

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103351

PEGGY A. BAIN, EMPLOYEE	CLAIMANT
HUGHES SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PTD TRUST FUND	RESPONDENT #3

OPINION FILED AUGUST 15, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on June 27, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents #1 represented by Ms. Melissa Wood, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 represented by Mr. David L. Pake, Attorney-at-Law, Little Rock, Arkansas.

Respondent #3 waived its appearance.

STATEMENT OF THE CASE

A hearing was conducted June 27, 2008, to determine various issues, set out further below.

This claim has been the subject of a prior hearing and has a lengthy procedural history. Most recently, a prehearing conference was conducted on April 23, 2008, and a Prehearing Order was filed on said date. At the conference, it was stipulated that the employment relationship existed between the claimant and

respondents #1 at all relevant times, including March 16, 2001; that the claimant sustained a compensable injury on said date; that she earned sufficient wages to entitle her to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability; that the claimant's healing period ended on or before May 11, 2006; that respondents #1 had accepted and paid a ten percent (10%) whole body impairment as the result of the admitted injury; and that respondents #1 controverted temporary total disability beyond the benefits previously paid, as well as liability for any wage-loss disability. In addition, it was agreed that the prior Opinions, specifically the decision of the Administrative Law Judge filed November 16, 2004, which was subsequently affirmed and adopted by the Full Workers' Compensation Commission, Opinion filed September 1, 2005, was final and the law of the case.

During the prehearing conference, the parties agreed to submit the following issues for determination:

- 1) Claimant's entitlement to additional temporary total disability.
- 2) The extent of claimant's permanent disability.
- 3) The extent of controversion for purposes of attorney's fees.

Claimant contended, in summary, that she was entitled to additional temporary total disability for the period beginning September 10, 2002, (the date respondents #1 terminated all additional benefits), and continuing through May 11, 2006; that beginning May 11, 2006, she was entitled to permanent total disability

benefits or, alternatively, substantial wage-loss disability in an amount to be determined by this Commission; and that a controverted attorney's fee should attach to all additional indemnity benefits awarded.

Respondents #1 contended that it had paid all appropriate benefits for which it was liable and that the claimant could not prove that she was temporarily totally disabled during the period claimed. Respondents #1 further maintained that the claimant was not permanently totally disabled and that, if she was entitled to any wage-loss disability, it was the responsibility of respondent #2.

Respondent #2, at all times, acknowledged that it was responsible for some wage-loss disability and that it had delayed taking a position on the percentage of wage-loss while attempting to negotiate a comprehensive settlement of the claim. At the prehearing conference, respondent #2 stated that it would accept a specific percentage of wage-loss disability within fifteen (15) days while maintaining that it had not controverted wage-loss disability in the event the claim could not be amicable resolved. Respondent #3 announced that it would defer to the outcome of litigation concerning its liability, if any. Subsequent to the prehearing conference, respondent #2 advised that it would accept a thirty percent (30%) liability for wage-loss. In addition, respondent #3 moved that it be dismissed as a party respondent to the claim, pointing out that respondent #2 would ultimately be responsible for any wage-loss disability in this claim. Respondents #1 objected to the dismissal of respondent #3, pointing out that respondent #2 did not accept

liability for permanent total disability. At the June 27, 2008, hearing, respondent #2, again, asserted that it accepted a thirty percent (30%) wage-loss without controversion, while, at the same time, pointing out that if the claimant was determined to be permanently totally disabled, it would be the Second Injury Fund's obligation and that it would not transfer any liability to the Trust Fund. Accordingly, on behalf of respondent #3, it joined in the Motion of respondent #3 that the Trust Fund be dismissed as a party respondent. Both respondents #1 and the claimant did not object to the dismissal of respondent #3. Accordingly, an Order was filed dismissing respondent #3 as a party respondent.

At the hearing, for the first time, respondents #1 and #2 requested a credit for any disability retirement benefits that the claimant had received in the past and was receiving at the time of the within hearing. Although both respondents were willing to enter a stipulation that a credit for disability retirement benefits was proper, the claimant refused to agree to the proposed stipulation. Accordingly, an additional issue was joined concerning whether respondents #1 and #2 were entitled to a credit pursuant to Ark. Code Ann. §11-9-411. All parties stipulated that respondent #2 had accepted and not controverted a thirty percent (30%) wage-loss disability, but that the Fund had controverted wage-loss disability in excess of thirty percent (30%) to the body as a whole and would be responsible for an attorney's fee on any wage-loss disability in excess of thirty percent (30%), if awarded. (Tr.7-11)

Again, as reflected by the stipulations, and as will be set out further below,

respondents #1 have controverted temporary total disability benefits beyond the benefits previously paid, as well as liability for any wage-loss disability. In fact, respondents #1 have previously controverted compensability of the claimant's back injury and resulting spinal surgery which was the subject of the prior hearing. Respondents #1 paid temporary total disability through September 9, 2002, pursuant to the prior Award, but did not pay any further indemnity benefits of any kind until the claimant's anatomical impairment was assigned on May 11, 2006, at which time it paid a ten percent (10%) whole body impairment related to the claim. All parties agree that respondent #2 has not controverted the thirty percent (30%) wage-loss accepted, and that it is responsible for any attorney's fee on wage-loss disability in excess of thirty percent (30%) to the body as a whole. Accordingly, the issues remaining for determination include:

- 1) Claimant's entitlement to additional temporary total disability.
- 2) The extent of claimant's overall permanent disability.
- 3) Whether respondents are entitled to a credit or offset pursuant to Ark. Code Ann. §11-9-411.

The claimant, Peggy A. Bain, was the only witness to testify. The record is composed solely of the transcript of the June 27, 2008, hearing containing various exhibits. In addition, the record of the prior hearing conducted October 1, 2004, together with the Opinions of Record filed November 16, 2004, and September 1, 2005, are incorporated by reference and made a party of the record herein. Subsequent to the immediate hearing, respondents #1 and #2 filed letter briefs on

the issues of the application of A.C.A. §11-9-411 and addressing the date that the claimant's healing period ended.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties, and contained in the Prehearing Order filed April 23, 2008, (Comm. Ex. 1) are hereby accepted as fact.
3. The claimant's healing period ended on May 11, 2006.
4. The claimant has shown, by a preponderance of the credible evidence, that she is entitled to additional temporary total disability for the period beginning September 10, 2002, and continuing through May 11, 2006.
5. The claimant has proven, by a preponderance of the credible evidence, that she is permanently totally disabled within the meaning of the Arkansas workers' compensation laws.
6. Respondents #1 and #2 are entitled to a dollar-for-dollar credit or offset during the periods of time that the claimant received, and continues to

receive retirement disability benefits through the Arkansas Teacher Retirement System pursuant to Ark. Code Ann. §11-9-411.

### DISCUSSION

The claimant, Peggy A. Bain, is fifty-seven (57) years old. The claimant has a Bachelor of Science education, together with some post-graduate work, but has not received a post-graduate degree. The claimant received her Bachelor of Science degree in 1976 from Memphis State University. Her work experience has primarily been as a school teacher at the high school level. Prior to going to work for the Hughes School District, the claimant taught at a private school in Memphis. Thereafter, she went to work at Hughes High School where she taught biology, advanced biology, human anatomy, psychology, physical science, earth science, and was the head of the science department. The claimant was employed by the Hughes School District for more than sixteen (16) years. She sustained an admitted, compensable injury on March 16, 2001, while trying to break up a fight between some students. As a result of her attempts to break up the altercation, the claimant was pushed against a table and fell. Although the medical records reflect that the claimant voiced complaints of problems involving her knees, neck, shoulders, and low back, respondents #1 paid some initial medical and related expenses prior to controverting the claim in its entirety. The reason, in part, for the controversion by respondents #1 was because the claimant had sustained prior injuries and had significant impairments and/or disabilities at the time of the

March 16, 2001, work-related incident. A summary of her prior physical condition was set out in the November 16, 2004, Opinion which will be summarized again. Prior to March 16, 2001, the claimant had undergone multiple surgeries involving her right knee, as well as prior lumbar spine surgery. The claimant first sustained an injury to her right knee in the early 1970s while in high school. The claimant underwent three (3) surgeries involving the right knee during high school, the last involving a reconstruction of the right knee. Following the reconstruction surgery, the claimant continued to participate in sports while in college, and, in fact, was second in the nation in racket-ball in 1975. The claimant graduated college in 1976. She did not have any additional problems involving her right knee following its reconstruction until sustaining another injury on or about 1987. At that time, the claimant was working for the employer herein. She stated that the building at the school flooded and while going to the science building, from the cafeteria, she fell and tore her right ACL. The medical records reflect that the claimant was initially examined and treated by Dr. Richard Ennis on January 19, 1988. Dr. Ennis previously evaluated the claimant in April, 1978. There was no record of medical treatment between 1978 and January, 1988. Dr. Ennis, thereafter, remained the claimant's primary treating physician involving her right knee. Dr. Ennis performed a fourth surgery involving the claimant's right knee on March 8, 1988. Thereafter, Dr. Ennis suggested that the claimant consider a total right knee replacement at least as early as 1988, which was repeatedly delayed because of the claimant's

young age. The claimant continued to experience problems involving her right knee at all times following the 1987 injury. In fact, at the prior hearing, the claimant acknowledged that her right knee frequently collapsed. At the time of the March 16, 2001, incident and injury, the claimant was required to use crutches in order to ambulate. The medical record indicated that the claimant desired, and required a total right knee replacement as early as 1999; however, the surgical procedure was not carried out until after the immediate claim of March 16, 2001. The prior medical record also reflected that the claimant began experiencing low back problems at least as early as 1996. Although the claimant related her prior back problems to a 1996 incident at work, it was never pursued as a workers' compensation claim. The claimant underwent various diagnostic studies, including an MRI on April 4, 1996, which revealed a Grade II spondylolisthesis with probable spondylolysis also at the L5 level and minimal degenerative arthritis. In addition, the MRI demonstrated a large herniated fragment at the L5-S1 level. The claimant underwent a decompression laminectomy and disc removal on April 12, 1996, as well as fusion during the laminectomy decompression. While the claimant underwent extensive treatment for her low back after April, 1996, the prior record did not reflect any treatment related to claimant's low back between 1998 and her compensable injury on March 16, 2001. Following the March 16, 2001, injury, the claimant underwent extensive medical treatment, including surgeries on both her right knee, as well as her low back, which was the subject of the prior hearing. Indeed, on May 9, 2002,

the claimant underwent a second surgical procedure on her low back. The surgical procedure was an anterior/posterior lumbar fusion with instrumentation, including rods, screws, and cages. The claimant has not returned to gainful employment since March 16, 2001. The following findings of fact and conclusions of law were made in the Opinion filed November 16, 2004:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a compensable injury to her right knee on March 16, 2001.
4. The claimant has proven, by a preponderance of the credible evidence, that she sustained a compensable back injury which arose out of and during the course of her employment and which was caused by a specific incident identifiable by time and place of occurrence on March 16, 2001, and which required medical services and resulted in disability as established by medical evidence, supported by objective findings.
5. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability for the period beginning March 17, 2001, and continuing through at least September 9, 2002, which was the latest medical evidence submitted by either party regarding the claim(s).

6. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's back injury, including, but not limited to spinal surgery performed on May 9, 2002, and respondents remain responsible for continued, reasonably necessary medical treatment. Respondents are not responsible for any medical and associated benefits related to the claimant's total knee replacement on April 17, 2001, or any follow-up medical treatment related to the claimant's right knee.
7. A medical lien has been filed by Arkansas Blue Cross/Blue Shield which paid medicals for both the unrelated total right knee replacement of April 17, 2001, as well as the spinal surgery on May 9, 2002. Respondents are entitled to a credit or offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received in medical services pursuant to Ark. Code Ann. §11-9-411. Reimbursements to medical providers are to be paid in accordance with Commission Rule 30.
8. The end of claimant's healing period, as well as entitlement to additional temporary total disability after September 9, 2002, for the claimant's back injury requires further development of the medical evidence and is by necessity reserved.
9. The issue of permanent disability has been specifically reserved.

The Full Workers' Compensation Commission affirmed and adopted the foregoing findings in an Opinion filed September 1, 2005, which is now a final

decision and the law of the case.

Respondents #1 paid the benefits previously awarded. Respondents #1 then, unilaterally, terminated entitlement to additional temporary total disability, and apparently made no efforts to ascertain the claimant's need for further benefits of any nature or kind, although it was quite apparent that the claimant required on-going medical treatment and was totally disabled from returning to gainful employment which would entitle the claimant to either temporary total disability or permanent total disability benefits, as will be set out further below. Further, respondents terminated the claimant's entitlement to follow-up medical care which further frustrated the claimant's ability to possibly improve her overall physical condition and return to gainful employment. For some inexplicable reason, the claimant's entitlement to outstanding and continued medical treatment was never joined as an issue at the June 27, 2008, hearing and must, by necessity, be specifically reserved.

#### ADDITIONAL TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in her healing period, she is entitled to temporary total disability. *Id.* The healing period is statutorily defined as that period for healing of an injury resulting from an accident. *Dallas County*

*Hospital v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable, and if nothing in the way of treatment will improve that condition, the healing period has ended. *Crabtree, supra*. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway & Transportation Department v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Id.*; *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *McWilliams, supra*; *J.A. Riggs Tractor v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. *McWilliams; Parker; supra*. In *Pallazollo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability

compensation for an unscheduled injury, a claimant must prove that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The medical evidence reflects that respondents #1 were not justified in terminating temporary total disability on September 9, 2002. Although the claimant's course of medical treatment is extremely sporadic, respondents terminated all medical treatment on September 9, 2002, thereby frustrating the claimant's ability to receive follow-up medical care, at which time the claimant was only four (4) months post-surgery. As previously pointed out, the claimant's surgery was extremely extensive and involved an anterior/posterior fusion with instrumentation. The only reason that the prior Opinion awarded temporary total through September 9, 2002, was that there was no medical evidence of any nature or kind beyond that date. In hindsight, respondents should have been ordered and directed to pay temporary total disability through an undetermined date when the claimant's healing period had been established by medical evidence and an impairment rating assigned. Clearly, the claimant remained within her healing period on September 9, 2002. In fact, the medical evidence submitted by respondents #1 from Dr. Keith H. Bidwell suggested additional diagnostic studies, as well as a continued treatment plan, which the claimant had failed to follow through with. However, as previously pointed out, the reason that the claimant

failed to follow-up with the recommended treatment plan was because respondents #1 terminated all benefits of any nature or kind. (Resp. #1 Ex. A, pp.8-9)

Following a lengthy litigation process, which included an appeal to the Full Workers' Compensation Commission, a final decision in this claim was not made until September 1, 2005. Rather than attempt to obtain narrative reports clarifying various issues, such as the end of the claimant's healing period, as well as claimant's entitlement to additional temporary total disability, respondents paid the benefits previously awarded and controverted further medical treatment and indemnity benefits. The claimant and respondents #1 subsequently agreed to an independent medical evaluation which was performed by Dr. Reza Shahim on May 11, 2006. His report is set out in its entirety below:

**PATIENT:** Peggy Bain  
Chart #06-1246 / ID #54524.0

**DATE:** May 11, 2006

**REQUESTING PARTY:** Huckabay, Munson, Rowlett & Moore, P.A.  
ATTN: Melissa Ross  
**VIA FAX: 374-5906**

#### INDEPENDENT MEDICAL EVALUATION

**HISTORY OF PRESENT ILLNESS:** Ms. Bain is a 55 year old lady who has a work injury from 2001. Reportedly she was a teacher at a High School and was trying to break up a fight and she injured her neck and back at that time. She underwent what appears to be an anterior, posterior lumbar fusion at L5-S1 for spondylolisthesis. She was told that she did not have a complete fusion and she continues to have back and leg pain. Her symptoms have worsened over time. She has developed increasing back pain and bilateral leg pain. She also tells me that she was seen by Orthopedic Surgery and was told that she has bilateral hip disease and she may require hip replacement. She is under management of the

orthopedic surgeon. She is not under pain management. She has not had an MRI of her lumbar spine for more than a year. I do not have her MR [sic] of the cervical spine to review, but she does complain of neck and shoulder pain bilaterally. She has back pain, neck pain and bilateral leg pain. She has difficulty walking due to leg pain and leg weakness and numbness. She has numbness and tingling in the right leg. She has had what sounds like epidural steroid injections and nerve blocks multiple times since 2001 with very little benefit.

**PAST MEDICAL HISTORY:** Lumbar fusion; total knee, right.

**MEDICATIONS:** Darvocet; Lodine; Flexeril; Imitrex; Zantac; Blood pressure medication.

**ALLERGIES:** None.

**HABITS**

**TOBACCO:** None.

**ALCOHOL:** None.

**FAMILY HISTORY:** Noncontributory.

**REVIEW OF SYSTEMS:** Noncontributory.

**PHYSICAL EXAM:** Well developed lady whose height is 5'2" and weight is 220 lbs. Cranial nerves II-XII are intact. Neck is supple. Abdomen is benign. Extremities are without lesions. Pulses are intact in both upper and lower extremities. Lower extremity, no edema. Motor strength, bilateral upper extremities is limited to pain and deltoids, biceps, triceps, and hand grip is 4/5. Reflexes are 2/4. The patient does not have a Hoffman's sign. Motor strength in both lower extremities is limited to pain and psoas and quads, plantar flexion and dorsiflexion is 4-/5. Reflexes are 1/4. The patient has a negative Patrick's sign. The patient has a positive straight leg raise test bilaterally.

**STUDIES REVIEWED:** I reviewed an MR [sic] of the lumbar spine from 2002 which showed postoperative changes from an L5-S1 fusion. She has what appears to be a Grade I to II lumbar spondylolisthesis.

**DECISION MAKING:** Ms. Bain is not at MMI. I think she should have an MR [sic] of the lumbar spine to rule out a disc herniation at the adjacent level. I will obtain x-rays of the lumbar spine today to assess her fusion. I think she should be evaluated by pain management for dorsal column stimulator or a narcotic pump for

management of her pain. I will be glad to refer her to Dr. Boop in Memphis who is a neurosurgeon who could assess her for pain management and could refer her to the pain clinic. If she does not have an anatomical nerve compression that could explain her leg symptoms, dorsal column stimulation may be of some benefit to her and she would have to go through trials for that. Her impairment rating for the one level lumbar spine, anteriorly, posteriorly fused is 10% impairment of the whole person. I will be glad to re-evaluate her to make the referrals to neurosurgery in Memphis if needed. (Resp. #1 Ex., pp.12-14) (Emphasis supplied)

It is unclear whether the aforementioned report was a true independent medical evaluation or simply an evaluation requested by respondents #1. However, despite the opinion of Dr. Shahim, that the claimant had not reached maximum medical improvement, the parties stipulated that the claimant's healing period ended on or before the May 11, 2006, evaluation at which time respondents #1 accepted the ten percent (10%) impairment assigned by Dr. Shahim which has apparently now been paid. The permanent nature of the claimant's injury was not ascertained until May 11, 2006. Accordingly, based upon a review of the medical evidence, together with the stipulations of the parties, I find that the claimant's healing period ended on May 11, 2006.

#### PERMANENT DISABILITY

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Emerson Electric v. Gaston, supra*.

In determining wage-loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence, and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage-loss. *Emerson Electric v. Gaston*, *supra*.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

When it become evident that a worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If an employee is totally incapacitated from earning a living at that time, she is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Manufacturing Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

A preponderance of the credible evidence of record reflects that the claimant

is permanently and totally disabled. As previously noted, the record reflects that the claimant was substantially impaired and had significant permanent disability prior to the March 16, 2001, injury. In fact, the record reflects that the claimant required crutches in order to ambulate. The claimant was a school teacher. Fortunately, her work was not physically demanding and required her to use her intellect rather than her brawn. The claimant has been a teacher for her entire life. As a result of the claimant's prior impairments and disabilities, together with her most recent injury, she cannot return to work as a teacher. The record reflects that the claimant was taking multiple medications which affected her memory, her cognitive abilities, not to mention her ability to travel to any workplace. The claimant has been declared permanently totally disabled by the Social Security Administration and was also drawing disability retirement benefits from the Arkansas Teacher Retirement Fund. The claimant loved her work as reflected by her strong work ethic before March 16, 2001. She stated that if she was physically able, she would continue teaching. Clearly, she is precluded from returning to work as a teacher.

On cross-examination, respondents questioned the claimant's motivation to return to work. The claimant candidly acknowledged that she had no desire to apply for any type of work other than teaching. This does not reflect a lack of motivation. Rather, it reflects an inability to return to gainful employment. The claimant's prior work did not impose significant physical requirements. If the claimant is not physically able to return to work as a teacher, it is my opinion that she is

permanently and totally disabled from engaging in any gainful employment.

The only remaining issue concerns respondents entitlement to a credit or offset for benefits that the claimant has received from the Arkansas Teacher Retirement System. Ark. Code Ann. §11-9-411(a) provides:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

The claimant began receiving retirement benefits from the Arkansas State Teacher Retirement Fund in September, 2001. Initially, the claimant received \$647.59 per month. Her benefits have increased incrementally since that time. At the time of the within hearing, the claimant was receiving \$765.84 per month. (Resp. Ex. #1, B, p.1)

In a letter dated May 13, 2008, addressed to the claimant, the retirement system issued the following letter:

As per the request from Worley, Wood & Parrish, P.A., on 5/13/2008, a letter as requested to verify retirement benefits received from Arkansas Teacher Retirement System. This letter is to certify that Peggy A. Bain, Social Security Number XXX-XX-XXXX , has received To Date Benefits in the amount of \$55,587.90 from the Arkansas Teacher Retirement System through April 30, 2008. This is a lifetime benefit, provided you continue to qualify for Disability retirement. (Resp. #1 Ex. B, p.21)(emphasis supplied)

It has been held that the provisions of A.C.A. §11-9-411 apply to the receipt

of disability retirement benefits. See, *Henson v. General Electric and SIF*, 99 Ark. App. 129, \_\_\_ S.W.3d \_\_\_ (2007)

#### AWARD

Respondent #1, Risk Management Resources, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$410.00 per week beginning March 16, 2001, and continuing through May 11, 2006.

All accrued benefits shall be paid in lump sum and without discount, and respondents #1 may claim credit for all temporary total disability benefits previously paid. In addition, respondent #1 is entitled to reduce its obligations in an amount equal to, dollar-for-dollar, the amount of benefits the claimant has previously received for the same period of disability under the Arkansas State Teacher Retirement System

Beginning May 12, 2006, the claimant is entitled to permanent total disability benefits at the rate of \$410.00 per week, the first 45 weeks of which is the responsibility of respondent #1. Thereafter, respondent #2, the Second Injury Fund for the State of Arkansas, is directed to pay permanent total disability benefits at the rate of \$410.00 per week and continuing through the present, and as long as the claimant remains permanently totally disabled within the meaning of the Arkansas workers' compensation laws, which, barring a change in the claimant's physical condition, should continue during the duration of the claimant's lifetime.

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

However, respondents #1 and #2 may reduce the amount of their respective liabilities, dollar-for-dollar, the amount the claimant receives under the Arkansas State Teacher Retirement System.

Additionally, claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715, one-half (½) of which is to be paid by the respective respondents and one-half (½) to be paid by the claimant out of benefits awarded herein.

The parties are reminded that the attorney's fees awarded are to be paid consistent with A.C.A. §11-9-715 which existed prior to Act 1015 of 2001 which had an effective date of July 1, 2001.

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

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge