

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409832

CAROLE AYTEKIN		CLAIMANT
A Z FACTORY CLOSE OUTS		RESPONDENT
FIRST COMP INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT
DEATH & PERMANENT DISABILITY TRUST	NO. 3	RESPONDENT

**OPINION FILED JULY 16, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JERED MEDLOCK, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by WILLIAM FRYE, Attorney, North Little Rock, Arkansas.

Second Injury Fund represented by DAVID SIMMONS, Attorney, Little Rock, Arkansas.

Death & Permanent Disability Trust Fund represented by CHRISTY KING, Attorney, Little Rock—not appearing at hearing.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 20, 2008, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on February 21, 2008. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. At the hearing, the claimant withdrew the issue of the entitlement to the payment of unidentified medical expenses. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Opinion of February 22, 2006 has become final and is res judicata of all issues raised and addressed therein.
2. The healing period ended January 22, 2007.
3. The respondent employer-carrier has accepted disability for permanent partial disability benefits for a permanent physical impairment of 10 percent to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to permanent disability benefits for permanent functional disability for loss of wage-earning capacity, including permanent total disability.
2. Whether Ark. Code Ann. §11-9-525 is applicable to the present claim.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"Claimant contends that she has reached MMI, been released but is unable to perform any type of work activity."

In regard to these issues, the respondent #1 contends:

"The claimant sustained a compensable injury in March of 2004. The claim was found compensable by the Administrative Law Judge and affirmed by the Commission. Subsequent to the injury, the claimant quit working for the respondent employer. The claimant then went to work for Formax at \$7.00 per hour. She also then returned to work for Cracker Barrel for \$7.65 per hour. At the time of her injury the claimant was making \$6.15 pr hour which is just above minimum wage. Ultimately, the claimant underwent surgery with Dr. Queeney, who gave the claimant a 10 percent rating. Subsequent to this, Dr. Queeney sent the claimant for a Functional Capacity Evaluation. It was noted that the claimant gave submaximal effort and could actually do more as far as restrictions. In addition, the claimant has a long history of substance

abuse. In fact, she has been incarcerated four times for DWIs. Also, the claimant has had a long history of depression, ADHD and bipolar disorder. The claimant was evaluated by Heather Taylor from Rehabilitation Management concerning a return to work. Ms. Taylor indicate in her evaluation that the claimant was not a candidate at this point due to psychological issues including depression, bipolar disorder, ADHD and suicidal tendencies. The claimant had just been hospitalized for an attempted suicide. It was also noted in the report that the claimant had previously tried to take computer classes to rehabilitate her self after she got out of jail and could not complete the classes due to her ADHD. It is the respondents position that the claimant is not entitled to any benefits above the 10 percent for her back. In addition the respondents contend that the Second Injury Fund should be a party since the claimant has numerous other longstanding problems that are affecting her ability to return to work."

In regard to these issues, the Second Injury Fund and Death & Permanent Disability Trust Fund did not file any contentions upon completion of their discovery.

## DISCUSSION

### I. SECOND INJURY FUND LIABILITY

The first issue is whether Ark. Code Ann. §11-9-525 is applicable to the present claim. In order for this subsection to apply to the present claim, certain threshold requirements must be met. First, it must be proven that the claimant was experiencing some degree of permanent partial disability or impairment at the time of the compensable injury giving rise to this claim. This permanent partial disability or impairment need not be the result of a compensable injury. However, this disability or impairment must be of such a nature, so as to entitle the claimant to benefits for permanent partial disability, under the Act, had it been the result of a compensable injury. Secondly, the claimant must sustain a subsequent compensable injury that results in additional permanent partial disability or impairment. Finally, the claimant's overall or combined

permanent partial disabilities or impairments must exceed that resulting from the last compensable injury, considered alone and of itself.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to establish that at the time of the present compensable injury, the claimant was experiencing any permanent partial disability or impairment, which would have entitled her to benefits under the Act, had it resulted from a compensable injury. In reaching this decision, I recognize that the evidence shows that the claimant had a pre-existing alcohol dependency and various episodes of emotional or psychological difficulties. The claimant's alcohol dependency resulted in numerous arrests and convictions, leaving the claimant with a felony record. However, the medical evidence shows that the claimant's episodes of various types of emotional or psychological difficultness resolved with appropriate treatment. None of these various emotional or psychological difficulties are of such a nature that would have entitled the claimant to any benefits for permanent partial disability or impairment, had such difficulties been caused by a compensable injury. While the claimant's felony record could clearly have a detrimental effect on her employability, it would not represent a permanent partial disability or impairment under the Arkansas Workers' Compensation Act.

I further recognize that the claimant's mother, Joy Chamberlain, testified that the claimant was suffering from severe brain damage that had been present since at least early childhood. However, this testimony is not supported by the medical evidence presented. No diagnosis of organic brain damage has been made by any of the medical experts, who have evaluated and treated the claimant including psychiatrists and psychologists. In fact, upon testing, numerous reports by these physicians note an IQ within the normal range and

no neurological deficits. Some of these records do note that the claimant's "judgement" is impaired, at least during her periodic episodes of emotional and psychological difficulties. However, lack of good judgement would not be particularly indicative of the presence of organic brain damage. Neither would a lack of good judgement form the basis for an award of benefits for permanent partial disability or impairment, under the Act.

I have also considered the testimony of the claimant and her mother that the claimant had "difficulties" in school. While the claimant testified that she only completed the tenth grade and took three attempts to complete a GED, the evidence still reveals that she did, in fact, obtain her GED. Again, it should be noted that the claimant tested in the average level on her various IQ tests. The claimant's difficulties in school would also not be particularly indicative of any organic brain damage. Nor would "difficulties" in school form the basis of an award of permanent partial disability benefits for permanent impairment or functional disability, had these "difficulties" been the result of a compensable injury.

Finally, I would note that the evidence presented fails to show any pre-existing permanent physical damage or defects, involving any part of the claimant's body, that would form the basis for an award of permanent partial disability benefits for permanent functional disability or permanent physical impairment, had they been the result of a compensable injury. While the medical record does note various physical injuries sustained by the claimant (usually as the result of a motor vehicle accident) none of these injuries appear to have resulted in any permanent physical damage.

In summary, the greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent partial disability or

impairment , at time of the compensable injury giving rise to this claim. Thus, this threshold requirement for the application of Ark. Code Ann. §11-9-525 has not been met, and the Second Injury Fund would have no liability in this case.

## II. EXTENT OF PERMANENT FUNCTIONAL DISABILITY, INCLUDING PERMANENT TOTAL DISABILITY

The next issue concerns the claimant's entitlement to permanent disability benefits for permanent functional disability (loss of wage-earning capacity). This includes permanent total disability. The burden rests upon the claimant to prove the existence and extent of permanent functional disability. As the claimant's compensable injury was to a portion of her body that is "unscheduled" by the Act, these issues would be controlled by the provisions of Ark. Code Ann. §11-9-522 and §11-9-519.

The record reveals that the claimant is relatively young, being only 42 years of age. Although she has a tenth grade formal education, she subsequently obtained a GED. The claimant also holds a CNA certification or license. Various psychological testing, which was performed on the claimant prior to her compensable injury, shows the claimant's IQ to be in the normal range, in regard to her general fund of knowledge. Although these same reports indicate some degree of impaired judgement and some psychological defects, these latter factors appear to be controllable by medication.

The claimant has a rather sporadic work history, which consists primarily of factory type employments that the claimant obtained through a temporary employment service. She has also performed employment in various fast food establishments, making sandwiches/burgers, dishwashing, and doing food prep. At the time of her injury, the claimant was employed for the respondent as a stocker. Subsequent to her injury, but prior to her surgery, the claimant

was employed, cleaning bathrooms and loading foam into bags with the help of a machine. During this period, she was also employed at the Cracker Barrel as a dishwasher, and in the kitchen making biscuits.

An FCE (Functional Capacity Evaluation) was performed on the claimant on January 9, 2007. This test was interpreted by the physical therapist as giving "good effort, but not full effort". The physical therapist also noted some minor inconsistencies in the reliability or accuracy of the claimant's subjective complaints, when compared to objective observations of the claimant during testing. However, the claimant's subjective reports or complaints were noted to generally match well with the distraction based observations. At that time, the physical therapist indicated that the claimant was deconditioned or out of shape and recommended a 20 visit rehabilitation program focused on conditioning and work hardening. However, even with these findings, the claimant was deemed to be capable of performing light physical demands. These included lifting on an occasional basis weights from 13 to 18 pounds, occasionally carrying up to 18 pounds and occasionally pushing or pulling up to 100 pounds.

Due to the claimant's deconditioned state, the physical therapist also recommended that the claimant begin by performing work at light physical levels for 2 to 4 hours per day and increase the length and level over time. Curiously, the January 22, 2007 report of Dr. Queeney indicated that the claimant declined the recommended physical therapy conditioning program.

Vocational rehabilitation or re-employment efforts were also initially provided by the respondents. However, it appears from the reports of the vocational rehabilitation consultant that the claimant was not interested in returning to work on a part-time basis, either in a paid capacity or as a

volunteer. Instead, the claimant has elected to apply for social security disability. All rehabilitation and re-employment efforts appear to have ceased.

The medical evidence indicates that the claimant is being prescribed and is taking substantial narcotic pain medication for her chronic lumbar and radicular pain from her compensable injury. These medications include 30 mg. of Roxicodone once a day, 10 mg. of Hydrocodone twice a day, and 5 mg. of Valium every eight hours (Claimant's Exhibit No. 1, page 29). In addition, the claimant is receiving and taking various medications prescribed for her psychological difficulties through the Western Arkansas Guidance and Counseling Center. These medications include Celexa, Cogentin, Stelazine, and Strattera.

In her testimony, the claimant stated that she was better now than prior to her surgery. It was her testimony and the testimony of her mother that the claimant could hardly walk prior to the surgery, but can now walk with an antalgic gait and use of a cane. The claimant testified that, at the present time, she can't walk for any distance or for any period of time, cannot stand for any significant period of time, and cannot sit for any extended period of time. She further stated that she was unable to lift any substantial weights, even a gallon of milk. She described difficulty in concentrating. This would not be unexpected in light of her extensive medication. She stated that the most demanding activities she currently performed was putting a load of clothes in the washer or dryer. Finally, she related that she was frequently required to lay down and that her foot occasionally goes numb or tingles.

This case is somewhat unusual, in that the claimant continued to be employed for other employers for a significant period of time immediately following her compensable injury. Her condition appears to have subsequently

deteriorated or worsened to the point that corrective surgery was ultimately performed by Dr. Queeney in August of 2006. This surgery consisted of a multi-level lumbar discectomy. Although the claimant was improved by the surgery, she contends that she has never returned to her preinjury state or even the level of activity she was able to maintain for a substantial period immediately following the compensable injury.

However, the claimant's lack of motivation to return to regular gainful employment as demonstrated by her refusal to participate in the recommended structured physical therapy or work hardening program and her refusal to work on a part time basis (either for pay or a volunteer) makes it substantially more difficult to accurately assess the true extent of her permanent functional disability. However, it is clear that the claimant has in fact, experienced a significant loss of wage-earning capacity or permanent functional disability as a result of the restrictions and limitations imposed by her compensable lumbar injury and subsequent surgery.

Although the evidence presented fails to show that the claimant had any pre-existing permanent disability or impairment (in the compensation sense) prior to her compensable lumbar injury, the record reveals that the claimant was at best a marginal employee. Her periodic incarcerations have prevented long term employments. Her prior criminal record would preclude her from numerous sales and clerical or cashier positions. Her episodes of psychological difficulties also appear to have interfered with any long term employments.

Her education, vocational training, and prior work experience would qualify her primarily for factory, janitorial, caretaker, and food service positions. Almost all of these positions would require heavy lifting, frequent lifting, and prolonged standing. As demonstrated by the FCE, the claimant

would be unable to perform employments requiring these activities. Individuals sustaining injuries of the type sustained by the claimant and undergoing corrective surgery will be generally prevented from engaging any employments requiring the foregoing activities, as well as prolonged sitting, frequent or repetitive bending or twisting at the waist, and prolonged bending or stooping at the waist. The claimant's residual radicular difficulties with her leg and foot would also preclude employments requiring the operation of foot control devices and climbing stairs, ladders, or other apparatus.

The restrictions shown by the FCE and those associated with surgically treated injuries, such as that experienced by the claimant, would prevent the claimant's return to essentially all of her pre-injury employment positions. While it is certainly possible that with the claimant's cooperation and whole hearted participation, she could be reconditioned and returned to regular or full employment in a light manufacturing or clerical position, such position would clearly be few in number. However, these positions exist in sufficient numbers to provide the claimant with a reasonable opportunity to obtain regular gainful employment, if she were so motivated.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that she has been rendered permanently totally disabled by her compensable lumbar injury. However, I find that the greater weight of the credible evidence does establish that the claimant has experiencing a permanent functional disability or loss of wage-earning capacity, equivalent to an additional permanent partial disability of 40 percent to the body as a whole. This permanent partial disability would be in addition to the permanent partial disability for the permanent physical impairment of 10 percent to the body as a whole.

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$164.00 for total disability and \$154.00 for permanent partial disability.
4. During the latter part of February or the first part of April of 2004, the claimant sustained a compensable injury to her lumbar spine.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services, and all such services have or will be paid.
6. There is no dispute at the present time, over the claimant's entitlement to temporary total disability benefits.
7. The claimant's healing period from the effects of her compensable injury ended on January 22, 2007.
8. The claimant has experienced a permanent physical impairment of 10 percent to the body as a whole, as the result of the effects of the compensable injury. The respondents have paid permanent partial disability benefits attributable to this permanent physical impairment.
9. The greater weight of the credible evidence fails to prove that, at the time of the claimant's compensable lumbar injury, she was experiencing any permanent disability or impairment, which was of such a nature that would entitle her to benefits to permanent

disability benefits under the Arkansas Workers' Compensation Act, should such permanent disability or impairment have been caused by a compensable injury. Thus, Ark. Code Ann. §11-9-525 is not applicable to the present claim and the Second Injury Fund would have no liability in this claim.

10. The claimant has failed to prove by the greater weight of the credible evidence that she has been rendered permanently totally disabled by the effects of her compensable lumbar injury.
11. The claimant has proven by the greater weight of the credible evidence that her compensable lumbar injury has produced permanent functional disability for loss of wage-earning capacity that would be equivalent to a 40 percent permanent partial disability to the body as a whole. These benefits would be in addition to the 10 percent permanent partial disability for permanent physical impairment, which has been previously paid by the respondents.
12. The respondent employer-carrier has controverted the claimant's entitlement to any permanent partial disability benefits in excess of 10 percent to the body as a whole.
13. The respondent Second Injury Fund has controverted the claimant's entitlement to any permanent disability benefits from the Fund.
14. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the additional permanent partial disability benefits herein awarded for permanent functional disability, in the amount of 40 percent to the body as a whole.

## ORDER

The respondents remain liable for all reasonable and necessary medical services required by the claimant for her compensable lumbar injury.

The respondents shall be liable to the claimant for an additional 40 percent permanent partial disability to the body as a whole. These benefits are for permanent partial disability attributable to permanent functional disability and are in addition to the 10 percent permanent partial disability benefits for permanent physical impairment, which has been previously paid by the respondents.

The respondents, A Z Factory Close Outs and First Comp Insurance Company, shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional controverted permanent partial disability herein awarded of 40 percent to the body as a whole. One-half of this fee shall be the obligation of the respondents in addition to these benefits. The remaining one-half of this attorney's fee shall be withheld by the respondents from these benefits.

All claims herein made against the Second Injury Fund of the State of Arkansas should be and hereby are denied and dismissed for the reasons heretofore set forth in this Opinion.

The claimant's request for permanent total disability benefits is also denied for the reasons heretofore set forth in this Opinion.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.  
IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge