerebral contusion, labyrinthine contusion, TMJ problem, cervical sprain and lumbar sprain.

In my opinion, she needs neuropsychological testing, an EEG, an EMG of the left leg with nerve conduction times, endocrinology consult, ophthalmology consult, a dental consult and a plastic surgery consult for the skin that has failed to heal over the leg as mentioned above.

The MRI of the lumbar area was reviewed and it was abnormal revealing a ruptured disc anteriorly at L3. There were end plate changes at L4-5 with a canal stenosis and facet arthropathy at that level with ligamentum flava hypertrophy. The same thing was present to a lesser degree at L2 and L5. There was a small synovial cyst on the left which caused some mild to moderate lateral recess stenosis at L2. There was a mild lateral recess stenosis on the right at L3-4. There was a small disc extrusion that extended anteriorly behind the posterior longitudinal ligament over the inferior end plate of L3. There was a mild small broad disc bulge at L5 with

some associated ligamentum flava hypertrophy, left greater than right with some right foraminal stenosis of a moderate degree greater on the left. (Cl. Ex. A, p.19)

Next, on March 17, 2005, the claimant underwent a neuropsychological evaluation at the Department of Physical Medicine and Rehabilitation Virginia Commonwealth University Medical Center in Richmond, Virginia. Dr. Jeffrey S. Kreutzer, Professor of Physical Medicine and Rehabilitation, Neurosurgery, and Psychiatry, as well as Dr. Laura A. Taylor, a Postdoctoral Fellow in Rehabilitation, Psychology, and Neuropsychology, issued a twenty-three (23) page narrative report. Relevant portions of the neuropsychological evaluation follow:

SUMMARY AND CONCLUSIONS

The conclusions offered below, with a reasonable degree of psychological certainty, are based on a thorough records review and an analysis of information collected during the independent evaluation. They reflect our experience in evaluating more than 4,000 traumatically injured patients during the past 20 years and an ongoing review of the literature regarding the normal effects of traumatic injury. We are **not** relying on the findings of a specific research study.

1. Review of medical records reveals that Ms. Rutherford was driving a van which was struck by a train on 6/13/02. Posttraumatic amnesia for the accident and events leading up to the accident were reported. Ms. Rutherford was reportedly transported via medflight from an outside hospital to Regional Medical Center at Memphis, with cervical collar and backboard in place. Initial GCS was 14. According to the Regional Medical Center records, Ms. Rutherford sustained a contusion on her left forehead, left flail chest, rib fractures, left pneumothorax, and open left knee laceration. Admission GCS was 15. A series of x-rays and CT scans were conducted on the day of the accident. Head CT scan revealed "left frontal and temporal soft tissue swelling" and "left periorbital soft tissue swelling with opacification of the left maxillary sinus." Cervical spine CT scan showed evidence of "cortical irregularity of right articular process of C6," and a fracture was suspected. Chest CT scan showed right upper lobe lung contusion, left flail chest, 5% pneumothorax, fracture of left ribs two through eight, bibasilar atelectasis, left hilar calcified lymph nodes, and degenerative changes of the

lumbar spine and pelvic bones. Pelvic CT scan revealed degenerative changes of the pelvis and left iliac bone fracture adjacent to the sacrum. Left knee x-ray provided evidence of soft tissue injury without evidence of fracture. Ms. Rutherford underwent debridement and irrigation of the left knee on the day of the accident. Ms. Rutherford was discharged home on 6/15/02 in stable condition. After discharge, she received in-home health care services and was followed by Stephen Williamson, M.D. and physicians at Mid Delta Health Systems.

2. During the 3/17/05 evaluation, the patient completed the Concussion Screening Inventory (CSI) which identifies sequelae commonly associated with concussion injury. Ms. Rutherford reported injury to her head as a result of the 2002 accident. Reportedly, she sustained a contusion to her left forehead. Among the symptoms commonly reported early on, the patient reported six of eight (75%). Ms. Rutherford reported experiencing headaches, drowsiness, posttraumatic amnesia, photosensitivity, blurred vision, tinnitus, and neck pain within minutes, hours, or days of the accident. Among the twenty problems commonly noted later within the weeks and months after injury, the patient reported experiencing each of the symptoms (100%). Problems occurring later on included the following symptoms: Headaches, dizziness, fatigue, motor slowly, insomnia, nightmares, frustration, impatience, irritability, sadness, misplacing things, losing train of thought, slowed thinking, poor concentration, memory problems, word-finding problems, and difficulty following instructions and conversations. The pattern of symptoms reported is consistent with concussion injury.
3. Ms. Rutherford and her sister-in-law completed the Neurobehavioral Functioning Inventory for the March 2005 neuropsychological evaluation. Ms. Rutherford described problems in the areas of depression, somatic symptoms, memory and attention deficits, communication problems, aggression, and motor problems. Her sister-in-law described a similar pattern of symptoms. Her report of symptoms is consistent with the sequelae of closed head injury.
4. Results obtained during the neuropsychological evaluation in March 2005 revealed impairments in the following areas: oral fluency, reading, arithmetic, conceptualization, delayed auditory and visual memory, auditory and visual learning, remote memory/fund of information, commonsense/safety reasoning, visuoperception, construction, visuoconstruction, and bilateral motor speed and dexterity. Variability was noted on tests of immediate and sustained attention and concentration (Impaired to Average range). There was no evidence of symptoms magnification or insufficient effort.

5. Ms. Rutherford reported symptoms consistent with a **DSM-IV diagnosis of Posttraumatic Stress Disorder, Chronic**. Ms. Rutherford experienced a traumatic event in which her life was in danger. She reported the following symptoms of PTSD: intense distress upon exposure to cues about the injury; recurrent, distressing nightmares of the accident; avoidance of thoughts, feeling, or conversations about the accident; avoidance of reminders of the accident; inability to recall important aspects about the accident; anhedonia; feelings of detachment and estrangement from others; insomnia; frequent awakening; irritability; concentration problems; and hypervigilance. Symptoms cause clinically significant distress, which has greatly impaired her ability to function socially and vocationally.
6. The current test results also reveal a pattern of findings consistent with a **DSM-IV Diagnosis of Major Depressive Disorder, Recurrent, Moderate**. She obtained a score of 32 on the Beck Depression Inventory, a score which suggests severe depression. Ms. Rutherford received psychotherapy and medication management through Counseling Services of Eastern Arkansas from 7/9/02 until 3/11/03. Ongoing individual psychotherapy and medication management would likely be beneficial in addressing psychological symptoms.
7. Ms. Rutherford has a history of learning problems which predate the June 2002 injury. She left school before completing the 8th grade. Nevertheless, she was working successfully at the time of the accident and had a history of stable employment in the past. The June 2002 closed head injury appears to have further compromised her ability to learn new information. The wide variety of severe cognitive impairments resulting from the June 2002 accident render Ms. Rutherford disabled from working. Clearly, she would have difficulty understanding, remembering, and carrying out instructions. In addition, given her temper problems, she would likely have difficulty responding appropriately to supervision and coworkers. Work pressures and work-related stress would exacerbate problems with irritability and symptoms of depression. Return to work in the near future would likely be unsuccessful.
8. Ms. Rutherford is at high risk for continuing emotional, social, and psychological problems for at least 10 to 15 years. She will continue to need ongoing therapy and medication management. Future psychological, psychiatric, and neuropsychological evaluations will help identify long-term psychological needs. (Cl. Ex. A, pp.35-37)

In conclusion, Ms. Rutherford sustained a concussion injury consequent to a car versus train accident in June 2002. Comprehensive neuropsychological testing revealed residual impairments in the areas of oral fluency, reading, arithmetic, conceptualization, immediate and sustained attention and concentration, delayed auditory and visual memory, auditory and visual learning, remote memory/fund of information, commonsense/safety reasoning, visuoperception, construction, visuoconstruction, and bilateral motor speed and dexterity. Since the June 2002 accident, Ms. Rutherford has been disabled from working. Ms. Rutherford is often in great pain, and her ability to perform activities of daily living has been compromised. Her brother has taken on the role of her legal guardian, and he manages her finances. She requires assistance with household responsibilities, driving, and medication management. Ms. Rutherford is emotionally distressed in reaction to her disability and activity restrictions, and her emotional well being is an area of significant concern. Ms. Rutherford reports symptoms of severe depression and anxiety, which are consistent with DSM-IV diagnoses of Depressive Disorder NOS and Posttraumatic Stress Disorder, Chronic. Psychotherapy is strongly encouraged, and ongoing medication management appears warranted. (Cl. Ex. A, pp.41-42)

The claimant, Brenda K. Rutherford, testified in her own behalf. The claimant is fifty-seven (57) years old. She has a 7th grade education. The record reflects that the claimant was gainfully employed at all times before the June 13, 2002, accident. The claimant worked at Baird's Department Store for thirty-one (31) years. During that time, she often held a second job which indicates a strong work ethic. The claimant was employed for approximately five (5) years as a van driver for Mid-Delta Community Services, Inc., which consisted primarily of picking up and transporting patients to hospitals and doctors' offices. The claimant has not been able to work since her accident on June 13, 2002, involving a vehicle/train wreck. As previously pointed out, the claimant has undergone significant physical and psychological treatment. The parties stipulated that the claimant's healing period ended March 20, 2006. The claimant sustained a head injury and was rendered unconscious.

The claimant also suffered broken ribs, a punctured lung, as well as spinal injuries and a significant injury to her left lower extremity. Although it is undisputed that the claimant had significant pre-existing problems, the prior conditions did not affect her ability to work. Clearly, the medical record reflects that the June 13, 2002, accident aggravated the claimant's pre-existing conditions, as well as caused additional injuries, both physical and psychological. The record reflects that the claimant has recently undergone a total knee replacement on her right knee which she attributed, in part, to an altered gait resulting from the deep laceration and injury to the left leg and knee. The record reflects that the claimant may be required to undergo a total knee replacement on the left knee which was, admittedly, injured in the accident. As previously pointed out, even Dr. Baskin recognized that the claimant sustained permanent impairment related to the admitted left knee injury. Permanent impairment is undisputed.

The claimant's brother, Henry Meredith, and sister-in-law, Brenda Jean Meredith, were called as corroborating witnesses. Both testified concerning their observations of the claimant's physical and mental abilities both before and after June 13, 2002. Rather than conduct exhaustive analysis of their testimony, suffice it to say that each confirmed that the claimant was able to care for herself before the accident, and that the claimant now requires substantial assistance in her daily activities. Both opined that the claimant was not only incapable of working, but, also, unable to perform household chores and/or care for herself. As previously noted, the

claimant's brother has recently been appointed as the claimant's legal guardian. This appointment was required, in part, because the claimant was involved and, in fact settled, a third-party lawsuit against the Union Pacific Railroad.

The claimant was also examined and evaluated by Bob White. Mr. White is both a vocational rehabilitation counselor and also a vocational specialist. Mr. White's vocational assessment was performed on February 23, 2006. He issued a February 25, 2006, report. The summary and conclusions of his vocational assessment is set out below:

SUMMARY

Objectively we have a 57 year old female (considered advanced age) with an eight [sic] grade education (marginal) with work history described as entry level, unskilled. She was involved in a MVA with subsequent vocational handicaps affecting return to work.

CONCLUSIONS

Quoting, Office of Hearings and Appeals Social security Administration, Vocational Expert Handbook, "Person Approaching advance age – if a claimant is of advanced age (55 to 59), age significantly affects the claimant's ability to engage in substantial gainful activity. If a claimant is severely impaired, of advanced age, and cannot do at least medium work, he or she may be found disabled unless the claimant has skills that he or she can transfer to less demanding skilled or semi-skilled jobs which exist in significant numbers in the national economy.

Limited education means ability in reasoning, arithmetic, and language skills which does not permit performance of most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, formal schooling at the 7th grade through the 11th grade level is a limited education.

Ability to be competitive in the labor market Brenda Rutherford would not be competing with other physically impaired 57 year old workers – she is competing against all individuals, regardless of age or gender – who are competing for a finite number of unskilled jobs – this includes all high school dropouts who enter the work

force, all high school graduates who do not choose to continue their education or training but directly enter the labor market, all dropouts from college, vocational technical school who do not complete degree or certification programs but enter the labor force and all individuals who are terminated, laid off, or quit jobs and directly re-enter the labor force, and in many cases degrees students who cant [sic] find work in their field of specialization.

All jobs require persistence and pace to complete specific job tasks – all jobs require dependability and reliability (worker traits) and the ability to complete the normal eight hour work day and 40 hours work week. All jobs have on going work processes (requiring an individual to be in a set position for a specific period of time to complete specific work tasks) with time dependent schedules.

The issue is not can Brenda return to work for a few days or even a few weeks, but can she perform specific essential functions of a job over a period of months and years as a reliable, dependable employee.

In reviewing the medical records of Brenda Rutherford what leaps out is the number of physical and emotional/psychological problems this lady has incurred – systolic hypertension, multi-level degenerative disc disease, diabetes type II, degenerative changes of the pelvis and left iliac bone fracture adjacent to the sacrum, shortness of breath, generalized de-conditioning, obesity, hypertension, asthma, closed head injury, major depression, acute stress disorder, chronic pruritis, etc.

Physically, Brenda Rutherford would be limited to no more than sedentary activity as that term is defined by the U.S. Department of Labor.

Vocationally she was only qualified for entry level unskilled work. Unskilled work – learned through observation, short demonstration and less than 30 days, requires little or no judgement, is learned by rote, supervision is concrete with few variables, with no more than one or two step directions.

Cognitively it is questionably if Brenda Rutherford could follow one to two step directions or read material off a page and follow directions.

Emotionally/Psychologically – she has severe deficits in judgement, attention and concentration, working under supervision and with co-workers, behaving in an emotionally acceptable manner, reacting predictably in social situations.

Overwhelmingly – most of these problems seem to have manifested themselves or deteriorated since Ms. Rutherford's MVA – as by report – she had worked for 36 years with two employers successfully.

Brenda Rutherford based on a combination of physical, cognitive, psychological, emotional and social impairments is not capable of return to any employment, has no recreational or avocational interest and cannot even engage in minimal activities of daily living. (Cl. Ex. A, pp.52-54)

Mr. White also testified at the August 4, 2006, hearing. Rather than conduct an exhaustive analysis of his testimony, suffice it to say that his opinion that the claimant was not a candidate to return to gainful employment remains unchanged. I concur with his assessment.

As noted above, and reflected in the claimant's medical records, the claimant had a number of pre-existing, physical and emotional problems. Nevertheless, she, at all times, remained gainfully employed before being involved in an extremely serious accident. The claimant is fortunate to have survived a vehicular accident with a train. The claimant has been unable to return to gainful employment since that time. She has undergone extensive medical treatment, physical therapy, as well as neuropsychological evaluations. Based on my observations of the character and demeanor of the claimant, I am persuaded that her testimony was credible and that her continuing physical and psychological problems are real. I feel compelled to further point out that despite the claimant's pre-existing problems, neither the claimant nor respondents joined the Second Injury Fund. The most logical inference that can be drawn is that the claimant's June 13, 2002, accident and injury is the reason for her current disability. In fact, I specifically find that her multiple injuries are the major cause of her disability as required by Ark. Code Ann. §11-9-102(4)(f)(ii)(a).

The record as a whole clearly supports the finding that the claimant is permanently and totally disabled as the result of the June 13, 2002, injury. Accordingly, I hereby make the following:

AWARD

Respondent, AIG Claims Service, is hereby directed and ordered to pay, to the claimant, permanent total disability benefits at the rate of \$193.00 per week beginning March 21, 2006, and continuing until its statutory obligation for permanent total disability benefits is exhausted.

All accrued benefits shall be paid in lump sum and without discount.

Additionally, claimant's attorney, Mr. Jesse B. Daggett, II, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid pursuant to Ark. Code Ann. §11-9-715.

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

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge