

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E606801 (05/08/96)

DONNA CHAMNESS, EMPLOYEE	CLAIMANT
WENDY'S RESTAURANT, EMPLOYER	RESPONDENT #1
ITT HARTFORD INS. CO., CARRIER	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED OCTOBER 24, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 10, 2007, at Forrest City, St. Francis County, Arkansas.

Claimant represented by the HONORABLE JOE PERRY and the HONORABLE ROBERT DONVON, Attorneys at Law, Marianna, Arkansas.

Respondents #1 represented by the HONORABLE BRETT D. WATSON, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits. On April 3, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Donna Chamness, Alfred Chamness, coupled with the deposition of Dr. Reginald Rutherford, along with medical reports and other documents comprise the record in this claim.

DISCUSSION

_____ Donna Kay Chamness, the claimant, with a date of birth of July 31, 1962, in a high school graduate with some post-secondary education, was employed by respondent-employer on three separate occasions with the first being from 1991 to 1993. At the time of her May 8, 1996, accident, which serves as the basis for the present claim, claimant's job title was that of assistant manager. The May 8, 1996, injury was the subject of prior litigation before the Arkansas Workers' Compensation Commission.

In terms of her employment history, the testimony of the claimant reflects that she chopped cotton and worked in a theater as teenager before graduating high school. Thereafter, claimant testified:

Kentucky Fried Chicken, Hayes Grocery Store and then I worked at Cato's Fashion Store. I worked at Truck Stops of America. I worked at Western Sizzlin. I cleaned house for a man, it's called S & S Farms. I used to clean his house while I as working my other jobs, on my day off. I worked at Wendy's. I worked at Southern Belle Casino and I really can't remember anything else. (T. 32).

Claimant operated her own restaurant, John's Snack House, in Hughes, Arkansas, for almost two years. Claimant explained that she was in charge of the restaurant as manager when she was employed by Southern Belle Casino. Claimant worked as a substitute teacher at Hughes Elementary School when she was working her other jobs. The claimant's testimony reflects that from the time she was 12 years old until the May 8, 1996, accident she has always had a job.

Regarding the one long period when she did not work, claimant testified:

There was once when I was married previously, when I was Fresh out of high school I was married and my husband wouldn't let me work. But that didn't last very long because I went to work at Cato's in Texas because I didn't know any - - I had always worked. And if you want something, that's the only way you're going to get it is you have to work for it. (T. 35-36).

As noted above and in the stipulations the claimant's May 8, 1996, accidental injury was the subject of prior litigation. As a result of the afore, the prior litigation it was determined that the claimant sustained a compensable low back injury in the May 8, 1996, accident. Claimant's testimony reflects, regarding the physical demands made on her by respondent #1 at the time of her May 8, 1996, accident:

I had to lift up to 40 pounds. I had to, I was constantly running all over. I was doing grill work, making sandwiches, lifting, stretching, bending, kneeling, stooping, cashier, sweeping, clean toilets - - I did everything. Clean toilet, help take out garbage, mop, sweep, you know, just everything, every aspect that there was to do, I did it. When people went on break, I took over their job and did their job while they ate or went on break. (T. 36).

Claimant maintains that due to the residuals of her May 8, 1996, injury she is unable to perform the tasks that she performed during her employment with respondents #1. Claimant noted that when she returned to her former employer and attempted to do the job she was unable to do so. Claimant explained the afore effort resulted her "hurting really bad" and that both her legs were swollen up "so huge" that in viewing same you could not identify the presence of her knees.

Claimant testified that she experiences painful muscle spasms in her back. During those instances when she experiences painful muscle spasms in her back she request assistance from her husband:

I usually ask him to rub me only when I have to. I don't ask him for assistance very much. But, and I couldn't give you an exact figure on that but . . . (T. 38).

Claimant identified the site of the muscle spasms as in her low back below her belt line.

Claimant's testimony reflects that she experiences the spasms every day.

Claimant provided testimony regarding a typical day and the impact of the residuals of her injury on daily activities. Claimant noted that there are some days that she is unable to get up and to provide for her family. Regarding the frequency of the afore, claimant testified:

I don't know because sometimes when I can't get up it goes for two weeks at a time and then I try not to do anything that's going to put me down or, so I can't get up. If I try to do what I know my limitations are, if I try not to bend, stoop, walk excessively, if I try not to pick up anything Heavy, a lot of times it won't come up on me like that. I can still get around and walk. But I'm going to say in May I had a really bad spell. All I did was, I looked out the window at night and the dogs were barking and I looked out the window that night. I went back to bed. I could not get up the next morning. I was out for two weeks. I had to use a cane, one of those kind of canes, an orthopedic cane that's got the four things on the bottom that's - -

Yes. I had to use one of those for two weeks to try to go to the bathroom. And at time I could not hold myself up in the bathroom and my husband would have to come and get me and carry me and lay me back down. And there's time when - -

I couldn't move. My - - I hurt so bad that I could not move. And I would swell. My legs swelled up and I had to go back to the doctor - - (T. 40-41).

The testimony of the claimant reflects that she is able to cook supper sometimes.

Claimant noted that she has a neighbor who cooked supper for her three nights a week and bought it over to her house. Claimant testified that some days she can drive and some days she cannot. Claimant estimates that during a month she is able to drive 20 days. Claimant's

testimony reflects that it is her job to pick up the children from school, however there have been times when she has been unable to do so, especially when taking medication, and other parents have taken off from work to pick up the children from school.

Claimant testified regarding the medications that she take in connection with her compensable low back injury. Claimant's testimony reflects that she takes Albuterol twice a day. Further, the testimony of the claimant reflects regarding her medications:

Advair. It is 100 slash 50. I take it twice a day. Amitriptyline, 25 milligrams, one or two at bedtime. Aciphex, 20 milligrams, one a day. Hydrocodine, Ibuprofen, it's 7.5 200 milligrams. It's one every 12 hours or I take it as needed for pain. I do not take this just once every 12 hours. Cyclobenzapr, 10 milligrams. It's one, two times a day for muscle relaxers. And I also take that just, I take those when I cannot stand the pain, when the pain is so bad that it's just unbearable. I do everything I can do before I resort to those because they knock you out. I'm nauseated all the time from hurting and then when I take this medicine it makes me sick. (T. 42).

Claimant noted that she was not taking any medicine prior to her May 8, 1996, work-related injury. The pain which limits her physical activity level and which she attributes as a residual of the May 8, 1996, compensable injury is described by the claimant as being in her low back and radiating down her legs.

The testimony of the claimant reflects that she treated with Dr. Howser relative to the May 8, 1996, compensable low back injury. Claimant's testimony reflects that Dr. Howser performed a physical examination and in the process conducted certain tests, to include a range of motion test. Claimant described the mechanics of the examination by Dr. Howser. (T. 43-5).

Regarding whether she would like to go back to work, claimant testified:

Of course. Of course I would. I would love to have a check coming every week instead of waiting on the check to come once a month. And I would love to be able to get my children things that they need. To

help my son get through college. My children sit there and other kids get to have a hamburger and a lot of times they don't. And, of course, there's nothing better I would love than going back to work. (T. 45).

Claimant explained that the afore is motivation enough for her to return to work if she physically could. Claimant pointed other financial hardships experienced since her injury which would be eased if she was physically capable of returning to work, to include the near lost of their house and automobile.

During cross-examination claimant providing a deposition on January 6, 2005, the examination by Dr. Reginald Rutherford, and undergoing a functional capacity evaluation in Jonesboro. Claimant testified that she was aware that during his examination Dr. Rutherford did not find any objective medical evidence for a diagnosis of lumbar facet joint syndrome. Claimant testified that she had not received anything from Dr. Rutherford. Claimant acknowledged that Dr. Rutherford did have an EMG/nerve conduction study run as a part of his evaluation/examination of her. Claimant testified that she was unaware of Dr. Rutherford's findings of prominent pain behavior and clear cut functional overlay. Further, claimant testified that she was not aware that Dr. Rutherford did not recommend any impairment rating relative to the May 8, 1996, compensable low back injury. Claimant also testified that she understood that the FCE reflected that she had given an unreliable effort. Claimant testified that she had not seen the reports.

Claimant acknowledged that Dr. Meredith released her to return to work in January 1997, and that she did in fact return to work. Claimant testified that she was unable to do the light duty work at respondent #1.

The testimony of the claimant reflects that she was referred to Dr. Howser by a friend.

Claimant's testimony reflects that Dr. Howser performed a number of diagnostic studies during his examination, to include an MRI , and EMG nerve conduction study. Claimant offered that the MRI performed at the direction of Dr. Howser was on her cervical spine. Claimant acknowledged that the MRI and EMG/NCV were normal. The testimony provided by the claimant during the prior 2001 hearing before the Arkansas Workers' Compensation Commission reflects that claimant acknowledged that Dr. Howser ordered the MRI, EMG and CT of the lumbar spine, which were all negative. The CT of the lumbar spine disclosed a slight bulge.

Claimant testified that prior to her May 2007, visit to Dr. Kumar, she had last been seen by him in December 2006, however she felt that she had also been seen by him in March 2007. Claimant recalled being seen by Dr. Schnapp who opined that she suffered from fibromyalgia. Claimant added that the duration of her visit with Dr. Schnapp was "a total of five minutes". Claimant noted that she only saw Dr. Schnapp on one occasion.

Claimant continued to smoke, noting that she presently smoke a half a pack a day. In addition to receiving Social Security Disability Benefits, claimant testified that her daughter receives benefits. The testimony of the claimant reflects that the total monthly amount of benefits received is \$1,215.00. Claimant noted that when she was employed she could make the afore in two weeks or sooner.

The testimony in the record reflects that the clamant usually pick up the children from school, entailing a 30 minute drive to school and 30 minute drive back home. Claimant noted that she usually leave an hour and a half early to accomplish the afore. The testimony of the claimant reflects that prior to the May 2007, two week period of real bad problems, she last

experienced such problems in December 2006, when she underwent the stress test with a physician designated by respondent #1.

Claimant acknowledged that she drove her daughter to school the first day because she had changed schools last year. Also claimant testified that she may have drive her daughter to school when she was going on a field trip. Claimant testified that she grocery shop for the family two to three time per week. Claimant denied that she did the shopping by herself most time:

No, most of the time my husband - - listen to me, my husband. My father goes with me or my daughter. The only time that I might do something is if I go by, when they're at school instead of going after school like my husband said, I usually go before school gets out and I'll just get something for dinner that night whether it's hamburger meat or a gallon of milk or something like that, that's it. (T. 55-56).

Claimant asserts that either her daughter or her father accompany her when she grocery shop, and that she never go by herself. Claimant acknowledged that during her January 2005 deposition she testified that she usually went grocery shopping alone. Claimant maintains that such is not the case anymore.

The testimony of the claimant reflects that she does vacuum the floors. Claimant added that if she can do it, she tries to do it. Claimant noted that the last time she went to the casino in Mississippi, which is an hour drive away, was this summer when she had some free room and she and her daughter went and spent two nights and ate at the buffet.

The testimony of the claimant reflects that after graduating high school, she took some college courses in psychology and English composition in which she made A's. Claimant acknowledged that since 1996 she has not checked into taking anymore college courses:

I'm not able. That's the same reason I didn't draw unemployment because in order to draw unemployment you have to be able to go to work.

I wasn't able to go to school. (T. 58).

Claimant concedes that she has not checked into any online college courses since 1996, although she does have a computer at home.

During the January 2005, deposition claimant testified that she had not taken any steps to find any work since 2000. During the hearing claimant conceded that she still had not taken any steps to find any kind of work. Claimant added:

I haven't. I've actually thought about trying to sell real estate. That is just about the only thing I could come up with that if you're ill and you can't get up that maybe you can put appointments off and do another time. But the way the financial situation is with real estate right now, I don't see that as being a, how do you say it, where it would actually pay me to do that. I don't think I can make any money doing it. (T. 58-59).

Claimant's testimony reflects that she made an inquiry about selling real estate and learned that she would have to take classes and a test in order to get a license. Claimant acknowledged that at one time she was very interested in doing some work transcribing medical records, however claimant offered that with her hands she did not think she could type all day long. Claimant identified as obstacles to being a medical transcriptionist sitting all day and typing all day.

During re-direct examination claimant testified that respondents #1 have never had her go to be evaluated for vocational rehabilitation programs of any kind. Regarding her experience with Dr. Rutherford claimant testified:

When I went to Dr. Rutherford, Dr. Rutherford did no testing on me whatsoever. He looked at me. He looked at me. He ran no tests. He looked at me and looked at my back. I saw him one time, the one time I went to him. What could he tell me in the short little period of time that I saw him? (T. 62).

Claimant estimates that the total time she was in the room with Dr. Rutherford was ten minutes.

Claimant concedes that Dr. Rutherford did touch her:

He, let me see exactly what did he do? He did the testing on me with the machine for the carpal tunnel. He did do that. And he did touch the back of my back. But he did actually no testing that I knew to be a test. Nothing. No x-rays, no anything. And I do remember that he did make me walk to see how I walked and put one foot in front of the other or something like that. (T. 63).

The testimony of the claimant reflects that the medications that she is taking was prescribed either by Dr. Kumar or Dr. Levitch, a psychiatrist. The testimony of the claimant reflects that she was referred by Dr. Kumar to Dr. Blankenship. Further, the testimony reflects that in April 2007, a Change of Physician Order was entered designating Dr. Blankenship as the treating physician. Claimant explained why she had been seen by Dr. Blankenship:

No, sir. When I went to see Dr. Blankenship they asked for money up front because this was a workmen's compensation case, therefore, they would not see me without money up front or the change of physician. Then when I got the Order for the change of physician, the doctor refused to see me because it was such an old workmen's comp injury. He would not see me. I couldn't get through the doctor. (T. 66).

Claimant testified that the basis for her award of Social Security Disability Benefits was both mental and medical/physical. From a physical standpoint claimant noted that the Social Security award involved both her lower back and neck.

Alfred Chamness, the claimant's husband, testified regarding his observation of the claimant since the May 8, 1996, compensable low back injury and the impact of same of the claimant's physical capabilities. Mr. Chamness and the claimant have been married since August 17, 1987, and have lived continuously since that time. Mr. Chamness and the claimant have two (2) children, a son 21 years of age and an 11 year old daughter. Mr. Chamness is employed as a lead technician for a cable TV company.

In terms of the claimant's work ethic and activity prior to May 1996, Mr. Chamness'

testimony reflects:

I know that she, we have always done things together and we played softball and we would just do stuff, go out dancing and stuff and after this injury occurred, when she got hurt, that stuff just completely disappeared. We do no more of that kind of stuff. There's not a lazy bone in her body. She was always, always active, always doing stuff and I watched it go, it did a complete 180 degree turn almost the first three or four years and then it slowly, she's trying to get back to where she does little stuff. Not a whole lot, you know. But I just know my wife. I know that she's not the same person that she was before this accident happened.

The - - it happened instantly from the, when she fell that day is when everything completely changed in our life. (T. 14-15).

The testimony of Mr. Chamness reflects that while the claimant had always worked since they had been married, she has not worked since the accident of May 8, 1996. Mr. Chamness elaborated regarding his observation of the claimant since the May 8, 1996, compensable low back injury:

Well, besides the basic stuff that needs to be done or has to be done, you know, which sometimes there are several things that she does that she pays for the next two or three days. But those are things that have to be done.

Well, laundry, you know, there's - - laundry is going down the steps to where the laundry room is toting a laundry basket if she has to or my daughter is toting it or I tote it when I get home that day. But when I get home of the evening, it's difficult to have to go in to do, start laundry at night time. But we've done it before. You know, groceries, backing up as close to the door as she can to get the light stuff and when I come home of the evening or my son is there or the neighbor or someone will bring in the drinks, the laundry - - the heavy stuff that she cannot pick up, you know, has an effect on her. And that's everyday stuff, cooking. Cleaning is almost, it's not like it used to be. I mean - -

This is everyday, you know, that she is able to do things - - yes, sir, this is everyday stuff that has to be done. And she does what she can, when she can. And she does, sometimes she does nothing. She can't do anything. (T. 16).

Mr. Chamness testified that he had seen the claimant with muscle spasms on several occasions. Regarding the location of the muscle spasms, Mr. Chamness' testimony reflects:

In her lower back she'll get them little knots, two or three or one on this side and one on this side and sometimes there'd be just one or on her back they will just tighten up probably half as big as maybe a lemon or something like that. (T. 18).

Mr. Chamness testified that felt the muscle spasms in the claimant's lower back and rubbed the ones that she is unable to reach. Regarding the frequency of the claimant's low back muscle spasms during the course of a month Mr. Chamness' testimony reflects:

Well, I don't know exactly when it's been - - the last time it happened was about two weeks ago and I don't, sir, if I told you something I wouldn't know, in a month's time I'll guess maybe twice a month, three times a month. But there are times she won't say a word to me. She lays in the, she's got a heating pad that she can sit on at times. And you walk in my house right now, on the couch it's right there. It's ugly, I don't like it, you know, but you can't move it, you know, because she has to have that. (T. 19).

Mr. Chamness testified that there are occasions when he has had to assist the claimant to the bathroom due to injury. Mr. Chamnes also observed:

Well, Sunday, this past Sunday. Well, she actually needed help. I had to take her to the emergency room Sunday. She was, I think the stress and stuff that she's been under and she was standing cooking for a period of time and she got real lightheaded and nauseated, pain all the way down her back and we went to the emergency room this past Sunday. (T. 20).

Claimant was seen at the emergency room of Crittenden Memorial Hospital in West Memphis.

Mr. Chamness testified regard the claimant's day to day activities:

Well, during the summertime here day-to-day activities are, she's not in a hurry to get up in the morning time because our little girl does not have to go to school. And it just depends on if she got a good night's rest or not whether she's up when I leave the house at approximately eight a.m. in the morning. Most of the time she's not up but a lot of times

here within the last two months she's been up every morning since I left. Then I come home, there's, you know, at my house lunch, you fix a sandwich, you eat whatever, you know. There's nothing cooked. But every night there is a supper. She does cook supper every night to the best of her ability, that she can, you know. And then if laundry needs done every two or three days it has to be done, she does that. We don't have a set date that laundry is done. Grocery store runs have to be done. And then a lot of sitting down to rest and to watch TV. (T. 21).

Mr. Chamness points to the installation of a shower in the home as an accommodation for the claimant relative to her compensable injury.

During cross-examination Mr. Chamness testified the prior the most recent visit to the emergency room, it had been three or four years since he had to take her to the emergency room. The testimony of Mr. Chamness reflects that at the time of her May 8, 1996, injury the claimant earned more than he did. The testimony in the record reflects that the claimant is responsible for handling financial issues around the resident.

Mr. Chamness testified that the claimant is covered by his health insurance at work. Mr. Chamness' testimony reflects, regarding the afore:

I think she is, yes. Matter of fact, I know she is because on Sunday night when we was at the emergency room I had to, I had my insurance card with her name on it because she give it to me. You know, she told me where it was at in her purse. And I found her's and her Medicaid card also. (T. 27).

In addressing the claimant's employment efforts since 1996, the testimony of Mr. Chamness reflects:

Well, sir, she's not, I mean, if she was able to work, she would go to work. There's not a lazy bone in her body. There never had been. And to this day, you know, I still see her going when she shouldn't be going but were forced to go. And she tried taking some college courses to try to better herself and stuff like that. But sitting in the class on them hard chairs and stuff, it was impossible for her to do it. Plus, the financial

part of it was difficult, you know. (T. 28-29).

Mr. Chamness conceded that he was unaware of any steps the claimant had taken to obtain employment since 1996.

The record reflects the presence of a July 2, 2004, report of Dr. John P. Howser, a Memphis neurosurgeon, relative to the claimant. The July 2, 2004, reports reflects a history of the claimant's May 8, 1996, injury and treatment received in connection with same. The report also reflects the results of Dr. Howser's physical examination of the claimant, review of diagnostic studies, diagnosis of the claimant's complaint, and permanent physical impairment. During earlier litigation in this claim the claimant's cervical complaints were ruled non compensable. The July 2, 2004, report of Dr. Howser reflects, in pertinent part:

On examination there was moderate restricted range of motion of the cervical spine on extension and rotation with pain. There was mild restricted range of motion on flexion. The Adson's test could not be performed because she could not rotate enough to either side to properly perform the Adson's test. There was decreased sensation over both palms and fingers consistent with a bilateral carpal tunnel problem but there were no weaknesses. Back examination revealed severe restricted range of motion on extension with pain, moderate restricted range of motion on flexion with pain and her straight leg raising was 60 degrees bilaterally. The deep tendon reflexes and motor examination were all normal.

It continues to be my opinion that this patient has sustained a cervical facet syndrome, lumbar facet syndrome and left carpal tunnel problem secondary to the fall at Wendy's restaurant which happened on the morning of May 8, 1996. She has been properly worked up including MRIs, myelogram and post myelogram CTs which failed to show any evidence of a ruptured disc. She has had blocks which were very successful in the lumbar area but they did not last. She has had facet rhizotomies in the lumbar area which did not work. She has had a typical cervical facet syndrome and lumbar facet syndrome.

Her diagnosis continues to be lumbar facet syndrome, cervical facet syndrome with cervicogenic headache and bilateral carpal tunnel syndrome.

She will have a 3% anatomical disability rating rated to the body as a whole as a result of her lumbar facet syndrome. She will have a 3% anatomic disability rating rated to the body as a whole as a result of her cervical facet syndrome. She will have a 2% anatomic disability rating rated to the body as a whole as a result of her right carpal tunnel problem. She will have a 2% anatomic disability rating rated to the body as a whole as a result of her left carpal tunnel problem. All of these problems are related to the injury as discussed above. This is a total 10% anatomic disability, however, her major disability is industrial. She is totally disabled to perform any type of work and in my opinion this will be a permanent restriction. As mentioned above, she has already been approved for social security because of these problems. She also has a psychological problem that developed because of the injuries as stated by Dr. Levitch. I will leave the percent disability from that standpoint up to Dr. Levitch. (CX. #1, p. 1-2).

The evidence in the record reflects that the claimant has treated with Dr. Sudhir Kumar as her primary care physician. A review of the medical records of Dr. Kumar reflects his efforts to refer the claimant to Dr. Blankenship in April 2007. The effort was unsuccessful. (CX. #1, p. 14). An April 30, 2007, office note of Dr. Kumar relative to the claimant noted that the claimant was having chronic low back pain, was unable to lie down and could not turn around. The office note, which assessed the claimant's complaint as chronic low back pain, reflects plans to refer the claimant to a pain clinic. The office note contains a handwritten entry indicating a May 11, 2007, appointment with Dr. Gera at 2:45. (CX. #1, p. 15).

The medical in the record reflects that on March 7, 2002, the claimant was seen at the Outpatient Pain Clinic of Crittenden Memorial Hospital by Dr. Jack Goodman. Noteworthy regarding the afore treatment is the fact that the chief pain complaints of the claimant centered on her neck, which was ultimately ruled non-compensable relative to the May 8, 1996, work-related accident. The March 7, 2002, clinic note reflects, in pertinent part:

CHIEF COMPLAINT: Ms. Chamness is a 39-year-old, white female, that Dr. Floyd Shrader has asked me to participate in the care of. This

patient comes in with a history of injuring herself at work in 1996 and since that time has been having problems with low back and neck pain. She has been treated by multiple physicians, including Dr. Meredith, Dr. Howser, Dr. Gocturk, Dr. Mays, and Dr. Schnapp, and has had multiple procedures done. The Patient states that over the past few months she has had increase in neck pain. She states that she has episodes that last 3-4 days where she gets a crick in her neck and is unable to move her neck secondary to the pain. She has difficulty getting out of bed secondary to this, can not drive a car, and basically can not function secondary to the pain. The patient states that she will get better and go two to three weeks without any episodes, but she is afraid to turn her head secondary to causing the episodes to recur. The patient is continuing to have low back pain with bilateral hip pain and occasional leg pain. She has had an MRI of the cervical spine done approximately a year ago, but these are not available for view today. The patient has been on disability since 1996 due to her pain. The patient has had physical therapy, blocks, medications, and is under the care of a psychologist. (CX #1, p. 16).

On September 13, 2005, the claimant was evaluated by Dr. Reginald J. Rutherford, a Little Rock neurologist, at the request of respondents #1. The September 13, 2005, report of Dr. Rutherford, relative to his evaluation of the claimant, reflects that he had access to the claimant's prior pertinent medical records, as well as a history of the May 8, 1996, work-related accident and medical treatment in connection with same. The September 13, 2005, report reflects, in pertinent part:

Clinical examination revealed Ms. Chamness to appear her stated age. Her general level of health was considered good. She did appear quite tense. She did not appear in physical discomfort or acute distress. Height was 5'5" with weight of 121 lbs. Heart rate was 92 and regular. Blood pressure was 108/62. Cardiac auscultation proved normal. There were no bruits over the carotid, vertebral, subclavian or femoral arteries. Pedal pulses were palpable, symmetrical and considered normal. Chest was clear of auscultation. Abdominal palpation proved negative for organs, masses or tenderness. In seated position there was no restriction in range of motion of the cervical spine. Neck extension did not precipitate radicular pattern pain. Neck flexion did not precipitate Lhermitte's phenomenon. There was no palpable spasm of the neck or shoulder girdle musculature. There was restriction in abduction both shoulders at approximately 90

degrees. There was no restriction on internal rotation either shoulder. There was no restriction in range of motion of the elbows or wrists. Adson's maneuver, flexed elbow test and Phalen's test proved negative bilaterally. In supine position straight leg raising maneuver resulted in complaint of pain at 10 degrees elevation with seated distracted testing being unrestricted to 60 degrees. In prone position flexion of the knee in preparation for femoral stretch test resulted in complaint of pain prior to initiating the procedure which was not further attempted. In standing position there was marked restriction in range of motion of the lumbar spine in all directions which was discrepant from watching Ms. Chamness change positions while on the examining table.

Neurological examination revealed Ms. Chamness to be awake and alert. She appeared tense. She did not appear overly depressed. There was no evidence of dysarthria, aphasia or cognitive impairment. Cranial nerve examination II through XII proved normal. Motor examination revealed normal muscle bulk and tone arms and legs. Formal assessment of strength via manual muscle testing revealed collapsing pattern weakness all muscle groups both arms and legs. Functional testing was discrepant from results of manual muscle testing Ms. Chamness being able to ambulate without assistance or restriction which would not be physically possible if the weakness demonstrated on manual muscle testing were a true finding. She was also noted to be able to walk on heels and toes again discrepant from giveaway weakness noted on manual muscle testing. Reflexes were hypoactive but symmetrical both upper extremities on testing biceps, brachioradialis, triceps and finger jerks. Lower extremity reflexes were normal and symmetrical on testing knee and ankle jerks. Plantar response was flexor bilaterally. Sensory examination revealed equal appreciation of pinprick, vibration and joint position sense all four extremities with the exception of complaint of diminished pinprick sensation right index finger. Cerebellar testing as assessed by finger to nose and heel to shin maneuvers was normal upper and lower extremities respectively. Stance and routine gait were unrestricted. Ms. Chamness was capable of walking on heels and toes without impediment.

There is no objective neurological abnormality identified in Ms. Chamness' case. There is prominent pain behavior and clear cut functional overlay. It is recommended that Ms. Chamness undergo an FCE under the direction of Rick Byrd and conventional EMG/Nerve Conduction Study both upper extremities to address whether or not there is any objective evidence for carpal tunnel syndrome. With respect to the alleged diagnosed lumbar and cervical facet joint syndrome there is no evidence to support either of these diagnoses neither of which are considered valid or credible. The questions

posed in the covering letter will be addressed upon completion of the above recommended further evaluation. (R#1, X#1, ex. #3).

On November 7, 2005, the claimant underwent a functional capacity evaluation at Functional Testing Centers, Inc., under the direction of Mr. Rick Byrd, in accordance with the recommendation of Dr. Rutherford. The November 7, 2007, functional capacity evaluation report reflects that the claimant put forth inconsistent effort throughout testing. Specifically, the report reflects that the results of the evaluation suggest that the claimant gave an unreliable effort, with 34 of 55 consistency measures within expected limits. (R#1,X#1, ex. #5).

The claimant underwent electrodiagnostic testing to further evaluate diagnostic possibility of carpal tunnel syndrome on November 29, 2005, in accordance with the recommendation of Dr. Rutherford. The nerve conduction study was normal. The November 29, 2005, report concluded that there was no evidence via electrodiagnostic parameters to suggest carpal tunnel syndrome. The afore testing was performed by Dr. Rutherford. In his November 29, 2005, response to the attorney for respondents #1, Dr. Rutherford noted the results of the FCE and the nerve conduction study. Dr. Rutherford also responded to the questions put to him by respondents #1 in the earlier correspondence. Specifically, Dr. Rutherford relayed that there was no objective medical explanation for the claimant's subjective complaints, that he would not recommend any further medical treatment for the claimant, and that he would not recommend any impairment rating for the claimant's back, neck, or carpal tunnel injuries. (R#1,X#1, ex. #4).

On June 12, 2007, the parties obtained the deposition testimony of Dr. Rutherford relative to his evaluation of the claimant. In addressing the September 13, 2005, clinical examination of the claimant Dr. Rutherford testified that there were inconsistency on examination findings. Dr.

Rutherford explained:

Inconsistent. Severe restriction on formal testing, but observation showed greater range of motion that was present when formally requested to bend the spine. (R#1,X#1, p. 8).

Dr. Rutherford testified that the inconsistencies meant that there was functional overlay. Dr.

Rutherford also opined that the results of his finding during the September 13, 2005, examination indicated that the claimant was not giving her best efforts. Dr. Rutherford elaborated on the “prominent pain behavior” observed of the claimant as, “just exaggerated behavior”. (R#1,X#1, p. 10).

Dr. Rutherford testified that in his opinion there is no objective evidence of a lumbar facet joint syndrome in the claimant, and likewise relative to the cervical spine. Regarding the carpal tunnel syndrome, of which he found no objective evidence to support same, Dr.

Rutherford’s testimony reflects:

Well, the examination showed no evidence for carpal tunnel syndrome. Symptoms pertaining to carpal tunnel syndrome were non-specific. The testing that had been done was sensory threshold testing, which is not considered to be a reliable diagnostic test. She had conventional nerve conduction study and it yielded normal responses. If you have normal nerve conduction study, you have ruled out carpal tunnel syndrome. (R#1,X#1, p. 11).

Dr. Rutherford concluded that in his opinion there was no objective evidence to support a finding of carpal tunnel syndrome.

Regarding the functional capacity evaluation, and specifically that of the claimant’s, Dr.

Rutherford testified:

Well, I find the functional capacity testing to be helpful. And Ms. Chamness’ functional capacity evaluation was consistent with my observations pertaining to neurological examination. She had functional overlay and

non-organic findings. Findings on examination that can't be explained by neurological injury or illness. (R#1,X#1, p. 13).

Dr. Rutherford based the absence of an impairment rating relative to the claimant's carpal tunnel of the nerve test that he conducted. Dr. Rutherford noted that the functional capacity evaluation corroborated his observations. Further the testimony of Dr. Rutherford reflects that the functional capacity evaluation showed that there is clear cut evidence for functional overlay. Dr. Rutherford explained that he did not think there was any objective basis for further treatment relative to the claimant based on his observation, examination and review of the diagnostic studies generated as a result of his evaluation. During the June 12, 2007, deposition Dr. Rutherford continued to hold to the opinion that there was a lack of objective basis for an impairment rating.

During cross-examination Dr. Rutherford was questioned regarding his assessment of the diagnostic blocks resulting in the assessment of facet joint syndrome in the claimant's cervical and lumbar spine. Dr. Rutherford reiterated the position set forth in the September 13, 2005, report, that there was no indication that the diagnostic blocks were placebo controlled, which would render the interpretation that the pain was localized to the facet joint problematic. Dr. Rutherford testified:

You just can't interpret it with certainty because you can't rule out placebo response.

There isn't sufficient detail in the procedure to allow for a definitive - - to allow for a definitive conclusion. (R#1,X#1, p. 17).

Dr. Rutherford testified that his examination of the claimant consisted of a general exam and a neurological exam. Dr. Rutherford provide a description of the composition of each exam

and its objective. (R#1,X#1, p. 17-20). Regarding the length of time of his examination of the claimant, Dr. Rutherford estimated that it would have been an hour or two, or maybe one and a half hours. Dr. Rutherford explained:

Well, that's the time interviewing Ms. Chamness and examining her. I also have to review records. I have to prepare reports. So there are several hours that go into that process.

It would take at least two hours to review the records. It would take at least a half an hour to prepare the report. (R#1,X#1, p. 22).

Dr. Rutherford noted that he tries to review the medical records before the examination and interview of the patient. Dr. Rutherford testified that he performs IME's occasionally, maybe one or two a month.

The claimant is receiving Social Security Disability benefits. The record reflects the February 27, 2001, Notice of Decision - Fully Favorable regarding the afore. A review of the Social Security Administration ruling reflects the basis for the ruling, which include matters not attributable to the May 8, 1996, compensable low back injury of the claimant. (CX. #2).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 8, 1996, the relationship of employee-employer-carrier existed among the parties.
3. On May 8, 1996, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$261.00/\$196.00, for total/permanent partial disability.

4. On May 8, 1996, the claimant sustained an injury to her low back arising out of and in the course of her employment.

5. The claimant reached the end of her healing period as a result of the compensable May 8, 1996, low back injury on April 5, 2000.

6. The claimant has failed to sustain her burden of proof by a preponderance of the credible evidence that the May 8, 1996, compensable low back injury resulted in permanent physical impairment, pursuant to Ark. Code Ann. §11-9-704(c)(1)(B).

CONCLUSIONS

At this juncture, the compensability of the claimant's May 8, 1996, low back injury is not disputed. Claimant asserts that the May 8, 1996, compensable accident has resulted in permanent physical impairment, and that when her age, education, and other wage loss considerations are considered she has been rendered permanently and totally disabled. Alternatively, claimant maintains that if not permanently and totally disabled, she has sustained wage loss disability for which she is entitled to corresponding permanent disability benefits. Respondents #1 deny that the claimant is permanently or physically impaired as a result of the May 8, 1996, low back injury, and maintain that she is not entitled to wage loss or permanent total disability benefits. Respondent #2 contend it is entitled to an offset in the amount of the claimant's long-term disability monthly benefits pursuant to Ark. Code Ann. §11-9-411, in the event the claimant is found to be permanently and totally disabled.

The present claim is one governed by the provisions of Act. 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having

been sustained subsequent to the effective date of the afore provision.

As noted above the compensability of the claimant's May 8, 1996, low back injury is no longer disputed, the matter having been previously litigated. The primary issue before the Commission is whether the May 8, 1996, low back injury resulted in permanent physical impairment.

In the instant claim one of the claimant's treating physician, Dr. John P. Howser, a Memphis neurosurgeon, has opined in a July 2, 2004, report that the claimant has sustained a 3% anatomical disability rating to the body as a whole as a result of her lumbar facet syndrome. While the report of Dr. Howser concludes that the claimant has a total of 10% anatomic disability, her major disability is industrial. Composing the 10% anatomic disability as assigned by Dr. Howser is 3% to the body as a whole for cervical facet syndrome, and 2% to the body as a whole for the carpal tunnel syndrome in each upper extremity. Only the claimant's low back complaint has been ruled compensable.

The parties stipulated that the claimant reached the end of her healing period relative to the May 8, 1996, compensable low back injury on April 5, 2000. The claimant underwent further diagnostic studies in 2005, as a part of the medical evaluation arranged by respondents #1. The September 13, 2005, evaluation of the claimant by Dr. Reginald J. Rutherford called into questions the prior diagnoses of the claimant's complaints. Indeed, EMG/Nerve Conduction studies failed to disclose the presence of bilateral carpal tunnel syndrome. Further, the September 13, 2005, examination/evaluation coupled with the November 29, 2005, EMG/NCV study and Functional Capacity Evaluation corroborated the assessment of Dr. Rutherford that there was no objective to support either diagnosis of lumbar and cervical facet joint syndrome as

valid or credible.

Ark. Code Ann. §11-9-102 (16)(A)(ii)(a), provides that “when determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers’ Compensation Commission, nor the courts may consider complaints of pain”. Ark. Code Ann. §11-9-704 (c)(1)(B), provides that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

During the course of his June 12, 2007, deposition Dr. Rutherford addressed the unreliability of the diagnoses rendered relative to the claimant’s lumbar and cervical facet syndrom, which were attributed as residuals of the May 8, 1996, compensable accident. Noting the lack of objective findings Dr. Rutherford has opined that there is no basis to assign the claimant an impairment rating relative the low back complaint or the neck and upper extremities. Dr. Rutherford set forth the basis for his opinion in his September 13, 2005, report and November 29, 2005, follow-up report. Further, during the course of his June 12, 2007, Dr. Rutherford was questioned extensively regarding the his assessment of the claimant’s complaint and findings during his evaluation. Dr. Rutherford had access to and reviewed the claimant’s prior pertinent medical records. Further, Dr. Rutherford had access to the claimant during his physical examination of same as well as the result of electrodiagnostic studies [EMG/NCV studies] and the November 2005 functional capacity evaluation. All of the afore factored into the evaluation and assessment of the claimant’s complaint.

Dr. Howser opined that the claimant sustained a 3% permanent physical impairment to the body as a whole relative to the diagnosed lumbar facet syndrome. At the outset it is noted

that Dr. Howser does not identify the *AMA Guides 4th Edition* as the basis for the impairment rating.

The Workers' Compensation Act of 1993 directed the Commission to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the *AMA Guide 4th Edition*. Accordingly, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the respondent, it is the duty of the Commission to determine, using the appropriate *AMA Guides*, whether the claimant has met her burden of proof. In the instant claim, the claimant has failed to meet her burden of proof by a preponderance of the evidence that she has sustained any permanent physical impairment relative to May 8, 1996, compensable low back injury.

The testimony present by the claimant relative to the residual of her low back injury consist of complaints of pain, and of descriptions of muscle tightness in the low back. Claimant also complained of weakness in the lower extremity resulting in falling. Applying the claimant's complaints and the results of medical diagnostic studies in the record does not result in objective and measurable physical findings in accordance with Ark. Code Ann. §11-9-704 (c)(1)(B). Resorting to the *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition* with the symptoms relayed by the claimant and reflected in the medical records, the claimant has failed to sustain her burden of proof by a preponderance of the evidence. *Mary K. Jones v. Wal-Mart Stores, Inc.*, ___ Ark. App. ___, ___ S.W.3d. ___ (September 19, 2007).

A percentage of permanent physical impairment must be established before consideration can be had relative to a claim for permanent partial disability in excess of the claimant's percentage of permanent physical impairment. Since the claimant has failed to establish by a

preponderance of the evidence that she has sustained some degree of permanent physical impairment as a result of the May 8, 1996, compensable low back injury, consideration of the wage loss factors of her age, education, work experience and other matters reasonably expected to affect her earning capacity may occur. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d. 882 (2000). This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE