

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401399

MARSHA DIANNE BAER		CLAIMANT
FORT SMITH SCHOOL DISTRICT		RESPONDENT
ARKANSAS SCHOOL BOARD ASSOCIATION WCT INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED APRIL 11, 2008

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

Second Injury Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 11, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on October 17, 2007. Prior to the commencement of the hearing, the parties announced that the stipulation concerning the payment of medical expenses and the stipulation concerning the end of the claimant's healing period were withdrawn. The end of the claimant's healing period was added as an issue to be resolved at the present time. A copy of the pre-hearing order, with these amendments 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. On September 19, 2003, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. On September 19, 2003, the claimant sustained a compensable injury to her jaw.
4. There is no dispute over temporary disability benefits.
5. The respondent employer has accepted liability for and has paid permanent partial disability for a permanent physical impairment of 5 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. whether the claimant sustained a compensable injury to her cervical spine.
2. The claimant's entitlement to benefits for permanent functional disability (i.e. loss of wage earning capacity).
3. The date of the end of the claimant's healing period.
4. Second Injury Fund liability.
5. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that during and within the scope of her employment on September 19, 2003, the claimant was in the classroom at the Fort Smith School District, Special Education Department, when a student struck the claimant on the left side of her face causing the TMJ injury and a cervical spine injury. The claimant has continued her medical treatment

and continues medical treatment in the nature of periodic visits to the dentist and replacement of medical appliances, periodic physical therapy, and medication therapy. The claimant was required to terminate her employment with the respondent employer on June 30, 2006, since her restrictions as a result of her compensable injury have prevented her from continuing her classroom teaching. At the time of the injury, the claimant was under a contract of employment with the Fort Smith School District with effective earnings of \$901.34 per week plus retirement and medical benefits. The claimant's contract the last year of her employment was \$46,870.00 plus benefits. The claimant's projected gross earnings for the entire year of her new occupation is \$34,400.00 less operating expenses, which will reduce her net income to substantially less than her contract of employment with the Fort Smith School District entitling her to a substantial wage loss as a result of her injury. The claimant claims wage loss over and above the 5 percent permanent impairment rating plus attorney's fees for all controverted benefits."

In regard to these issues, the respondents #1 contend:

"Respondents No. 1 deny that claimant is entitled to wage loss disability as a result of her work related injury. Alternatively, respondents contend that claimant's wage loss, if any, is the responsibility of the Second Injury Fund as the claimant had pre-existing disability or impairment which has combined with the September 19, 2003 injury to cause more disability than would have resulted from the last injury considered alone."

In regard to these issues, the Second Injury Fund contends:

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"The claimant is not permanently and totally disabled and is not entitled to permanent partial disability benefits in excess of her anatomical impairment rating for her injury pursuant to Ark. Code Ann. §11-9-522.

The claimant suffered no combination of prior impairment or disability with the current injury to create a greater disability than the

last injury, in and of itself, to prove Second Injury Fund liability pursuant to Midstate Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W. 2d 539(1988).”

## DISCUSSION

### I. COMPENSABILITY OF THE CLAIMANT’S NECK OR CERVICAL DIFFICULTIES

The first issue to be addressed concerns the question of whether the claimant also sustained a “compensable injury” to her cervical spine in the specific employment related incident of September 19, 2003. The burden rests upon the claimant to prove all the factors necessary to establish this alleged “compensable injury”.

Ark. Code Ann. §11-9-102(4)(A)(i) sets out five specific requirements that must be met in order for an injury to be “compensable”. These requirements are:

- (1) The physical injury must arise out of and occur in the course of the employment.
- (2) The physical injury must be caused by a specific incident.
- (3) The physical injury must be identifiable by time and place of occurrence.
- (4) The physical injury must cause internal or external physical harm to the claimant’s body.
- (5) The physical injury must require medical services or result in disability.

In order to meet the first three of these requirements, the claimant must prove the existence of a causal relationship between any physical injury or damage to her cervical spine and the specific employment related incident of September 19, 2003.

However, she need not prove the existence of this causal relationship to an absolute or mathematical certainty. It is only necessary that she show that the existence of this causal relationship is likely or probable. Further, the claimant need not prove that the specific employment related incident was the sole or even "major cause" of the physical injury or damage to her cervical spine. She need only show that it played some causal role in producing the ultimate condition that resulted in her difficulties. After consideration of all the evidence presented, I find that the claimant has failed to prove that the September 19, 2003, employment related incident played any causal role in producing a physical injury to her cervical spine.

The claimant has presented no expert medical opinion directly addressing the existence of a causal relationship between the employment related incident and any physical injury to her neck or cervical spine. Clearly, expert medical opinion is not absolutely necessary to prove causation, but it is certainly relevant and helpful absent expert medical opinion the claimant must prove that the injury occurred within a reasonable time after the employment related incident, could logically be caused by such an incident, and that there is no other equally reasonable cause of the injury.

The claimant's testimony is the only direct evidence offered to prove the facts necessary to establish a causal relationship between the specific employment related incident of September 19, 2003 and her subsequent difficulties with her neck or cervical

spine. However, this testimony is inconsistent and lacking in credibility.

The claimant testified that her initial difficulties involved only her left jaw and consisted of pain in this area with an inability to open her mouth. This testimony essentially coincides with the complaints noted in the emergency room records and the records of Dr. Keith Holder.

The claimant then testified that the "first days" after the injury, she started having muscle spasms that started in the area of the left transmandibular joint (TMJ) that radiated down into her cheek, then into her neck, and finally into her upper back and shoulder blade area. Although the claimant further testified that she informed Dr. Holder of these difficulties, his initial records and reports make no mention of any complaints involving the claimant's neck or cervical area. Nor, does his initial reports and records note any difficulties or defects in this area during his physical examinations of the claimant. The records of St. Edwards Mercy Medical Center emergency room, dated September 20, 2003, specifically note that the claimant made no complaints other than those involving her left jaw, that she had no headache, and that she had no neck pain. On physical examination on that date, her neck was noted to be "supple and non tender". When the claimant initially saw Dr. Steven Kilpatrick on October 17, 2003, his records also show that no "neck aches (cervicalgia)" were reported.

On cross examination, the claimant offered the explanation that her intense jaw pain somehow caused her to fail to mention her

neck complaints, when she was seen at the emergency room of St. Edwards Mercy Medical Center on September 20, 2003. She further stated that she was unable to explain why Dr. Holder failed to mention these complaints, as she was sure that she mentioned them to him. Finally, the claimant admitted that the first day she told anyone about her neck complaints was on November 7, 2003. However, she still maintained that these complaints had been present since shortly after the accident. Again, she had no explanation for why she put down that these complaints were “new” or had appeared “since last visit” on forms she completed for Dr. Kirkpatrick on November 7, 2003.

The medical evidence also shows a change in the claimant’s description of the employment related incident of September 19, 2003. In the initial medical records, it was expressly noted that the claimant was struck by a student in the area of the left cheek or jaw with an “open hand”. However, the history contained in somewhat later medical records describe the blow as being struck with a closed fist. At this point, it is also worthy to note that the initial emergency room records note only “mild swelling” in the left mandibular area with no abrasions or bruising. Clearly, these findings would be more supportive of the conclusion that the blow was of lesser impact and from an open hand.

The medical evidence further reveals that the claimant not only failed to voluntarily provide the various doctors she consulted with a history of her previous neck or cervical difficulties, but expressly denied any prior complaints in this

area. However, as shown by Respondents' Exhibit No. 1, the claimant had a long history of prior difficulties with her cervical spine and upper thoracic musculature that was strikingly similar to her present complaints. Testing, which was performed long before the accident, giving rise to this claim, showed degenerative defects involving almost the same areas of the cervical spine as studies performed after the incident of September 19, 2003. These prior cervical and upper back and left shoulder difficulties also followed an alleged employment related incident in January of 1995. This incident occurred when the claimant fell at work, striking the back of her head and neck. This incident produced a 10 minute period of unconsciousness.

As a result of this January 1995 incident, the claimant underwent extensive treating and treatment for her cervical complaints that lasted through at least November of 1995. She also received extensive medical treatment for her left shoulder difficulties, that continued through February of 1997, and included surgery on her left shoulder.

In her testimony, the claimant conceded all of these prior difficulties. Her only explanations for her failure to relate these prior difficulties to her current treating physicians and her specific denial of prior neck complaints, was that she was in severe pain at the various times of these visits and simply did not recall her prior neck injury or problems. It is difficult to conceive that even the most severe pain would cause a person to

forget a cervical injury that required extensive testing and at least 10 months of active medical treatment.

The medical evidence also shows that the claimant's neck or cervical complaints, after November 7, 2003, appear to wax and wane or come and go. In her testimony, the claimant indicated that her neck difficulties were episodic and seemed to appear whenever she experienced increased pain in her jaw or TMJ area, and that the pain starts in her TMJ area and then radiates into her neck and upper back. The foregoing evidence would be more supportive of the conclusion that the claimant's pain in her neck was simply referred pain from her injured jaw, than pain due to an actual physical injury to the cervical spine or neck, itself.

In his report of February 7, 2005, Dr. Keith Holder noted that cervical x-rays did show moderate to severe degenerative changes, particularly at the C5-6 level, and minimal anterolisthesis at C3 on C4 with possible degenerative spondylolisthesis. It was his diagnosis that the claimant was experiencing spondylolisthesis. At Dr. Holder's request, an MRI of the cervical spine was performed on February 15, 2005. This MRI was interpreted as showing degenerative spondylolisthesis at the C5-6 level, with minimal disc degeneration or bulging at the C4-5 level. Thus, the claimant has satisfied the statutory requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(D).

However, these objectively demonstratable defects involving the claimant's cervical spine must also be causally related to the accident of September 19, 2003. In this regard, the medical

evidence shows that she had objectively demonstratable defects in these areas long before the employment related incident of September 19, 2003. The medical evidence further shows that the claimant has a propensity to experience arthritic changes throughout her body. These various cervical defects demonstrated are of a type that are degenerative and progressive in nature, and are the result of a longstanding process rather than the result of any specific traumatic event.

After considering all of the evidence presented, as the claimant has simply failed to prove by the greater weight of the credible evidence that the employment related accident of September 19, 2003, was the most likely or probable cause of any physical injury to her neck or cervical spine. Specifically, she has failed to prove that such an injury occurred within a reasonable time after the accident, was logically attributable to the accident, and that there is no other, at least, equally reasonable or probable cause of the injury. Thus, the claimant has not shown that her neck or cervical difficulties arose out of and occurred within the course of her employment with this respondent, was caused by a specific incident, and is identifiable by time and place of occurrence, and has failed to establish a "compensable injury" to this portion of her body, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). Her claim for benefits attributable to this alleged injury must be denied.

## II. HEALING PERIOD

As I have found that the claimant has failed to prove that she sustained a “compensable injury” to her cervical spine, in the employment related accident of September 19, 2003, the only injury that can be considered in determining the date of the end of her healing period is the admittedly compensable injury to her jaw or transmandibular joints. The Act defines the “healing period”, as that period of time necessary for the healing of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms, once this underlying physical damage has resolved or stabilized, is not sufficient, in and of itself, to extend the healing period.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. In the present case, the medical evidence shows that the claimant was under continuous active medical treatment for the damage caused by her compensable jaw injury through March 2, 2005. Prior to that date, the claimant had received extensive conservative treatment modalities that included oral medication and physical therapy. She had also undergone two surgical procedures, the last of which occurred on or about November 2, 2004. On March 2, 2005, the claimant was assessed a

permanent physical impairment of 5 percent to the body as a whole for her compensable jaw injury. Thus, it appears that on that date the claimant's residual physical damage from her compensable jaw injury had become fixed, permanent, and ascertainable.

The medical evidence does show that, after March 2, 2005, the claimant consulted Dr. Steven Kilpatrick, one of her authorized treating dentists, and Dr. Holder. However, records of Dr. Kilpatrick note only the presence of continuing chronic complaints with various portions of her body (some related to the compensable jaw injury and some not). There is no indication that the claimant received or even required any further active medical treatment intended to improve the actual physical damage caused by the compensable jaw injury. The records of Dr. Kilpatrick show only symptomatic treatment for the chronic jaw complaints. The records of Dr. Holder also show that his services after March 2, 2005, consisted only of an evaluation and the refilling of medication intended only to relieve or reduce the claimant's chronic pain symptoms. Clearly, these services, which were intended only to provide the claimant with some symptomatic relief of chronic complaints, would not be sufficient to extend the healing period beyond March 2, 2005.

### III. PERMANENT FUNCTIONAL DISABILITY FOR LOSS OF WAGE EARNING CAPACITY

The next issue concerns the claimant's entitlement to permanent partial disability benefits for permanent functional disability or loss of wage earning capacity. The burden rests upon

the claimant to prove her entitlement to such benefits. The claimant's entitlement to these benefits is controlled by the provisions of Ark. Code Ann. §11-9-522.

Ark. Code Ann. §11-9-522(b)(2) provides:

“However, so long as an employee subsequent to his or her injury, has returned to work, has obtained other employment, or has a bonafide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by the preponderance of the medical testimony and evidence.”

Further, Ark. Code Ann. §11-9-522(c)(2) states:

“Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists or exists because of discharge of misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.”

Thus, it is first necessary to determine if the claimant is entitled to receive any permanent disability benefits for permanent functional disability, at this time. The burden rests upon the respondents to prove all of the facts necessary for the application of §11-9-522(b)(2).

The record shows that, prior to the claimant's compensable injury, she began taking courses for a graduate degree in counseling. This course of study not only provided the claimant with pay increases in her position with the Fort Smith Public

Schools, but was also intended by the claimant to allow her to pursue a new career in the future, as a counselor.

Following her compensable injury, the claimant returned to her regular employment position, as a special education instructor with the Fort Smith School District. She completed the 2003-2004 school year. She also remained in this position for the 2004-2005 and 2005-2006 school years. The evidence further shows that during these periods, the claimant completed all the required duties for her position in a satisfactory manner and was in no jeopardy of having her contract terminated or not renewed by the Fort Smith Public Schools. During the 2005-2006 school year (October of 2005), the claimant completed her internship and obtained her license as a counselor.

However, the claimant voluntarily elected not to renew her teaching contract with the Fort Smith Public Schools for the 2006-2007 school year. In April of 2006, the claimant notified the respondent that she intended to retire at the end of the 2006 school year.

The claimant testified that she had decided to voluntarily retire, because she "couldn't do the job she needed or wanted to do". She attributed this inability to her compensable jaw injury.

Cindy Jeffries, the claimant's assistant in her special education class, testified that after the claimant's injury, the claimant had trouble talking as much as required, missed a lot of work, would cry, would appear tired, would frequently go home early, stopped driving the school bus, and had difficulty in

chewing her food. Ms. Jeffries also testified that she could tell that the claimant was in a lot of pain.

Tammy Staton, the claimant's supervisor for the Fort Smith Public Schools, testified that she had observed the claimant in her classroom and at student conferences. She stated that the claimant did her job both before and after the injury. However, following the injury, the claimant reduced her outside activities and did not appear to be as enthusiastic in performing her employment activities following her injury. However, Ms. Staton further stated that she did not observe the claimant having any difficulties in performing her required job duties. However, she conceded that the claimant did tell her that the required talking caused increased pain and made the job difficult.

Soon after her retirement from the Fort Smith Public Schools, the claimant appears to have commenced her new profession as a counselor. She apparently initially joined another licensed counselor, who was already in private practice. However, according to the claimant's testimony, this arrangement did not work out, because the claimant did not have the right type of certification or license.

In August of 2007, the claimant apparently began working as a counselor for a company called Perspectives Behavioral Health Management. This business provided counseling services to several of the schools in the Fort Smith School District. The claimant's tax records indicate that between August of 2007 and December 31, 2007, the claimant earned some \$18,700.00 with this company.

According to the claimant's testimony, the claimant then contracted with another business which provided contract counseling at Northside High School in Fort Smith. The claimant stated that from January of 2007 through the date of hearing, she had averaged working at least 20 hours per week for this particular company at \$50.00 per hour and had earned approximately \$30,000.00.

All of the claimant's wages or earnings were in addition to the \$2,400.00 per month the claimant receives from the Teacher Retirement Program. However, had she continued working for the Fort Smith School District, a substantial portion of these retirement benefits would have been paid into the claimant's DROP (Deferred Retirement Option Plan). The claimant testified that she had entered into the DROP a year before her actual retirement.

At the time of the claimant's injury, she was earning a yearly wage of approximately \$47,000.00. During her last school year (2005-2006), the claimant received a contract salary of \$55,150.00. Had the claimant renewed her contract with the 2006-2007 school year, she would probably have received something in excess of \$55,150.00.

Clearly, the claimant voluntarily terminated her employment with the respondent. Had she continued this employment, she would have earned wages in excess of those she was earning at the time of her compensable injury. However, it is my opinion that this voluntary termination by the claimant was not without good cause connected with the work. Therefore, the claimant would not be barred from receiving permanent partial disability benefits for

permanent functional disability or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-522.

I find the testimony of the claimant, Cindy Jeffries, and Tammy Staton, to be credible in regard to the claimant's difficulties in performing her employment duties after her compensable jaw injury. This testimony is sufficient to show that the claimant's employment position, as a full time special education teacher with the Fort Smith School District, caused her to experience significant increased pain and difficulties related to her compensable jaw injury. Applicable case law provides that the provisions of the Act cannot be used to force an injured employee to continue to work in any position that would noticeably increase the pain and discomfort resulting from a compensable injury.

I have considered the fact that the claimant is now working less hours and, when her retirement benefits are considered, is earning close to the same amount she would have earned had she continued her employment with the Fort Smith School District in determining the claimant's motivation for voluntarily terminating her employment with the Fort Smith School District. However, as previously noted the DROP which she had previously instituted would have allowed her to continue her employment with the Fort Smith School District and have a substantial portion of her \$2,400.00 per month retirement paid into this fund, in addition to her regular salary. Thus, the claimant has in fact experienced a significant reduction in her overall income by her retirement. This would

support the claimant's testimony that such action was taken only to alleviate the increased pain and discomfort that her continued employment with the Fort Smith School District was causing.

The claimant's retirement benefits are not wages. Thus, they cannot be considered in determining if the claimant's current wages are greater than or equal to her average weekly wage at the time of her compensable injury for the purposes of Ark. Code Ann. §11-9-522(b)(2).

Ark. Code Ann. §11-9-522(b)(1) provides various factors to be considered by this Commission in determining the extent of permanent functional disability or loss of wage earning capacity. The record shows that the claimant is relatively young, being only 51 years old. She has extensive educational training, having a bachelor of science degree in special education, a master of science degree in education counseling, and advanced hours in counseling. She holds not only a teaching certificate in special education, but is also a certified licensed counselor. She clearly appears to be well motivated, as she continued her employment with this respondent, even though it caused a significant increase in pain and difficulties. She has also obtained and maintained other less stressful employment thereafter.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that she experienced a permanent functional disability of 5 percent to the body as a whole, solely as a result of her compensable jaw or TMJ injury. Clearly, she would be entitled to appropriate benefits, under Ark.

Code Ann. §11-9-522(b)(1), for this loss. These benefits are in addition to the 5 percent permanent partial disability to which she is entitled for permanent physical impairment that was caused by her compensable jaw or TMJ injury.

#### IV. SECOND INJURY FUND

The final matter to be addressed concerns the liability of the Second Injury Trust Fund of the State of Arkansas. This matter is controlled by the provisions of Ark. Code Ann. §11-9-525.

In Midstate Construction v. Second Injury Fund, 295 Ark. 1, 746 S.W. 2d 539(1988), the Arkansas Supreme Court first announced the three pre-requisites to the application of Ark. Code Ann. §11-9-525. These pre-requisites are that a claimant must have sustained a compensable injury, that prior to that injury the claimant must have had a permanent partial disability or impairment (whether from a compensable injury or otherwise), and that the pre-existing disability or impairment must have combined with the recent compensable injury to produce the claimant's current disability status.

Clearly, the claimant sustained a compensable injury to her jaw or temporomandibular joints while working for the Fort Smith School District on September 19, 2003. Thus, the first pre-requisite for applying Ark. Code Ann. §11-9-525 has been met.

The evidence shows that the claimant experienced a multitude of various injuries and conditions, prior to her compensable jaw injury of September 19, 2003. As early as 1987, the claimant exhibited objective signs of systemic arthritis difficulties and

has experienced episodes of difficulties with multiple joints since that date. In 1988, the claimant was diagnosed as experiencing migraine headaches, and has experienced periodic episodes of similar difficulties thereafter. In 1989, the claimant was diagnosed as suffering from depression and was subsequently diagnosed as experiencing a bipolar disorder. In January of 1995, the claimant reported experiencing an employment related fall with resulting difficulties involving headaches, pain, and spasms involving her cervical spine, upper back, and left shoulder. Objective testing performed on the claimant, at that time, reveal the presence of degenerative changes of the claimant's cervical spine that included a bulging disc at C5-6. Other significant physical changes or damage was observed involving the claimant's left shoulder. The difficulties with the claimant's left shoulder resulted in surgical intervention, in the form of a clavicle resection and a joint debridement.

On February 11, 1997, an assessment of 1.5 percent permanent physical impairment to the body as a whole was made for the claimant's left shoulder difficulties. This assessment was made by Dr. Greg Jones, an orthopaedic surgeon, and the claimant's primary treating physician for these difficulties. No assessment of permanent physical impairment has been made for any of the claimant's other physical or psychological injuries or conditions. From the evidence presented, it is impossible to determine if the claimant had a rateable impairment that would meet the Act's requirements. Further, the record fails to show that any of these

pre-existing injuries or conditions were producing any “disability” or adverse impact on the claimant’s wage earning capacity.

However, the 1.5 permanent physical impairment for the claimant’s prior left shoulder difficulties is sufficient to prove that the claimant was experiencing some degree of pre-existing permanent disability or impairment at the time of her compensable jaw injury, on September 19, 2003. In fact, the evidence presented would indicate that this 1.5 permanent physical impairment was not an accurate assessment of the actual permanent physical impairment that was caused by the claimant’s prior left shoulder difficulties and resulting surgery. Under the Commission’s official rating guide in effect at that time, the surgical procedure performed, in the form of a resection of the distal clavicle, would carry a permanent physical impairment rating of 10 percent to the upper extremity or 6 percent to the body as a whole (table 27, page 61, and table 3, page 20 of the guides). Thus, the second pre-requisite for the application of Ark. Code Ann. §11-9-525 has been met.

The real controversy arises over the third pre-requisite. After consideration of all the evidence presented, it is my opinion that the evidence fails to show that the claimant’s proven pre-existing impairments or disabilities in any way contributed to her “current disability status”. The evidence proves that the only reason that the claimant did not continue to pursue a regular employment position for this respondent was solely due to the effects of her compensable jaw or temporomandibular joint injury, on September 19, 2003. Her pre-existing impairments and

disabilities have not been shown to have had any adverse effect on her wage earning capacity, either at the time of her current compensable injury or subsequently thereto.

After the claimant's initial release from treatment for her prior shoulder difficulties, she returned to her employment position with this respondent and was physically capable of performing this position, without difficulty until her accident on September 19, 2003. There is no evidence presented to in any way indicate that the claimant's prior shoulder injury and resulting permanent physical impairment has had any adverse effect on her earning capacity or employability, after September 19, 2003. Thus, the final pre-requisite for the final application of Ark. Code Ann. §11-9-525 has not been met and the Second Injury Fund has no liability in this case.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 19, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On September 19, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability.

4. On September 19, 2003, the claimant sustained a compensable injury to her jaw or temporomandibular joints.

5. The claimant has failed to prove by the greater weight of the credible evidence that she also sustained a “compensable injury” to her neck or cervical spine in the employment related accident of September 19, 2003. Specifically, she has failed to prove that on that date she sustained a physical injury to her neck or cervical spine that arose out of and occurred in the course of her employment on that date.

6. There is no dispute over temporary total disability benefits.

7. The claimant’s healing period from her compensable jaw injury ended on March 2, 2005. By that date, the actual physical damage caused by this compensable injury had stabilized at a level where nothing further in the way of time or medical treatment offered a reasonable expectation of improvement.

8. Ark. Code Ann. §11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability in this case. Specifically, the evidence presented fails to prove that any pre-existing disability or impairment which the claimant may have been experiencing prior to her current compensable jaw injury, in any way combined with the compensable injury of September 19, 2003, to produce the claimant’s “current disability” status.

9. The claimant has sustained a permanent functional disability for loss of wage earning capacity in the amount of 5 percent to the body as a whole. She is entitled to permanent partial disability benefits for this loss. This percentage or degree of permanent partial disability is in addition to the

permanent partial disability for permanent physical impairment, which is also in the amount of 5 percent to the body as a whole.

10. Both the respondents and the Second Injury Fund has controverted the claimant's entitlement to any benefits for permanent functional disability or loss of wage earning capacity.

11. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the 5 percent permanent partial disability herein awarded to the claimant for permanent functional disability or loss of wage earning capacity.

#### ORDER

The respondents shall pay to the claimant an additional 5 percent permanent partial disability for permanent functional disability or loss of wage earning capacity. This shall be in addition to permanent partial disability benefits previously paid for permanent physical impairment.

The respondents remain liable for any reasonably necessary medical services required by the claimant for her compensable jaw or temporomandibular joint injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional 5 percent permanent partial disability benefits herein awarded. One-half of this fee shall be in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondents from these benefits.

For the reasons heretofore set forth in this Opinion, any claims for benefits attributable to the claimant's alleged neck or cervical injury should be and hereby are denied and dismissed.

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

This award shall bear the maximum legal rate of interest until paid.

For the reasons heretofore set forth in this Opinion, any and all claims made against the Second Injury Fund of the State of Arkansas should be and hereby are dismissed.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE