

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505683

GEORGIA D. WHITLATCH, EMPLOYEE

CLAIMANT

GARLAND and BRENDA MILLER,  
d/b/a B M SURPLUS SUPPLY &  
RESTAURANT, UNINSURED EMPLOYER

RESPONDENT

OPINION FILED OCTOBER 11, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on September 8, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondent appeared through Mr. Garland Miller, acting *pro se*.

STATEMENT OF THE CASE

A hearing was conducted September 8, 2006, to determine whether the extent of claimant's disability resulting from a compensable injury sustained on April 29, 2005.

A prehearing conference was conducted in this claim on August 9, 2006, and a Prehearing Order was filed on said date. In addition, this claim has been the subject of a prior hearing, on January 13, 2006. An Opinion was filed on February 24, 2006, from which no appeal was taken and which is now a final decision and the law of the case. No benefits have been paid pursuant to the prior Opinion and Award issued on February 24, 2006. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the August 9, 2006, Prehearing Order. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1."

By agreement of the parties, the primary issue concerned claimant's entitlement to permanent disability benefits. As will be set out further below, the end of claimant's healing period, as well as the period of claimant's temporary total disability must also be determined. Because the employer is uninsured, the claimant requested a determination and judgement for all disability benefits to which she may be entitled.

Claimant contended, in summary, that as the result of her admitted compensable injury, she was entitled to temporary total disability benefits for the period beginning April 30, 2005, and continuing through April 11, 2006; that Dr. Edward Cooper, an orthopedic surgeon, had assessed a fifteen percent (15%) permanent impairment rating to the body as a whole; that as a result of her injury, surgery, and permanent impairment rating, she was permanently totally disabled, and, therefore, entitled to 260 weeks of permanent disability pursuant to A.C.A. §11-9-522(f)(1).

The respondent contended that the claimant could not prove entitlement to permanent total disability, maintaining that the major cause of claimant's disability was related to her age and/or pre-existing conditions and prior injuries.

In addition to the claimant, her son, Stanley Whitlatch, was called as a corroborating witness. The record is composed solely of the transcript of the September 8, 2006, hearing containing a forty-one (41) page medical exhibit introduced as "Claimant's Exhibit A." The record of the prior hearing conducted

January 13, 2006, as well as the Opinion filed February 24, 2006, were incorporated by reference and made a part of the record herein.

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. On April 29, 2005, the claimant sustained an injury arising out of and during the course of her employment with Garland and Brenda Miller, d/b/a G M Surplus Supply & Restaurant, specifically, a broken hip, at which time she earned wages sufficient to entitle her to a compensation rate of \$100.00 per week for both temporary total and permanent disability benefits.
3. The claimant's healing period ended April 11, 2006.
4. The claimant sustained a fifteen percent (15%) permanent impairment to the body as a whole as the result of her injury.
5. Upon consideration of the claimant's age, education, and work experience, together with the permanent physical impairment attributable to the claimant's injury and resulting surgeries, the claimant has proven, by a

preponderance of the credible evidence, that she is permanently totally disabled within the meaning of the Arkansas workers' compensation laws.

6. Pursuant to Ark. Code Ann. §11-9-522(f)(1), the claimant is entitled to 260 weeks of permanent disability.
7. The claimant has proven, by a preponderance of the evidence, that the major cause of her permanent disability resulted from the April 29, 2005, admitted injury.
8. The respondent has controverted the claim in its entirety.
9. Respondent is responsible for all costs in taking and transcribing the within proceeding pursuant to Ark. Code Ann. §§11-9-704 – 11-9-705 and Commission Rule 099.20.

#### DISCUSSION

The relevant facts in this case are basically undisputed. As reflected above, this claim has been the subject of a prior hearing. An Opinion was issued on February 24, 2006, which is now a final decision and the law of the case. No benefits have been paid pursuant to the prior Opinion and Award. Unfortunately, the respondent is an uninsured employer. Garland Miller, the owner and operator of G M Surplus Supply & Restaurant, is an extremely nice gentleman who failed to secure workers' compensation coverage for his employees. Regrettably, an accidental work-related incident occurred on April 29, 2005, when the claimant fell and broke her hip. The claimant has not returned to gainful employment since the admitted injury.

The following findings of fact and conclusions of law were entered on February 24, 2006:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The claimant has proven, by a preponderance of the evidence, that she sustained an injury arising out of and during the course of her employment with Garland Miller, d/b/a G M Surplus Supply and Restaurant, which resulted from a specific incident identifiable in time and place of occurrence on April 29, 2005, when she fell over a stool and broke her hip.
3. A preponderance of the evidence proves that the claimant was providing employment services at the time of her admitted injury.
4. A preponderance of the credible evidence reflects that the claimant's average weekly wage was \$150.00, entitling her to a compensation rate of \$100.00 per week for temporary total disability and permanent partial disability.
5. Respondent is responsible for all hospital, medical, and related expenses as the result of claimant's compensable injury and remains responsible for continued, reasonably necessary medical treatment.
6. The claimant is entitled to temporary total disability beginning April 30, 2005, and continuing through at least November 30, 2005, and until such date that she is determined to have reached maximum medical improvement by her

primary treating physician, Dr. R. Edward Cooper, Jr.

7. The respondent has controverted this claim in its entirety for purposes of attorney's fees.
8. Claimant's entitlement to permanent disability benefits has been specifically reserved.

Based upon the foregoing, benefits were awarded to the claimant. Again, no benefits were paid pursuant to the prior Award. A second hearing was conducted on September 8, 2006. The primary issue concerned claimant's entitlement to permanent total disability. In addition, the claimant requested a determination and judgement for all disability benefits since respondent failed and/or refused to pay the benefits previously awarded.

The claimant, Georgia Whitlatch, testified in her own behalf. The claimant is seventy-nine (79) years old. She has an eighth grade education. The claimant did not receive a GED and denied any additional vocational training. The claimant's primary work experience has consisted of factory work. In addition, the claimant has worked as a waitress, cook, and in house cleaning. All of the claimant's work history has consisted of manual labor. The record reflects that the claimant sustained a prior injury involving her left hip when she fell at a shoe factory and broke her left hip in the late '70s or early '80s. The claimant returned to work following surgery, performing her regular job duties. The claimant denied having any further problems with the left hip. The claimant sustained an injury to her right hip on April 29, 2005. The record reflects that the claimant has undergone two (2)

surgeries following the within, compensable injury. Initially, the claimant underwent an open reduction internal fixation of the right intertrochanteric hip fracture which involved having a rod placed in her hip and leg. Because of continued problems, the claimant ultimately underwent a second surgery which resulted in a total hip replacement on the right side. The claimant has not returned to gainful employment. Although the claimant acknowledged that she was capable of performing limited household chores, she is restricted in her ability to stand, walk long distances, and lift. Her primary treating physician, Dr. R. Edward Cooper, determined that the claimant reached maximum medical improvement on April 11, 2006, at which time he assessed a fifteen percent (15%) whole person impairment for the total hip replacement resulting from the work-related injury on April 29, 2005. (Cl. Ex. A, p.41)

Temporary total disability is determined by the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. It is that period in which an employee is within the healing period and totally incapacitated to earn wages. *Arkansas State Highway Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *J.A. Riggs Tractor Co. v. Etzlkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Stafford v. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The healing period is that period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of the

injury will permit, and if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996); *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The only medical opinion of record reflects that the claimant's healing period ended April 11, 2006. The primary, remaining issue concerns claimant's entitlement to wage-loss disability in excess of her admitted permanent impairment.

The claimant sustained an injury to that portion of her body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury

incapacitate the worker from earning the wages which she was receiving at the time of the injury. When making a determination concerning the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair her earning capacity, as well as other factors such as a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 living at that time, she is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Manufacturing Company*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The claimant is seventy-nine (79) years old. She has a limited education. Her work experience has been limited to manual labor. As the result of a total hip replacement, she has sustained a fifteen percent (15%) permanent impairment and has substantial, physical restrictions. After consideration of the claimant's age, education, and work experience, I find the claimant has proven that she is

permanently totally disabled within the meaning of our workers' compensation laws.

Ark. Code Ann. §11-9-522(f)(1)(Supp. 2005) provides:

(f)(1) Permanent total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.

(2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

The employer maintains that the major cause of claimant's disability is related to her age and/or pre-existing conditions. I specifically find that the major cause of the claimant's permanent disability is the injury and resulting surgery which consisted of a total hip replacement. A pre-existing disability or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *Minor v. Poinsett Lumber & Manf. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). In my opinion, the claimant's pre-existing condition, if any, did not prevent her from working. Likewise, the claimant's age did not prevent her from working. However, the significant injury combined with the claimant's age, education, and work experience resulted in her inability to return to gainful employment. An employer takes a worker as it finds them. The respondent is responsible for permanent total disabilities

pursuant to, and limited by the Act. Accordingly, I hereby make the following:

AWARD

Respondent, Garland and Brenda Miller, d/b/a G M Surplus Supply & Restaurant, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$100.00 per week, beginning April 30, 2005, and continuing through April 11, 2006, for a total of \$4,920.00.

All benefits having accrued, respondent is to pay the \$4,920.00 in lump sum and without discount.

Thereafter, respondent is directed and ordered to pay, to the claimant, permanent total disability benefits at the rate of \$100.00 per week beginning April 12, 2006, and continuing for 260 weeks for a total of \$26,000.00 pursuant to Ark. Code Ann. §11-9-522(f)(1).

All accrued permanent disability benefits shall be paid in lump sum and without discount. Thereafter, respondent is to pay \$200.00 biweekly.

Claimant's entitlement to current and future disabilities will total \$30,920.00 should the employer fail and/or refuse to pay benefits awarded herein.

Additionally, claimant's attorney, Mr. Phillip Wells, is hereby awarded the maximum statutory attorney's fee on this entire Award, one-half (½) to be withheld from claimant's benefits, and one-half (½) to be paid by the respondent pursuant to Ark. Code Ann. §11-9-715; §11-9-801, and Commission Rule 099.10. Pursuant to the Full Commission's decision in *Coleman v. Holiday Inn*, AWCC #D708577

(November 21, 1990) and *Chamness v. Superior Industries*, AWCC #E019760 (March 5, 1992), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits and remitted by respondent directly to claimant's attorney. As a reminder, Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2002 limiting attorney's fees on medical benefits and services for injuries after July 1, 2001. The total amount of the attorney's fee is \$7,730.00. Again, one-half (½) of which is to be paid by the claimant and one-half (½) of which is to be paid by respondent in addition to the benefits awarded to the claimant.

Respondent is further directed and ordered to pay Gibson Reporting Services \$231.95 for costs in taking and transcribing the hearing.

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

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge