

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E910984

MYRTLE NEMETH, EMPLOYEE	CLAIMANT
ST. EDWARD MERCY MEDICAL CENTER, EMPLOYER	RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 4, 2003

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and adopted.

OPINION AND ORDER

The respondents appeal from a decision of the Administrative Law Judge filed November 12, 2002. The Administrative Law Judge entered the following findings of fact and conclusions of law:

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

2. On August 31, 1999, the relationship of employee-self insured employer existed between the parties.
3. On August 31, 1999, the appropriate weekly compensation rates were \$267.00 for total disability and \$200.00 for permanent partial disability.
4. On August 31, 1999, the claimant sustained a compensable injury to her low back or lumbar spine.
5. Under the doctrine of res judicata or the law of the case, the claimant's compensable low back or lumbar injury of August 31, 1999, took the form of bulging or herniated discs at the area of L3-4, L4-5, and L5-S1.
6. Under the doctrine of res judicata or the law of the case, the claimant's cervical injury or condition does not represent a "compensable injury" or a "compensable consequence" of her compensable lumbar injury, but is separate and distinct from and occurred after the compensable lumbar injury of August 31, 1999.
7. There is no dispute over the payment of medical expenses incurred for reasonably necessary medical treatment of the claimant's compensable lumbar injury.
8. There is no dispute over the payment of temporary disability benefits attributable to the claimant's compensable lumbar injury.
9. The claimant's healing period from the effects of her compensable lumbar injury ended on June 22, 2000.
10. The evidence presented fails to prove that the claimant was experiencing any pre-existing permanent impairment or disability at the time of her compensable injury on August 31, 1999. Therefore, Ark. Code Ann. § 11-9-525 is inapplicable to the present claim

and the Second Injury Fund has no liability for any benefits.

11. The claimant has failed to prove by the greater weight of the credible evidence that the compensable lumbar injury of August 31, 1999, has rendered her permanently totally disabled. However, the claimant has proven by the greater weight of the credible evidence that she has experienced a permanent partial disability of 24% to the body as a whole, which is solely the result of her compensable lumbar injury of August 31, 1999. This includes a permanent physical impairment to (sic) 9% to the body as a whole, and a permanent "functional" disability for loss of wage earning capacity in the amount of 15% to the body as a whole. Liability for such benefits rests solely upon the respondent self insured employer.
12. The respondent self insured employer has denied the claimant's entitlement to any permanent disability benefits, either for permanent physical impairment or for permanent "functional" disability (i.e., loss of wage earning capacity).
13. The Second Injury Fund has denied the claimant's entitlement to any benefits from the Fund.
14. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee for the controverted permanent partial disability benefits herein awarded.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact

made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

For prevailing on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I must respectfully concur in part and dissent in part from the decision of the principal opinion, which in all respects affirms and adopts the decision of the Administrative Law Judge.

Specifically, I concur in all respects with the decision of the principal opinion except the affirmance of the Administrative Law Judge's determination that the Second Injury Fund incurred no liability in this case. While I concur in the affirmance of the Administrative Law Judge's finding that the claimant proved entitlement to wage loss in the amount of 15% against the respondent employer, my review of the evidence indicates that claimant's compensable injury combined with her pre-existing diabetes to produce wage loss benefits greater than that which she would have experienced in the absence of her diabetes. Accordingly, I find that the Second Injury Fund incurred liability in this case pursuant to Ark. Code Ann. § 11-9-525, and that the claimant is entitled to wage loss benefits in an amount greater than 15% from the Second Injury Fund.

I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant sustained a 15% loss in wage-earning capacity. Based upon my de novo review of the

record, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits. However, if I were to find that the claimant was entitled to any wage loss disability benefits, a finding which I do not make, I find the Second Injury Fund would have no liability.

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters are motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); 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). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 1982.

The evidence indicates that the claimant is only 51 years old and is a high school graduate. She is also a graduate of nursing school and has received a certification to be a licensed practical nurse. Prior to becoming employed with the respondent-employer in 1991, the claimant worked as a head housekeeper with Budgetel Inns, which

included checking the rooms after they had been cleaned by the housekeepers. The claimant has also worked as a brazer at Ft. Smith Table and Chair Company, as well as a PBX Operator at Sparks Hospital.

The evidence demonstrates that the claimant also drew unemployment for approximately four to five weeks in 2001. The claimant, in fact, testified at the hearing that she was actively looking for work at the time of the previous August 1, 2000, hearing. The claimant has also traveled to Colorado Springs, Colorado, in June or July of 2001, to help her sister move. She is currently drawing Social Security benefits in the amount of \$654.00 a month.

The medical evidence also supports a finding that the claimant is not entitled to wage-loss disability benefits. Dr. Capocelli, the claimant's treating physician, has not recommended that the claimant receive any surgery whatsoever for her lumbar problems. In fact, the claimant has not even seen Dr. Capocelli since June of 2000. The claimant states that the reason she has not seen Dr. Capocelli is because she does not want to undergo back surgery. However, it is significant that Dr. Capocelli has not recommended surgical intervention for the claimant's lumbar injury. The claimant has had a cervical fusion because of the non-compensable cervical injury.

Therefore, when I consider all the evidence, I cannot find that the claimant is entitled to any wage-loss disability benefits. The claimant has not sought any employment whatsoever since 2001, and at that time, she received unemployment for approximately four or five checks. In order for the claimant to receive unemployment benefits, she must actively be seeking employment. Further, the evidence indicates that the claimant's husband is disabled and she chooses to stay home with him. Accordingly, I must respectfully dissent from the majority opinion.

JOE E. YATES, Commissioner