

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D601990

LAVANNA S. MULLINGS, EMPLOYEE	CLAIMANT
WORLDSBEST INDUSTRIES, EMPLOYER	RESPONDENT NO. 1
LIBERTY MUTUAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 29, 2004

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

Claimant represented by the HONORABLE H. OSCAR HIRBY,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE JAMES C.
BAKER, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 2, Respondent No. 1, and the claimant
appeal an administrative law judge's opinion filed January
30, 2003. The administrative law judge found that the
claimant did not sustain a compensable cervical spine
injury. The administrative law judge found that the

claimant was permanently and totally disabled, and that Respondent No. 2, Second Injury Fund, was "liable for permanency over and above the impairment paid by Respondent #1." The administrative law judge found that the claimant "was temporarily and totally disabled from on or about the date of her compensable injury, January 27, 1986 to September 27, 1994." The administrative law judge found that "the claimant's medical treatment and related therapies and medications for her back, heart and psychiatric condition was reasonably necessary medical treatment and related to her compensable back injury." The administrative law judge also found that "the claimant is entitled to payment for the course of rehabilitation which she took in the 1990s."

After reviewing the entire record *de novo*, the Full Commission finds that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable neck or cervical spine injury. The Full Commission finds that the claimant proved she was permanently and totally disabled, and that the Second Injury Fund is liable for these benefits. We find that the claimant proved she was entitled to temporary total

disability compensation from January 27, 1986 through February 27, 1991, and from April 29, 1993 through September 9, 1994. We find that treatment for the claimant's back and heart condition was reasonably necessary for treatment of the injury received by the claimant. We find that the claimant proved she was entitled to the vocational rehabilitation program provided her by the respondents. The Full Commission therefore affirms, as modified, the opinion of the administrative law judge.

I. HISTORY

Lavanna S. Mullings, age 57, testified that she had a general education diploma. Dr. Thomas Eans recorded the following history relative to the claimant in October 1978:

This is a 31 year old white female admitted for therapeutic tubal ligation to prevent pregnancy which could possibly be fatal due to her organic heart disease....

The patient has a history of apparently congenital aortic stenosis with the murmur first being found at about age 3....She had her first heart catheterization in 1961 at age 14....In 1974 she was seen in the Medical Center in Little Rock where she had another catheterization....She underwent an aortic (sic) valvulotomy and commissurotomy....She had another heart catheterization in 1974 that was done because of some symptoms of syncope and shortness of breath....They classified her as organic heart disease Class I and recommended no restriction of her physical activity.

Thereafter she apparently developed a blood clot in her right brachial artery that was apparently related to catheterization and this required a saphenous vein graft obtained from both thighs....

IMPRESSION

1. Congenital heart disease, aortic stenosis and aortic insufficiency, post valvulotomy and and (sic) catheterization procedures.
2. Admitted for therapeutic tubal ligation....
3. Mild obesity. Needs to lose weight due to heart condition.
4. Chronic anxiety with insomnia.
5. Patient will be referred back to a cardiologist to be followed by him for consultation due to apparent worseing (sic) of the aortic stenosis and the aortic insufficiency since the last records available to me in 1974.

The claimant testified that she began working on an assembly line for WorldsBest Industries in 1986. The parties stipulated that the claimant sustained a compensable injury to her back on January 27, 1986. The claimant testified that she lost her balance and fell on her right hip. The claimant testified at deposition that she felt pain mostly in her lower back, with no neck pain on the date of injury. The claimant was treated on January 27, 1986 and was diagnosed with "Acute strain paraspinous muscles of thoracic spine."

The impression from a CT scan of the lumbar spine taken February 18, 1986 was "Pars defect bilaterally without sUBLUXATION. Degenerative changes in the upper lumbar spine. No sign of herniated nucleus pulposus." An MRI of the cervical spine was taken on October 2, 1986, with the impression, "Advanced degenerative disc disease with associated spondylosis C5-C6. The hypertrophic spurs at this level are indenting the thecal sac and minimally compressing the ventral surface of the adjacent cord. No acute disc herniation is seen."

Dr. John L. Wilson examined the claimant and informed the respondent-carrier on October 15, 1986, "I feel that this lady has a history of lumbosacral strain which is resolved. She has cervical spondylosis at C5-C6 with radiculitis. She did not have pain in her neck at the time of her injury. Apparently this began some six weeks later. According to the history I do not understand how the two are related." Nevertheless, Dr. H. Austin Grimes stated on October 16, 1986, "We plan to do an anterior lumbar spine fusion at L5-S1 and an anterior cervical spine fusion at C5-6."

The claimant was admitted to Baptist Medical Center on November 3, 1986 for surgery, but the operation was rescheduled, because the claimant "was found to have a history of 'open heart surgery.'" An echocardiogram was taken on November 5, 1986, with the summary, "Aortic valve disease with probable aortic stenosis and aortic insufficiency, plus mild concentric hypertrophy of the left ventricle." Dr. Grimes discharged the claimant on November 6, 1986 "to have her heart taken care of before consideration of any spine surgery." Dr. John R. Thompson informed the claimant on November 14, 1986, "I saw you while you were recently hospitalized to undergo an anterior lumbar spinal fusion. An echocardiogram was performed which was suggestive of aortic stenosis. Your EKG and physical exam were also consistent with this finding. Dr. Bennett, the cardiologist, and I agreed that coronary angiography should be done prior to undergoing any major surgical procedure such as an anterior spinal fusion."

Counsel for Respondent No. 1 stated at hearing that the claimant was paid temporary total disability compensation through November 20, 1986, and that subsequent payments were converted to permanent partial disability. The claimant

contended that she received permanent partial disability from November 21, 1986 through January 17, 1989. The claimant contends she should have been receiving temporary total disability compensation during this period.

After a follow-up visit with the claimant, Dr. Grimes informed the parties on April 1, 1987, "She has had persistent neck and back pain. She was a poor risk for open heart surgery, and likewise would be a very poor risk for any spine surgery. Certainly, if they can't do the open heart surgery, we cannot consider doing surgery on her back. She wants to try some non-surgical treatment." Dr. Grimes assigned an impairment rating for the claimant on June 3, 1987, and he stated, "She might be trainable as some type of lab technician, in which she would have the perogative (sic) to sit and work, either part-time or at least change positions, probably without having to do heavy bending, stooping or lifting."

The claimant was admitted to The University Hospital of Arkansas on March 2, 1988, with the principal diagnosis "Aortic valve disease, (congenital aortic stenosis, status post commissurotomy now with aortic stenosis and aortic insufficiency)," "Bilateral postoperative pneumothoraces,

resolved," and "Degenerative joint disease, L-4, L-5." The following history was recorded at that time:

Ms. Dunlap is a 41 year old white female with congenital aortic valve stenosis who presents for aortic valve replacement on 3-4-88, tentatively. She had a history of congenital aortic stenosis with aortic commissurotomy performed in 1961, at Little Rock Baptist Hospital. She has had increasing symptoms gradually including shortness of breath, dyspnea on exertion, paroxysmal nocturnal dyspnea and orthopnea and currently sleeping on two pillows. She has also complained of some increasing chest pain. She was admitted to UAMS for cardia (sic) catheterization 12-17-86, which revealed a normal wall motion, 3+ aortic insufficiency, normal coronary arteries and an aortic valve gradient of 50-60 mm/Hg. She had suffered a work related back injury at that time but her heart disease precluded tentative fusion surgery of the disk and she has continued to experience increase in symptomatology, particularly shortness of breath and chest pain....

The patient was admitted to the hospital and on 3-3-88, underwent cardiac catheterization of both the left and right heart revealing normal right-sided pressures, grossly normal coronary arteries and 3+ aortic insufficiency with moderately severe aortic stenosis....On 3-4-88, the patient with progressive aortic insufficiency and aortic stenosis underwent aortic valve replacement with St. Jude's prosthetic valve #19....

The claimant was discharged on March 15, 1988. She was restricted from lifting greater than 10 pounds and was instructed not to drive for six weeks. Dr. Grimes reported on July 29, 1988, "she has had her heart surgery now and is on Coumadin, high doses, so I wouldn't consider her for a

surgery candidate for her Grade I spondylolisthesis....She is a candidate for Social Security disability in the meantime and she may not be a candidate for surgery in the future depending on how she's getting along and what the Coumadin levels are going to respond to." Dr. Grimes wrote on September 30, 1988, "Dr. Joseph Bisset (sic), her cardiologist, says that she should go ahead with her surgery. We plan to do a one level lumbar spine fusion at L5-S1. She has a Grade I spondylolisthesis with degenerative disc disease."

Dr. Bissett wrote to the claimant's attorney on November 17, 1988:

We have followed Mrs. Lavanna Sue Dunlap for the past eight years. During this time I have felt that Mrs. Dunlap has had significant dyspnea and limitation of exercise ability because of her aortic valve disease.

I believe that inspite (sic) of her prosthetic valve Mrs. Dunlap continues to have marked limitation of her exercise ability.

In addition Ms. Dunlap requires coumadin because of her prosthetic aortic valve. The oral anticoagulant would pose the additional hazard of bleeding from minor trauma should Ms. Dunlap sustain an injury or other trauma.

With her recent back injury Ms. Dunlap has developed an additional limitation. She continues to experience back pain with motion, so that with the combination of her cardiac disease and injury related symptoms

I feel that she would be permanently and totally disabled for any occupation....

At this point my opinion is that Ms. Dunlap remains permanently and totally disabled.

Dr. Grimes wrote on February 22, 1989, "She has been cleared for any surgery to her spine, if that becomes necessary." Dr. J. Zachary Mason informed an administrative law judge on August 3, 1989, "I agree with Dr. Grimes' recommendations to proceed with an anterior interbody fusion for this patient." The claimant was hospitalized on October 9, 1989 for surgery. Dr. Grimes performed a "one level anterior lumbar interbody fusion with a right iliac crest bone graft" on October 10, 1989. The claimant testified that she initially felt better after the 1989 surgery, "but then the pain just started over again just as if nothing had happened." The claimant continued to periodically follow up with Dr. Grimes.

Dr. Grimes wrote on February 28, 1991:

Ms. Owens was seen in the office on February 27, 1991. She is still having a good deal of cervical arthritis pain and disc disease, but we do not consider that she is a good candidate for surgery to her cervical spine. She does not particularly want any surgery to her cervical spine either. The lumbar fusion site appears to be stable and solid....

Her permanent partial physical impairment is more considering her cervical spine and her lumbar spine. The lumbar spine was 25 percent to the body as a whole and that in addition to her cervical spine complaints, would elevate an additional 10 percent to the body as a whole orthopedically, so a total of 35 percent cervical and lumbar spine complaints was what we estimated will be her permanent partial physical impairment to her spine....

Dr. Grimes informed the claimant's attorney on December 2, 1991, "Please be advised that I do feel that Ms. Mullings was still temporarily totally disabled on the date of the visit referenced in my June 3, 1987 report, and to and through the date of February 27, 1991."

On April 29, 1993, Dr. Grimes diagnosed "Nonunion secondary to anterior lumbar interbody fusion for a grade 1 spondylolisthesis L5-S1." Dr. Grimes performed a "Selby-Wilsey interpeduncular screw fixation L4 to S1 with a crossbar at L5 and bank bone rib, match-stick grafts augmented by the patient's bone from the spinous processes and lamina of L5 and L4 partially and S1." The claimant testified that she did not benefit from the 1993 surgery. The claimant was deposed on March 22, 1994. The claimant testified at that time that she had not worked since 1986, and that she had been determined to be "permanently and totally disabled" by the Social Security Administration.

Dr. Grimes referred the claimant to a pain manager, Dr. Jeff K. Ketcham, who first examined the claimant on June 28, 1994:

I discussed with the patient the various options available for management of her pain and the fact that a multidisciplinary effort would be necessary. This includes the use of psychologist, Joe Brogdon for biofeedback as well as evaluation. Also I think she is going to need some type of long term pain control which is going to have to utilize narcotic regimen. The question is whether she would prefer to have an oral program or a consideration for placement of an intrathecal infusion pump....The patient felt very strongly that she would prefer an intrathecal pump type of solution as this would require her not to have to remember to bring her pills....

Dr. Ketcham noted on August 30, 1994, "We had requested that she see a psychologist, Joe Brogdon, but apparently her Worker's Comp has refused this....Once again, I don't think that any type of therapy for the pain is likely to be of benefit until the depression comes under treatment. I think the depression has advanced far enough that she probably needs psychiatry rather than psychological evaluation, especially so that medications can be used as well....After the depression is under treatment and appears to be resolving, I think the next step after that would probably be a trial of an epidural catheter as a trial toward an intrathecal pump."

Dr. Grimes informed the respondent-carrier on September 9, 1994, "1) No, this patient has not sustained any additional impairment over the 25 percent whole body rating. 2) Yes, her condition does seem to have reached a plateau."

Dr. Ketcham noted on October 21, 1994, "The patient very much desires to be on an intrathecal pump." Dr. Ketcham scheduled the claimant "for placement of temporary tunnelled epidural catheter with a differential to be done the day of placement and then if differential shows primary somatic origin of the pain, continuation of the catheter with Morphine infusion over the next 5-7 days as a trial towards a Synchromed intrathecal pump."

Dr. Reginald J. Rutherford independently examined the claimant on December 7, 1994 and concluded the following:

Upon review of the supplied medical documentation which has been partially summarized above, I do not share Dr. Ketchum's (sic) enthusiasm or optimism pertaining to the potential efficacy of a morphine pump related to either adequate pain control or improved functional status. The available clinical data suggests the operant diagnoses to be personality disorder, somatization disorder, prescription drug dependency abuse and failed surgical back syndrome....If arachnoiditis is confirmed and Dr. Wilson concurs with the implementation of a morphine pump on a trial basis, I would then recommend that Mrs. Mullings proceed to a lumbar differential epidural as recommended by Dr. Ketchum and subsequent to this, an outpatient infusion trial. If arachnoiditis is not confirmed or

psychological barriers are considered significant, I would then recommend that an orthopedic opinion be obtained from Dr. Peek, Saer, McCarthy or Peeples regarding the advisability of removal of the spinal instrumentation. If removal of the instrumentation ultimately transpires, I would then strongly advocate that Mrs. Mullings be admitted to an inpatient behavioral management program emphasizing detoxification, psychotherapy and progressive physical therapy.

The claimant returned to Dr. Ketcham on February 8, 1995, at which time he assessed "Failed back surgery syndrome; history of depression, although this seems to be improving; probably has epidural scarring, secondary to laminectomy; she has hardware in place at the present time." Dr. Ketcham noted that the claimant was on Methadone. Dr. Ketcham resumed pain management in the form of "differential epidural" on March 8, 1995.

The parties deposed Dr. Bissett, a cardiologist, on June 9, 1995. An attorney for Respondent No. 1 examined Dr. Bissett:

Q. What is a commissurotomy?

A. That is a good question. As far as I know, a commissurotomy is the physical separation of the aortic commissure. It's either by fracturing it with your hand or by using an instrument to dilate....

Q. Doctor, assuming somebody undergoes a commissurotomy, does that mean that they then have aortic valve stenosis?

A. Yes, sir....

Q. So we know, from your records at least and from other records that we have that will be introduced at the hearing, that she did have aortic valve stenosis dating back to at least 1961?

A. Yes, sir....

Q. Doctor, let me ask you this. We know that she had this commissurotomy in 1961. Is it fair to say that based on the fact that she had that commissurotomy back in '61 that it was pretty much inevitable that she was going to have to have a valve replacement at some point in the future?

A. Yes, sir....

Q. Now, Doctor, you are aware, are you not, that Ms. Mullings sustained an injury to her back at work in January of '86?

A. Well, yes and no. I don't know much about that.

Q. But have you heard -

A. I have heard; yes, sir.

Q. And, Doctor, is it fair to say that the heart surgery that was performed in '88, in other words the valve replacement, was something that would have been required whether or not she would have undergone this ...

A. I think that's fair.

Q. Just so I can finish the question for the record - in other words she would have required the valve replacement in 1988 whether or not she'd had the back injury in '86?

A. I would think so. I mean, in other words an injury would not influence the rate of re-stenosis after the valves were separated.

Q. In other words, they're two totally separate problems medically; is that correct?

A. That would be my interpretation....

Q. And Doctor, is there any particular contraindication to performing a lumbar fusion type surgery before the heart surgery?

A. I have to plead ignorance on that.

Q. I guess what I'm asking is, would it have been dangerous for Ms. Mullings to have undergone another surgery before she had the valve fixed?

A. The best answer would probably be something like this.

Q. Okay.

A. The risk of any kind of non-cardiac surgery goes up if you are in heart failure, if you've had a recent heart attack, if you're in some rhythm other than a normal rhythm, or if you're performing some kind of emergency surgery so ...

Q. She would not really have fallen into any of those categories, would she?

A. Far as I could tell, would not....

Q. Doctor, would you have expected this aortic valve stenosis to have resulted in some physical impairment to Ms. Mullings even before this '86 back injury?

A. I would think so; yes, sir....

Q. So, again, if she was performing manual labor before the '86 injury she was doing so at some risk to herself; is that right?

A. I think that's a fair statement.

Q. And she was laboring under or laboring with a fairly significant problem at that time, too; is that correct?

A. I would think so. Not only did she have it, but it had been there a long time....

Q. Doctor, in that letter you mentioned that it's your opinion that because of the combination of the back problems and her heart disease that she is permanently and totally disabled; is that correct?

A. Yes, sir.

Q. Is that still your opinion today?

A. Yes, sir.

The claimant's attorney questioned Dr. Bissett:

Q. In order to treat the back injury - in other words, we have a work related injury that's been accepted as a compensable occurrence and benefits are being paid. And we are at this point where they cannot do the back surgery because of cardiology consults. Says get the heart problems squared away first.

A. Sure.

Q. Is that consistent with your understanding of the problem that she had to have the heart valve replaced first to get the back treated?

A. That would be consistent with what I suspect is standard practice, as far as I know....In general, elective back procedure would be - I'm talking like

an orthopedic surgeon, and I'm not. But, in general, the orthopedic surgeon would, I'm sure, want the cardiac condition improved or stabilized, or whatever you want to say, prior to doing that surgery.

Dr. Ketcham informed a representative of the respondent-carrier on December 28, 1995, "At some point in the future the patient could probably benefit from one of the interventional techniques including consideration for spinal cord stimulator or intrathecal pump. Certainly at least her quality of life is improved on the Methadone which she is currently taking, but again I think that the depression is still an overriding element....In regards to her back pain I am really making no changes other than continuing on pharmacological management. I still feel that maximized conservative therapy including trial with physiatry services is warranted."

Dr. Ketcham noted on July 1, 1996, "I discussed with the patient at this point that I would recommend proceeding on toward intrathecal pump placement....I told her that the period before this we would need to have her see Joe Brogdon for psychological evaluation for appropriateness of pump therapy." Joseph Brogdon, a "psychological examiner," recommended for Dr. Ketcham on October 30, 1996 "that Ms.

Mullings be approved for the morphine infusion pump procedure."

The record indicates that the respondent-carrier arranged vocational rehabilitation counseling for the claimant, beginning July 15, 1997. It was noted at that time that the claimant expressed vocational interest "in self-employment in porcelain doll making." The vocational counselor arranged a functional capacity assessment, which was carried out on August 7, 1997. The claimant passed a "validity/behaviorial profile." In addition, work restrictions were imposed.

The vocational counselor reported on August 15, 1997, "The FCE report places Ms. Mullings in the sedentary physical demand level of work with restrictions on walking, stooping/crouching, below the knee reaching, and below the knee lifting. Ms. Mullings has provided me with the information regarding start-up costs for her self-employment proposal in doll-making. Recommendation is for pending further case activity until after case settlement discussions with prospect of future Labor Market Survey to identify employment opportunities for Ms. Mullings within her physical restrictions."

Dr. Ketcham noted on September 17, 1997:

I recommended that she be seen by one of the rehab doctors, Dr. Barry Baskins (sic) or Vestal Smith, to see if she was a candidate for rehab prior to considering a more costly type of procedure such as the intrathecal pump. This was turned down by her insurance company, Liberty Mutual. I also recommended that she see Joe Brogdon (sic) for behavioral therapy, again, to try to avoid having to place an intrathecal pump. Unfortunately, this was turned down as well. The Methadone works relatively well, it causes her some problems with constipation, but overall, she tolerates it relatively well....I think that she probably is developing some elements of tolerance as she has been on it for quite some time....

At this point since all other avenues are being blocked by her insurance company, I have recommended that we proceed with a trial catheter to see if she would be a candidate for intrathecal pump placement.

In the meantime, the claimant continued to work with the vocational counselor, to whom she had been referred by the carrier. It was reported on December 15, 1997, "We recommend case closure at this time, but will be happy to re-open our file if requested to proceed with Labor Market Survey or to assist Ms. Mullings in the feasibility of her self-employment goal in porcelain doll making."

Ms. Mullings claimed entitlement to additional worker's compensation, and a pre-hearing order was filed with the Commission on September 3, 2002. The claimant contended that she injured her back and neck on January 27, 1986. The

claimant contended that Respondent No. 1 paid a 25% impairment for the back and a 10% impairment for the cervical spine. The claimant contended that she was entitled to medical treatment for her heart. The claimant contended that she was entitled to temporary total disability compensation through at least September 14, 1994, and that she became permanently and totally disabled on that date. The claimant contended that she was entitled to vocational rehabilitation.

Respondent No. 1 contended that the claimant did not sustain a compensable neck injury. Respondent No. 1 contended that there had been three healing periods. Respondent No. 1 contended that the first healing period ended on October 6, 1996; that the second healing period occurred from October 23, 1989 through February 27, 1991; that the duration of the last healing period was from May 13, 1993 through September 9, 1994. Respondent No. 1 contended that the claimant was not entitled to additional temporary total disability. Respondent No. 1 contended that it was not liable for the claimant's vocational expenses. Respondent No. 1 characterized the claimant's vocational expenses as unilateral, unauthorized, and not reasonably

necessary. Respondent No. 1 contended that treatment related to the claimant's heart was not reasonably necessary in connection with the compensable injury, and that a morphine pump was not reasonably necessary.

Respondent No. 2, Second Injury Fund, controverted the claimant's contention that she sustained a compensable neck injury. Counsel for Respondent No. 2 appears to have contended that the claimant was not entitled to wage-loss disability or permanent total disability.

II. ADJUDICATION

A. Compensability of alleged neck or cervical spine injury

The burden rests on the claimant to establish her claim for compensation. Voss v. Ward's Pulpwood Yard, 248 Ark. 465, 452 S.W.2d 629 (1970). The standard of proof before the Commission is the preponderance of the evidence. Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). The administrative law judge found in the present matter, "The preponderance of the evidence reflects that the claimant did not sustain a compensable cervical spine injury on January 27, 1986." The Full Commission affirms this finding. We find that the claimant did not

prove by a preponderance of the evidence that she sustained a compensable injury to her neck or cervical spine.

The parties stipulated that the claimant sustained a compensable injury to her back on January 27, 1986. As we have noted *supra*, the claimant testified at deposition that she felt pain in her lower back, with no neck pain on the date of injury. The medical diagnosis on January 27, 1986 was acute strain in the thoracic spine, with no reference to a cervical or neck injury. There is simply no probative evidence of record that the claimant sustained a neck or cervical injury on January 27, 1986. The administrative law judge's decision is affirmed.

B. Temporary total disability

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood based on medical evidence, age, education, experience, and other matters reasonably expected to affect the claimant's earning power. Rooney & Travelers Insurance Co. v. Charles, 262 Ark. 695, 560 S.W.2d 797 (1978). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v.

Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge found in the present matter, "The preponderance of the evidence reflects that the claimant was temporarily and totally disabled from on or about the date of her compensable injury, January 27, 1986 to September 27, 1994." The Full Commission affirms, as modified, the administrative law judge's finding. The Full Commission finds that the claimant proved she was entitled to a period of temporary total disability compensation from January 27, 1986 through February 27, 1991. The claimant proved she was entitled to another period of temporary total disability from April 29, 1993 through September 9, 1994.

The claimant was first within a healing period and totally incapacitated to earn wages beginning on January 27, 1986, the date of the claimant's compensable injury. The claimant eventually began treating with Dr. Grimes, who planned a lumbar fusion at L5-S1. The claimant's lumbar spine surgery was postponed due to the claimant's pre-existing heart condition, which condition we will discuss in greater detail *infra*. Although Respondent No. 1 paid the claimant temporary total disability compensation through November 20, 1986, the record indicates that the claimant

was still within her healing period and totally incapacitated to earn wages as of that date. The claimant still had not undergone surgical treatment which the treating physician opined was reasonably necessary. Dr. Grimes did not opine that the claimant was able to return to work. The claimant underwent a cardiac catheterization in March 1988. The claimant was not expressly released to return to work following the catheterization. Dr. Grimes noted that the claimant was on high doses of Coumadin, and he again scheduled the claimant for surgery at L5-S1.

Dr. Bissett opined in November 1988 that the claimant could not yet return to work. The claimant finally underwent the recommended surgery in October 1989. Dr. Grimes wrote in December 1991, "Please be advised that I do feel that Ms. Mullings was still temporarily totally disabled on the date of the visit referenced in my June 3, 1987, report, and to and through the date of February 27, 1991." The Full Commission therefore finds from a preponderance of the evidence that the claimant proved she was entitled to temporary total disability compensation from January 27, 1986 through February 27, 1991.

The claimant proved she was entitled to another period of temporary total disability compensation from April 29, 1993 through September 9, 1994. Dr. Grimes performed additional surgery on April 29, 1993, so that the claimant entered another healing period and was again totally incapacitated to earn wages beginning on that date. The claimant testified that this surgery did not improve her physical condition, and that she did not return to work. Dr. Grimes stated on September 9, 1994 that the claimant's condition had "reached a plateau." The record therefore shows that the claimant reached the end of her healing period no later than September 9, 1994, so that the claimant failed to prove she was entitled to additional temporary total disability after September 9, 1994.

C. Permanent disability

The administrative law judge found, "The preponderance of the evidence reflects that the claimant is permanently and totally disabled." The Full Commission affirms this finding. The claimant is age 57 and has only a general education diploma. The claimant suffers from congenital heart disease. Following her compensable injury in 1986, the claimant underwent lumbar-spine surgery in 1989 and an

additional surgery to her lumbar spine in 1993. Dr. Bissett believed that the claimant was permanently and totally disabled, even before the claimant's surgeries by Dr. Grimes. Dr. Grimes released the claimant in 1994, but the claimant testified that she has been unable to return to work since that time. When considering the claimant's anatomical impairment, along with the claimant's advanced age, limited education and substantial wage loss, the Full Commission affirms the administrative law judge's award of permanent total disability. See, Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961).

D. Second Injury Fund

Second Injury Fund liability comes into question after three hurdles have been overcome. First, the employee must have suffered a compensable injury at her present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). The administrative law judge found in the present matter, "The preponderance of

the evidence reflects that the Second Injury Fund is liable for permanency over and above the impairment paid by Respondent #1." The Full Commission affirms this finding.

It was stipulated that the claimant sustained a compensable injury to her back on January 27, 1986 while employed with Respondent No. 1, thus satisfying the first requirement of Second Injury Fund liability. The record also shows that, prior to the compensable injury, the claimant had a permanent partial impairment. The claimant's history indicates that she was diagnosed with congenital aortic stenosis at age 3. In October 1978, a physician's impression was "congenital heart disease" after the claimant was hospitalized for symptoms including shortness of breath. Surgery was scheduled for the claimant in November 1986 after the claimant's compensable injury, but surgery was postponed because of the claimant's history of open heart surgery and aortic stenosis. In November 1988, Dr. Bissett wrote that he had treated the claimant for several years for "significant dyspnea and limitation of exercise ability because of her aortic valve disease." These chronic conditions clearly pre-existed the compensable injury. Dr. Bissett opined, "With her recent back injury [the claimant]

has developed an additional limitation. She continues to experience back pain with motion, so that *with the combination of her cardiac disease and injury related symptoms I feel that she would be permanently and totally disabled for any occupation* (emphasis supplied)."

Respondent No. 2 argues that no proof of "actual" wage loss exists in the present matter. However, a claimant's non-work related condition suffered prior to the compensable injury need not have involved a loss of earning capacity. Mid-State Constr., *supra*. The claimant has therefore overcome both the second and third hurdles to establish Second Injury Fund liability. The decision of the administrative law judge is affirmed.

E. Reasonably necessary medical treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary for the treatment of the injury received by the employee. Ark. Stat. Ann. § 81-1311 (Supp. 1985). 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, "The

preponderance of the evidence reflects that the claimant's medical treatment and related therapies and medications for her back, heart and psychiatric condition was reasonably necessary medical treatment and related to her compensable back injury." The Full Commission affirms this finding.

Dr. Grimes was one of the claimant's treating physicians following the claimant's 1986 compensable injury. Dr. Grimes scheduled surgery for the claimant's lumbar spine in November 1986, but as we have noted *supra*, this surgery was postponed due to the claimant's history of aortic stenosis and aortic insufficiency. Dr. Grimes, Dr. Bennett, and Dr. Thompson agreed that the claimant should undergo a coronary angiography before undergoing surgery to her spine. The claimant underwent cardiac catheterization and aortic valve replacement in March 1988. Following Dr. Bissett's approval, Dr. Grimes performed a lumbar fusion in October 1989. Dr. Grimes performed additional surgery in April 1993.

Dr. Grimes eventually referred the claimant to Dr. Ketcham, who opined in June 1994 that the claimant's condition following her compensable injury and surgeries would improve with utilization of an intrathecal infusion

pump. Dr. Ketcham also recommended psychological treatment with Joe Brogdon (the respondents do not appeal the administrative law judge's award of mental health treatment for the claimant). We recognize Dr. Rutherford's opinion that he was not "enthusiastic" about use of an infusion pump for treatment of the claimant. In the instant matter, however, the Commission attaches more significant weight to the opinion of Dr. Ketcham, the pain manager referred for the claimant by her primary physician, Dr. Grimes.

The Full Commission also recognizes Dr. Bissett's testimony that the claimant's cardiac valve replacement would have taken place whether or not the claimant sustained a compensable injury. But whether or not the claimant would have ultimately needed another cardiac procedure is not the question before the Commission. We again note from the record that at least three treating physicians advised that the claimant undergo additional procedures for her heart before undergoing surgery for her spine following the compensable injury. In addition, we place significant weight on Dr. Bissett's testimony, "in general, the orthopedic surgeon would, I'm sure, want the cardiac condition improved or stabilized, or whatever you want to

say, prior to doing that surgery." The preponderance of evidence therefore indicates that treatment for the claimant's heart was reasonably necessary to maintain and stabilize her condition following the compensable injury. See, Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). The Full Commission finds that all of the treatment of record provided to the claimant was reasonably necessary for her compensable injury. Reasonably necessary medical treatment for the claimant includes all of the treatment and recommendations from Dr. Grimes, Dr. Ketcham, and Dr. Bissett. The decision of the administrative law judge is affirmed.

F. Vocational Rehabilitation

Ark. Stat. Ann. § 81-1310 provides:

(f) **Rehabilitation.** An employee who is entitled to receive compensation benefits for permanent disability shall be paid, in addition to benefits otherwise provided for by this Act, reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation for a period not to exceed sixty (60) weeks, if the Commission finds that such program is reasonable in relation to the disabilities sustained by such employee. A request for such program must be filed with the Commission prior to a determination of the amount of permanent disability benefits payable to such employee.

The administrative law judge found in the present matter, "The preponderance of the evidence reflects that the claimant is entitled to payment for the course of rehabilitation which she took in the 1990s." The Full Commission affirms this finding. Respondent No. 1 argues on appeal that it "never agreed" for the claimant to enroll in vocational rehabilitation courses. The record shows, however, that the respondent-carrier actually arranged vocational rehabilitation for the claimant beginning in July 1997. Respondent No. 1 also argues that the claimant "waived" her right to vocational rehabilitation, because the claimant did not "petition the Commission for approval of these programs prior to incurring the cost of the programs." Nevertheless, Ark. Stat. Ann. §81-1310(f) does not require that permanent disability benefits be awarded before a claimant can have vocational rehabilitation. Hampton & Crain v. Black, 34 Ark. App. 77, 806 S.W.2d 21 (1991). A request for vocational rehabilitation must be made prior to entry of a final order. Allen Canning Co. v. McReynolds, 5 Ark. App. 78, 632 S.W.2d 450 (1982). We note that the claimant worked with the vocational counselor to whom she had been referred by the respondent-carrier, but the

claimant's vocational rehabilitation file was closed in December 1997. The evidence therefore shows that the claimant was not successful in her attempt at vocational rehabilitation. If no rehabilitative evaluation is made, then the Commission has no way of knowing whether the employee could have been retrained. Smelser v. S.H. & J. Drilling Corp., 267 Ark. 996, 393 S.W.2d 61 (Ark. App. 1980). The Full Commission affirms the administrative law judge's finding that the claimant was entitled to the vocational rehabilitation program provided her by the respondents.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant failed to prove she sustained a compensable neck or cervical spine injury. The Full Commission finds that the claimant proved she was permanently and totally disabled, and that the Second Injury Fund is liable for the claimant's permanent total disability. We find that the claimant proved she was entitled to temporary total disability compensation from January 27, 1986 through February 27, 1991, and from April 29, 1993 through September 9, 1994. We find that treatment for the claimant's back and heart condition was reasonably

necessary for treatment of the injury received by the claimant. We find that the claimant proved she was entitled to the vocational rehabilitation program provided her by the respondents. The Full Commission therefore affirms, as modified, the opinion of the administrative law judge. The claimant's attorney is entitled to the maximum fee for legal services, pursuant to Ark. Stat. Ann. § 81-1332 (Repl. 1976). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of One Hundred Dollars (\$100), pursuant to Ark. Stat. Ann. § 81-1332.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur with the findings in the principal opinion that claimant is permanently and totally disabled; that the Second Injury Fund is liable for permanent disability benefits; that Respondent No. 1 is liable for the expenses of all disputed services

provided or recommended for the compensable injury; that claimant is entitled to additional benefits for temporary total disability from January 27, 1986 to February 27, 1991 and from April 29, 1993 to September 9, 1994; and that Respondent No. 1 is liable for benefits related to claimant's efforts at vocational rehabilitation. However, I must respectfully dissent from the finding that claimant failed to prove by a preponderance of the evidence that she sustained a cervical injury. Additionally, I dissent from the failure to award benefits for temporary total disability during the entire time between the date of the injury and September 27, 1994.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority opinion. Specifically, I concur in the finding that the claimant failed to prove she

sustained a compensable cervical injury on January 27, 1986, the finding that the claimant was permanently and totally disabled, and the finding that the Second Injury Fund was liable for the permanency benefits. However, I must dissent from the finding that the claimant proved by a preponderance of the evidence that her heart surgery and the intra-theecal morphine pump are reasonable and necessary medical treatment and related to the claimant's compensable injury; the finding that the claimant was temporarily totally disabled for the periods January 27, 1986, through September 27, 1994; and the finding that the claimant is awarded rehabilitation benefits. In my opinion, the claimant has failed to meet her burden of proof on these issues.

My review of the evidence demonstrates that the claimant's first healing period ended on October 15, 1986. In a report from Dr. Wilson dated that same date, he stated: "I feel that this lady has a history of lumbosacral strain which is resolved." The claimant underwent a second healing period on October 10, 1989, when she underwent a one level anterior lumbar fusion. This healing period ended on February 27, 1991, when Dr.

Grimes noted that the fusion site was stable and solid and assessed the claimant with a 25% impairment rating. The claimant entered her third and final healing period when she was admitted for surgery for a non-union on April 29, 1993. This healing period ended on September 9, 1994. Therefore, in my opinion the claimant should only be awarded temporary total disability benefits for the following periods: January 27, 1986 to October 15, 1986; October 10, 1987, through February 27, 1991; and April 29, 1993, through September 9, 1994.

The majority found that the heart valve surgery the claimant underwent was reasonable and necessary medical treatment for treatment of her compensable back injury. The evidence demonstrates that Dr. Grimes was reluctant to proceed with the lumbar fusion until the claimant's valve replacement was performed. However, the preponderance of the evidence clearly establishes that the valve was not solely replaced so that the work-related condition could be addressed. Dr. Bissett testified as follows:

Q. And, Doctor, is it fair to say that the heart surgery that was performed in 1988, in other words the valve replacement, was

something that would have been required whether or not [sic] she would have undergone this -

A. I think that's fair.

Q. Just so I can finish the question for the record - - in other words she would have required the valve replacement in 1988 whether or not she had had the back injury in '86?

A. I think so.

Q. In other words, they are two totally separate problems medically; is that correct?

A. That would be my interpretation.

Additionally, Dr. Bissett even challenged the notion that the heart valve surgery was a necessary pre-condition to the low back surgery, stating:

Q. Again, I know that in some of the records there's an indication that when it was discovered by her orthopedic surgeon that she had an aortic valve stenosis problem, they wanted to get that problem corrected before they did any surgery. And that's always a good idea, I assume; is it not?

A. I'm not sure about that. The answer to your question is I don't know. That comes up - that type of thing comes up frequently. And I, for better or worse, usually have taken the other view.

There is certainly no indication that the work-related injury caused or aggravated the heart problem, and there is no evidence indicating that the low back

surgery was the sole cause of the need for the heart surgery in 1988. Accordingly, I must dissent from the majority's award of benefits.

The majority has also awarded medical treatment by Dr. Ketchum. In my opinion, the evidence demonstrates that the intra-thecal morphine pump recommended by Dr. Ketchum is not reasonable and necessary medical treatment. Dr. Ketchum acknowledged that this procedure required the claimant to quit taking Coumadin which she takes for her heart problems. The record contains no opinion from the claimant's heart doctors giving clearance for the claimant to stop the Coumadin. It remains unproven that the recommended treatment of the intra-thecal morphine pump is reasonable treatment, in the absence of a report from the claimant's cardiologist approving the cessation of the Coumadin. The claimant has not proven that the intra-thecal morphine pump and the spinal cord stimulator are safe, reasonable, and necessary forms of treatment. It very well may be that the claimant obtained cardiac clearance, but this is speculative at this point in time since the claimant did not present evidence that these procedures were

reasonable and necessary treatment. Furthermore, Dr. Rutherford has recommended against the morphine pump. He stated:

I do not share Dr. Ketchum's enthusiasm or optimism pertaining to the potential efficacy of a morphine pump related to either pain control or improved functional status. The available clinical data suggests that operant diagnoses to be personality disorder, somatization disorder, prescription drug dependency/abuse and failed back syndrome.

The claimant's cardiac physician has not made a recommendation that it is advisable for the claimant to go off Coumadin and the claimant must get off the Coumadin medication before she would be able to undergo this procedure. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that the intra-theal morphine pump is reasonable and necessary medical treatment.

I also must dissent from the award of rehabilitation benefits. The claimant presented evidence that she took rehabilitation-oriented courses in the 1990s. Respondent No. 1 never approved these courses. Despite the fact that the respondents never agreed to

these courses, the claimant proceeded to undergo vocational courses in 1987 and in 1994.

Given the 1986, date of injury, her claim for rehabilitation benefits is governed by Section 10(f) of the Workers' Compensation Act, which provides:

Rehabilitation. In addition to benefits otherwise provided for by this Act, an employee who is entitled to receive compensation benefits for permanent disability shall be paid reasonable expenses of travel and maintenance and other necessary cost of a program of vocational rehabilitation, if the Commission finds that such program is reasonable in relation to the disability sustained by such employee. The employer's responsibility for said additional payment shall not exceed 60 weeks, regardless of the length of the program requested. The employee shall not be required to enter any program of vocational rehabilitation against his consent. A requests for such program if elected by the claimant, must be filed with the Commission prior to a determination of the amount of permanent disability benefits payable to such employee

The claimant did not follow the proper procedures for seeking rehabilitation benefits. The requirement that the Commission must find that the program is reasonable in relation to the disability sustained by the employee is retained under Ark. Code Ann. § 11-9-505. Thus, for both the 1987 rehabilitation course, and

the 1994 rehabilitation course, the claimant has waived her right to obtain Workers' Compensation benefits for these programs. It was incumbent upon the claimant to petition the Commission for approval of these programs prior to incurring the costs of the programs and she failed to do so. Additionally, it is rather inconsistent for the Administrative Law Judge to require respondent no. 1 to pay for rehabilitation benefits in a case in which he has found the claimant to be permanently and totally disabled, and the Commission is reminded that the claimant was approved for Social Security disability in 1988. The Commission must first determine that the claimant is a candidate for rehabilitation before it approves a disability program. Coosenberry v. McCruskey Sheet Metal, 6 Ark. App. 177, 639 S.W.2d 518 (1982). Accordingly, I find that the claimant failed to prove by a preponderance of the evidence that she is entitled to reimbursement for the rehabilitation courses she underwent in the 1990s. The respondents never agreed to these courses and the claimant failed to follow the proper procedures for seeking rehabilitation benefits.

Therefore, for all the reasons set forth herein I respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner