

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E902151

TANYA L. BOYD,  
EMPLOYEE

CLAIMANT

BROOKSHIRE GROCERY COMPANY,  
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JUNE 7, 2004

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

Claimant represented by the HONORABLE JAMES N. PRATT, JR.,  
Attorney at Law, Camden, Arkansas.

Respondent No. 1 represented by the HONORABLE PAUL MILLER,  
Attorney at Law, Texarkana, Texas.

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

Decision of administrative law judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 1 and Respondent No. 2 appeal an  
administrative law judge's opinion filed August 8, 2003.  
The administrative law judge found that the claimant  
sustained a compensable injury on February 9, 1999. The  
administrative law judge found that the claimant was

temporarily totally disabled "for the periods beginning February 10, 1999 through September 26, 2000, and continuing through October 23, 2002." The administrative law judge found that the claimant had a permanent physical impairment of 16%, and that the claimant had suffered wage-loss disability in the amount of 60%. The administrative law judge found that Respondent No. 2, Second Injury Fund, was liable for the claimant's wage-loss disability.

After reviewing the entire record *de novo*, the Full Commission affirms as modified the opinion of the administrative law judge. The Full Commission finds that the claimant proved she sustained a compensable injury on February 9, 1999. The claimant proved she was entitled to reasonably necessary treatment as provided by Dr. Saer and Dr. Reddy. The claimant failed to prove that treatment from Dr. Russell was reasonably necessary in connection with the claimant's compensable injury. We find that the claimant proved she was entitled to temporary total disability compensation from February 10, 1999 through September 25, 2000. The claimant proved she was entitled to anatomical impairment in the amount of 10% and wage-loss disability of 30%. The Full Commission finds that Respondent No. 2,

Second Injury Fund is liable for the claimant's 30% wage-loss disability.

I. HISTORY

Tanya Boyd Harper, age 39, testified that she graduated from high school and attended college for two years. Ms. Harper testified that she became employed with Brookshire Grocery in about 1988, "I started out in the bakery and I worked there about six months and then I moved to the [meat] market." Respondent No. 1 stipulated that the claimant was an employee of Brookshire Grocery Company "at the time of her initial injury on January 21, 1991." The claimant testified, "I was picking a ham box up in 1991 and I had a hurting in my back and it went down my leg, my left leg." The claimant testified that she subsequently underwent surgery from Dr. Edward H. Saer, III. In December 1991, Dr. Saer estimated the claimant's impairment to be "10% to the body as a whole."

The record indicates that Dr. Saer wrote to an attorney on April 7, 1993:

I initially saw Ms. Boyd on March 14, 1991, for a work related injury to her back. She was having primarily buttock pain with some intermittent lower extremity symptoms. She did not respond to conservative treatment and was evaluated with an MRI. This showed a disc herniation at L5-S1

on the left. Because she continued to be symptomatic, we ultimately went ahead with surgery in the form of laminotomy and disc excision on 6/10/91.

She did well following the surgery. She continued to have some intermittent discomfort. I had followed her intermittently since that time. She did return to work with some restrictions, but ultimately ended up basically doing her former job.

She developed pain in the right lower extremity without any new injury last fall. That got progressively worse and work-up, again with an MRI, showed evidence of recurrent disc herniation at L5-S1, predominantly right sided. She became very symptomatic and had surgery on January 6, again consisting of disc excision with good results. I have not released her to return to work, but so far she seems to be doing well....

Dr. Saer reported after examining the claimant on August 30, 1993, "Her persistent symptoms do appear to be related to her disc herniation and at this point I do not anticipate any further surgical intervention....I think she has reached the end of her healing from her surgery in January and has sustained an additional 5% impairment related to her recurrent herniation."

Dr. Saer wrote on February 15, 1994, "Repeat x-rays today show a little narrowing at L5-S1. I think her symptoms are simply due to some further wear and tear type changes which have occurred at the lumbosacral level."

An MRI of the lumbar spine with and without contrast was taken on January 5, 1995, with the following conclusion:

Post op changes of a laminectomy at L5/S1. There is disc degeneration with a broad based moderate sized disc herniation that is slightly larger on the right side and which abuts the right S1 nerve rootlet as it emerges from the thecal sac.

At L4/L5 there is evidence of disc degeneration and posterior disc bulge along with a posterior annular tear.

The claimant continued to occasionally follow up with Dr. Saer.

The parties stipulated that the employment relationship existed on February 9, 1999. The claimant testified, "I was wrapping some meat and the - it's a big, tall rack and they slide the meat in trays on the rack and it was on the very bottom and I reached down to pull it out and wrap it and I felt a sudden pain again in my lower back." The claimant testified that she did not return to work after February 9, 1999. Respondent No. 1 stipulated that it paid temporary total disability compensation and medical treatment.

An MRI of the lumbar spine with and without contrast was taken on February 23, 1999, with the following conclusions:

At L5-S1 there is evidence of a prior S1 laminectomy and central discotomy. There is now

evidence of a central recurrent and right and left lateral small disc herniation that do not appear to encroachment (sic) significantly on the thecal sac but do encroachment on the right and left intervertebral foramina.

Evidence for degenerative disc disease most obvious at L5-S1.

Evidence of a prior discotomy with no evidence of recurrence at L4-5.

The claimant returned to Dr. Saer on April 1, 1999:

She hurt herself at work again on February 9, 1999. She was lifting a pan meat when she felt a pop in her back. She's been off work since....

I reviewed the MRI films. She does seem to have a central herniation/protrusion at L4-5. She had a small annular tear on the last MRI and this looks different from that. The changes at L5-S1 are noted too....

Hopefully we can get by without having any surgery. It's hard to say whether this new injury caused changes at L4-5, L5-S1, or both....

The impression from a CT of the lumbar spine taken August 11, 1999 was "Degenerative disc at L4-5 with posterior central annular tear."

On October 11, 1999, Dr. Saer performed a "Laparoscopic anterior fusion, L5-S1." Dr. Saer's pre- and post-operative diagnosis was "Post-laminectomy disk disease at L5-S1."

Dr. Saer referred the claimant to Dr. Yeshwant P. Reddy, a physiatrist, who began treating the claimant on

February 24, 2000. Dr. Reddy kept the claimant off work. Dr. Reddy wrote on March 23, 2000, "We will give her another try of aquatic rehabilitation." Dr. Reddy wrote on May 18, 2000, "At this point patient cannot work."

Dr. Saer opined on September 12, 2000, "I think her fusion is solid and from the standpoint of her last surgery done last year, she is at MMI. I explained that I do not think she needs any further surgery on her back. She obviously does need some treatment, and I will defer to Dr. Reddy about that."

Dr. Reddy reported on September 25, 2000:

Ms. Boyd reported a work-related accident in February 1999 while working as a meat packer. She underwent laparoscopic anterior lumbar interbody fusion at L5-S1 in October 1999 performed by orthopedic spine surgeon Edward H. Saer III, M.D. Since then she has been off work and continues to complain of low back pain and activity intolerance of any kind.

I have watched this video, which was over 1 hour 45 minutes. It has been recorded from February 28<sup>th</sup> until August 20, 2000 on different occasions.

I have viewed this video particularly to find out Ms. Boyd's physical capabilities including lumbar flexion-extension, pain behavior, weightlifting activities, and also the endurance she has with activities....

It is quite clear that she could do more than what she used to report to me. I was surprised to note that she was able to carry a dog, bend and lift

and put it into the Jeep at least two times on March 2<sup>nd</sup>. On August 11<sup>th</sup> she was able to carry a heavy object in the hand without any problem. She was also able to clean the windshield of a sports utility vehicle without effort. It seems like she also cleaned the boat on that day.

The most revealing video surveillance was from August 11<sup>th</sup>, 12<sup>th</sup>, and the following week on August 18<sup>th</sup>, 19<sup>th</sup>, and 20<sup>th</sup>. She was on the lake boating and fishing. She was able to bend and scratch her foot without any discomfort. This indicates that she has near normal lumbar flexion. She was able to sit comfortably and bend indicating that she has no sitting intolerance. On several occasions she was able to bend and pick up objects from the floor. She was able to carry a vessel containing water and throw the water easily.

On August 19<sup>th</sup> she was able to sit comfortably in the driver's seat and close the door, which was wide open, by bending indicating that there was no restriction in the range of motion.

On August 20<sup>th</sup>, single-handedly she loaded the trunk of the Jeep with picnic items and camping items without rest and no problem. Actually she emptied the trunk of another SUV and loaded the items into the Jeep. This not only indicates that she is able to carry but also that she has good endurance with her activities.

My overall impression of this video surveillance is that she could walk, bend, lift weight without any problems. Her endurance was good. She was never seen to rest or show signs of back pain or problems during the two weekend activities on the lake. She behaved as a normal person.

I feel that watching this video was very informative. Ms. Boyd has recovered from her fusion surgery quite nicely.

Dr. Reddy informed a risk manager for the respondent-employer on September 25, 2000, "I have observed, analyzed and commented upon the surveillance video you have provided on Ms. Boyd. As indicated in my video surveillance it is quite clear that Ms. Boyd can do more activities that she made us believe. She is at maximum medical improvement. I will provide her with permanent impairment rating and release her from my care." Dr. Reddy planned the following on September 26, 2000:

1. Ms. Boyd is at maximum medical improvement following anterior lumbar interbody fusion at L5-S1 in October 1999. According to the AMA Guidelines for Impairment Rating, she will receive a 10% partial permanent total body impairment rating. This is based on L5-S1 fusion. According to Chapter 3, Table 75, she will receive this 10% whole-person impairment. In the future she may require medical management. This may involve pain medications, sleeping medications, and nonsteroidals anti-inflammatory medications. I do not think she requires any further physical therapy for this injury.
2. As she lives quite far away from Little Rock, I will now release her from my medical care. She can obtain maintenance medications from local physicians.

The claimant testified that the respondents did not pay her the 10% impairment rating assessed by Dr. Reddy. The claimant testified that she received a letter from the

respondent-employer on or about November 10, 2000, terminating her benefits and her employment.

The claimant began treating with Dr. Anthony E. Russell on November 16, 2000, who noted, "I am not a strong believer of the value of videotaping in most of these cases. My major concern here is whether or not Ms. Harper has a potentially treatable lesion that has gone undetected at this time. We will plan to have Ms. Harper undergo a followup MRI scan. She will be seen back afterwards for further evaluation." An MRI of the lumbar spine with gadolinium was taken on November 16, 2000, with the following impression:

1. Probable postoperative changes on the right at L4-5 without an obvious laminectomy defect. There is minimal right-sided epidural fibrosis and enhancement of the disk.
2. Post fusion changes at L5-S1. There is mild diffuse spondylosis with minimal canal narrowing.

Dr. Russell noted on November 29, 2000:

Ms. Boyd returns today to review the findings of her MRI scan and flexion/extension lumbar spine films. The flexion/extension films appear to indicate continued movement across the disc space as evidenced by a widening of the disc space with flexion and narrowing with extension. This continued movement may be responsible for muscle spasm and the subsequent pain that she is experiencing. She also has degenerative changes which may be causing nerve root irritation. Ms. Boyd continues to be in severe pain. At this

point, further conservative measures likely have very little to offer. It is possible that the continued movement across the disc space could be responsible for her continued pain and for that reason I propose that we reoperate posteriorly and add pedicle screws and rods to the construct. At the time of surgery, we would plan to do a wide decompression around the nerve roots in order to alleviate any possible nerve root compression. I have discussed the fact with Ms. Boyd that this is certainly a last resort and does not carry a good statistically chance of improvement. On the other hand, without reoperation it is clear that her pain will continue....

On December 29, 2000, Dr. Russell performed an "L5-S1 posterior decompression and stabilization using the Synthes pedicle screws and rods." The claimant testified that she received "sudden relief" after surgery from Dr. Russell.

Dr. Russell noted on January 9, 2001, "Ms. Boyd returns today in one week follow-up of her lumbar fusion utilizing the pedicle screws and rods. She notes that she is doing extremely well and is very, very pleased with the results os (sic) her surgery....She appears to have had an excellent result from surgery noting that her pain is less now than it has been at anytime after any of her previous operative procedures. It would appear that we now have adequately addressed the problem that has plagued her. It is apparent to me that the symptoms she has been suffering have related

back to the initial injury clearly and only now this has been adequately addressed."

The claimant continued to follow up with Dr. Russell after surgery. Dr. Russell noted on May 2, 2001 that "follow-up studies were negative for any nerve root compression."

Dr. Jim J. Moore provided a Review Of Records on July 22, 2001:

I have been provided a number of records on this patient. She has been treated surgically on several occasions. She has been treated surgically in 1991, 1993 and again in 1999. Dr. Ed Saer was the operating surgeon. The patient also had a fourth operative procedure on 12-29-00 by Dr. Anthony Russell.

Review of the patient's previous records reflect that her problems have always been at the L5/S1 level either right or left and for which she was submitted to the surgery in 1991 and 1993. In 1999, however, the patient underwent a laproscopic anterior lumbar fusion....I do not have a copy of an operative procedure from Dr. Russell's surgery but this apparently was a posterior fusion with cage and pedicle screws and has shown neurologic changes intermittently and erratically during her period to follow, at least the best I can tell in review of these records....

Dr. Russell did indeed carry out a post-operative myelogram and CT dated 4-3-01. These films are also available for review. With the exception of some degradation of the image from the metallic instrumentation, these appear to be satisfactory and not thought to represent any obvious component

of compromise as far as the nerves are concerned. I reviewed with special attention to the flexion/extension study of 11-29-00. These films in my opinion do not show any significant motion and I do see evidence of the bone plug construct from the anterior lumbar fusion. I don't see any motion at all....

I have been asked to comment upon my opinion so far as the last operative procedure. Obviously this was a judgment call by Dr. Russell and in his opinion apparently there was justification. I gather that predominantly this was based upon the patient's subjective complaints and the findings that Dr. Russell interpreted as showing motion at L5/S1. I do not believe that such exists and, therefore, I do not believe that the surgery was necessarily justified.

The parties deposed Dr. Reddy on October 15, 2001. Dr. Reddy credibly testified regarding the claimant's treatment, her pain complaints, and the videotaped surveillance. Dr. Reddy was surprised to learn that Dr. Russell had performed additional surgery in December 2000.

The claimant testified that she underwent yet another operation from Dr. Russell on April 23, 2002. The claimant testified that she obtained relief "for a while but it is coming back."

The parties deposed Dr. Russell on May 6, 2002. Dr. Russell testified regarding the diagnostic testing from November 2000:

A. Well, the flexion extension films appeared to indicate that she had continued movement across the disk space and this was evidenced by a widening of the disk space with flexion and narrowing with extension. In other words, the width between the two bones would widen out when she leaned forward and then it would narrow down when she leaned back.

Q. And that is indicative, I take it, of not what you really want following a fusion of that type?

A. It can be. Yes....

Q. Did you make a recommendation to her as to some procedures that you might could do to help her with her continued pain?

A. Well, due to the longstanding nature of the symptoms, I really didn't feel that conservative treatment measures were going to add much to her case. At that point I felt like because of the movement the only viable option would be to add to the fusion, which is not unusual. Occasionally, with an anterior fusion you will add a posterior fusion as well or posterior stabilization using rods and screws. And that provides additional support to this space in order to allow it to fuse.

Dr. Russell opined that the December 2000 surgery and April 2002 surgery "were both necessary." The claimant's attorney examined Dr. Russell:

Q. Dr. Russell, do you have an opinion as to whether or not she has been disabled to the point of being unable to work during these months and the year or so that you have treated her, going all the way back to September of 2000 when she first came to see you?

A. Well, any patient that's undergone four and now five lumbar spine operative procedures, in my opinion, is temporarily, if not permanently/ totally, disabled from most physical activities and most work. That may not be my long-term projection for her. In other words, once her - once she is completely healed from all of the operations, she may not be. But for the time since I've been seeing her - yes. She's been disabled.

Q. That continues up to today?

A. Sure.

Q. Do you think she has reached the end of her healing period?

A. No. Not at this point. No.

Q. Can you give us some projection or estimate if things go well when that might occur?

A. From the latest operative procedure, I would usually allow anywhere from eight to twelve weeks for full recovery.

Dr. Russell wrote to the claimant's attorney on  
February 12, 2003:

This young lady has undergone previous lumbar disc surgery and recently underwent a follow-up procedure for some residual pain. The patient has had a lumbar fusion at L5-S1 utilizing pedicle screws and rods. This is in conjunction with a previous surgical procedure and in conjunction with the loss of a motor segment as well as ongoing radicular changes, she would be entitled to a 16% impairment rating based on AMA Guidelines. In regard to her operative procedures, she has reached maximal medical improvement effective October 23, 2002.

Ms. Boyd claimed entitlement to additional worker's compensation, and a pre-hearing order was filed on April 8, 2003. The claimant contended that she continued to be temporarily and totally disabled as a result of her February 9, 1999 injury. The claimant contended that she was entitled to additional medical treatment.

Respondent No. 1 listed as an issue for litigation whether the claimant sustained a compensable injury on February 9, 1999. Respondent No. 1 contended that "all benefits arising from Claimant's alleged injury have been paid" and that "any periods of disability have ended."

Respondent No. 2, Second Injury Fund, contended that the claimant could not prove she sustained a compensable injury in 1999. Respondent No. 2 contended, "claimant did not suffer any internal or external physical harm to her body as a result of the February 9, 1999, episode. Rather the conditions found to be present in claimant's lumbar spine after the 1999 episode existed as far back as 1995. Accordingly, the 1999 episode is not the major cause of claimant's disability or impairment."

The administrative law judge's pre-hearing order indicated that the parties would litigate the following issues:

- (1) Compensability;
- (2) Reasonably necessary medical treatment, including treatment by Dr. Russell;
- (3) Temporary total disability compensation from September 26, 2000 until a date to be determined;
- (4) Anatomical impairment and wage-loss disability;
- (5) Second Injury Fund liability; and
- (6) Attorney's fees.

Hearing before the Commission was held on May 29, 2003. The claimant testified, "my back hurts and my leg hurts and I'm just not able to work." The claimant testified with regard to the surveillance video, "Then I just pushed myself where now I just try to watch what I do and how I do it."

The administrative law judge found that the claimant sustained a compensable injury on February 9, 1999, and that the claimant was entitled to temporary total disability from February 10, 1999 through October 23, 2002. The administrative law judge found that the claimant had sustained anatomical impairment in the amount of 16% and wage-loss disability in the amount of 60%. The

administrative law judge found that Respondent No. 2, Second Injury Fund, was liable for the claimant's wage-loss disability. The administrative law judge found that Respondent No. 1 shall pay for the claimant's reasonably necessary medical treatment. Both respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

"Compensable injury" means an accidental injury causing physical harm to the body, arising out of and in the course of employment and which requires medical services or results in disability or death. Ark. Code Ann. §11-9-102(4)(A)(i). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The claimant must prove by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i).

The administrative law judge found that the instant claimant sustained a compensable injury on February 9, 1999. The Full Commission affirms this finding. The claimant testified that she sustained an accidental injury at work on February 9, 1999. The administrative law judge correctly

noted that the respondent-employer initially accepted the claimant's injury as compensable. The administrative law judge relied on the "objective findings" found in the February 23, 1999 MRI, namely "a central recurrent and right and left lateral small disc herniation" at L5-S1. Respondent No. 1 has now abandoned its earlier contention that the claimant did not sustain a compensable injury on February 9, 1999.

Respondent No. 2 begins its brief by stating that the claimant "suffered a compensable injury" in February 1999. However, Respondent No. 2 goes on to argue that the claimant did not sustain physical harm as a result of "the February 1999 episode." Respondent No. 2 refers the Commission to Dr. Saer's April 1999 language, "It's hard to say whether this new injury caused changes at L4-5, L5-S1, or both." However, we specifically note Dr. Saer's earlier language, "She does seem to have a central herniation/protrusion at L4-5. She had a small annular tear on the last MRI and this looks different from that. The changes at L5-S1 are noted too." This report by Dr. Saer is evidence that the post-traumatic changes seen on the February 23, 1999 MRI were objective findings establishing an accidental injury, which

findings were not within the claimant's voluntary control. The Full Commission affirms the administrative law judge's finding that the claimant sustained a compensable injury on February 9, 1999.

B. Medical treatment

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant bears the burden of proving that she is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

The administrative law judge found in the present matter, "Respondent No. 1 shall pay all reasonable hospital and medical expenses arising out of the injury of February 9, 1999." The administrative law judge concluded that treatment from Dr. Russell beginning in September 2000 was "reasonable, necessary, and related to claimant's February 9, 1999, compensable injury."

The record indicates that the claimant has suffered from back problems since at least January 1991. She underwent surgery in 1991 and received a 10% anatomical impairment rating from Dr. Saer. Dr. Saer performed another low-back surgery in 1993 and assigned an additional 5% anatomical impairment. The claimant sustained another accidental injury in February 1999, and a subsequent MRI basically showed new objective medical findings. Dr. Saer performed an L5-S1 fusion in October 1999. The claimant began treating with Dr. Reddy in February 2000. Dr. Saer opined in September 2000, "I think her fusion is solid and from the standpoint of her last surgery done last year, she is at MMI. I explained that I do not think she needs any further surgery on her back. She obviously does need some treatment, and I will defer to Dr. Reddy about that."

The Full Commission finds that additional treatment after Dr. Saer released the claimant on September 12, 2000 was not reasonably necessary in connection with the claimant's February 1999 compensable injury. The Commission has the duty of weighing the medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. Green Bay Packaging v. Bartlett,

67 Ark. App. 332, 999 S.W.2d 695 (1999). Dr. Saer, the treating surgeon in the present matter, opined in September 2000 that the claimant's fusion was "solid," and that the claimant was at maximum medical improvement. Dr. Saer further opined that the claimant would not need further back surgery, and he deferred to Dr. Reddy with regard to additional medical treatment. Dr. Reddy reviewed a surveillance videotape and stated on September 25, 2000, "Ms. Boyd has recovered from her fusion surgery quite nicely." Dr. Reddy formally pronounced maximum medical improvement on September 26, 2000.

Based on the expert opinions of Dr. Saer and Dr. Reddy, the Full Commission finds that medical treatment rendered after September 2000 was not reasonably necessary in connection with the claimant's compensable injury. The Full Commission recognizes that after the claimant presented on her own to Dr. Russell in November 2000, Dr. Russell arranged additional diagnostic testing and stated, "The flexion/extension films appear to indicate continued movement across the disc space as evidenced by a widening of the disc space with flexion and narrowing with extension." We note that such "movement across the disc space" was not

reported in the November 16, 2000 MRI arranged by Dr. Russell. Dr. Russell testified at deposition that the diagnostic films "appeared to indicate that she had continued movement across the disk space and this was evidenced by a widening of the disk space with flexion and narrowing with extension." Neither treating surgeon Dr. Saer nor follow-up physician Dr. Reddy observed the "widening" reported by Dr. Russell. We further note that Dr. Moore, a neurological surgeon, reviewed the diagnostic films in July 2001 and reported, "I don't see any motion at all." Dr. Moore, like Dr. Saer and Dr. Reddy, did not believe additional surgery was justified. But even if the prevailing opinion of the medical experts did indicate that there was "movement across the disk space," which the record does not indicate, it would require conjecture and speculation to causally link this alleged condition to the February 1999 specific incident. Conjecture and speculation cannot supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Finally, the Full Commission notes that after Dr. Russell performed yet another surgery in April 2002, the claimant's fifth low-back

operation, the claimant testified that her condition was worsening.

Therefore, the claimant failed to prove that additional medical treatment after November 10, 2000 was reasonably necessary in connection with the claimant's compensable injury. The Full Commission reverses the administrative law judge's finding on this issue.

C. Temporary disability

An injured employee is entitled to temporary total disability compensation during the time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge found in the present matter, "The claimant was temporarily totally disabled for the periods beginning February 10, 1999 through September 26, 2000, and continuing through October 23, 2002." The Full Commission affirms as modified the decision of the administrative law judge. We find that the claimant failed to prove she was entitled to temporary total disability compensation after the respondents controverted the claim on November 10, 2000.

Respondent No. 1 began paying temporary total

disability compensation after the claimant's accidental injury on February 9, 1999. Dr. Saer performed an L5-S1 fusion in October 1999. Dr. Saer subsequently referred the claimant to Dr. Reddy for after-care. On September 12, 2000, Dr. Saer expressly opined that the claimant's fusion was "solid" and that the claimant was at maximum medical improvement. Dr. Saer, the original treating surgeon, did not report any of the "movement" purportedly seen later by Dr. Russell. On September 25, 2000, Dr. Reddy completed a report after viewing a large amount of surveillance evidence. Dr. Reddy concluded that the claimant had "recovered from her fusion surgery quite nicely." Like Dr. Saer, Dr. Reddy pronounced maximum medical improvement. The preponderance of the evidence therefore indicates that the claimant reached the end of her healing period no later than September 25, 2000, the date Dr. Reddy pronounced maximum medical improvement. Temporary disability cannot be awarded after the claimant's healing period has ended. Trader v. Single Source Transportation, Workers' Compensation Commission E507484 (Feb. 12, 1999).

The Full Commission also finds that the claimant failed to prove she was totally incapacitated to earn wages after

September 25, 2000. Dr. Reddy noted on that date that the claimant was physically able to perform a wide range of activities. The claimant appears to assert that the Full Commission should assign minimal weight to Dr. Reddy's expert opinion, which opinion was based in part on Dr. Reddy's viewing of the surveillance footage. Nevertheless, the Full Commission has on a number of occasions relied on surveillance videotape in order to find that a claimant was not incapacitated to earn wages. See, Lander v. RAB Holdings, Inc., Workers' Compensation Commission F114155 (Feb. 6, 2004); Alexander v. Lakewood Property Owners Assoc., Workers' Compensation Commission F100706, F114022 (April 1, 2003); Jones v. E-Z Loader Boat Trailer, Inc., Workers' Compensation Commission E814459 & E909650 (June 24, 2003).

In the present matter, the Full Commission finds that the claimant failed to prove she remained within her healing period and incapacitated to earn wages after September 25, 2000. We attach significant weight to the credible reports of Dr. Saer, Dr. Reddy, and Dr. Moore, along with the videotaped evidence. Nor does the record support the claimant's testimony that she was "pushing" herself during

the videotaping, straining to overcome the debilitating effects of a spinal injury. Instead, the claimant was seen at a veterinarian's office and on a camping trip, among other places, with absolutely no apparent physical limitations.

D. Anatomical Impairment/Wage-loss disability

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. §11-9-704(c)(1).

None of the parties on appeal discuss the present claimant's entitlement to anatomical impairment. Pursuant to Ark. Code Ann. §11-9-522(g) and our Rule 34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) to be used to assess anatomical impairment. Dr. Reddy in the present matter assigned a 10% anatomical impairment rating based on Chapter 3, Table 75 of the Guides. The claimant testified that she did not receive compensation for the 10% rating assessed by

Dr. Reddy. The Full Commission finds that the claimant proved she was entitled to this 10% anatomical impairment rating, that the rating was based on objective and measurable physical findings, and that the compensable injury was the major cause of the claimant's 10% anatomical impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining such disability based upon a consideration of the medical evidence and other matters, including age, education, and work experience. See, Ark. Code Ann. §11-9-522(b)(1); Cross v. Crawford County Mem. Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In the present matter, the Full Commission finds that the claimant sustained wage-loss disability in the amount of 30%. We note that the claimant is only 39 years old and attended college for two years. Following the claimant's compensable injury and resulting surgery, Dr. Saer pronounced maximum medical improvement on September 12, 2000. Dr. Saer noted that the claimant's fusion was solid, and that the claimant would not require further surgery. On September 25, 2000, Dr. Reddy noted

that the claimant was able to perform such physical activities as walking, sitting, bending, and lifting.

Respondent No. 2, Second Injury Fund, does not argue that it is not liable pursuant to Ark. Code Ann. §11-9-525 and Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). Instead, Respondent No. 2 argues that "the 60% award is excessive and should be reduced or eliminated entirely based upon the evidence." The Full Commission agrees that the 60% award was excessive and should be reduced. Based on the claimant's age, education, work experience, and the compensable injury, we find that the claimant sustained wage-loss disability in the amount of 30%. We find that the Second Injury Fund is liable for the claimant's wage-loss disability.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained a compensable injury on February 9, 1999. We find that the claimant proved she was entitled to reasonably necessary medical treatment as provided by Dr. Saer and Dr. Reddy, and that the claimant proved she was entitled to temporary total disability compensation from February 10, 1999 through September 25, 2000. The claimant failed to prove that any

treatment provided by Dr. Russell was reasonably necessary in connection with the claimant's compensable injury. The claimant proved she was entitled to an anatomical impairment rating of 10% as assessed by Dr. Reddy and wage-loss disability in the amount of 30%. Respondent No. 2, Second Injury Fund, is liable for the instant claimant's 30% wage-loss disability. The claimant's attorney is entitled to maximum fees for legal services as provided by Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), as provided by Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

\_\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

**CONCURRING AND DISSENTING OPINION**

I concur in part and dissent in part from the majority opinion. Specifically, I concur with respect to the findings that Claimant's February 9, 1999 injury

is compensable, that the medical treatment she received from Dr. Saer and Dr. Reddy was reasonable and necessary, that Claimant is entitled to temporary total disability benefits, and that Claimant incurred permanent physical disability and loss in wage earning capacity as a result of the compensable injury. I must respectfully dissent, however, from the Majority's finding that the medical treatment Claimant received from Dr. Russell is not reasonable and necessary, that Claimant is not entitled to temporary total disability benefits through October 23, 2002, and their reduction of the permanent impairment rating and wage-loss disability benefits awarded by the Administrative Law Judge.

I find that the Administrative Law Judge's award should be affirmed and, therefore, dissent from those aspects of the Majority opinion that reduce the Administrative Law Judge's award of medical benefits, temporary total disability, permanent physical impairment, and wage-loss disability benefits.

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SHELBY W. TURNER, Commissioner