

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F010619 & F204234

JOAN BOYD, EMPLOYEE	CLAIMANT
ST. BERNARD'S MEDICAL CENTER, A SELF INSURED EMPLOYER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

**OPINION FILED JULY 11, 2006**

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

Claimant represented by HONORABLE KRISTOFER E. RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 and Respondent No. 2 appeal a decision of the Administrative Law Judge filed on May 31, 2005, and an Amended decision of the Administrative Law Judge filed June 6, 2005. More specifically, respondent

No. 1 appeals that portion of the Administrative Law Judge's opinion finding that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits, for which it is liable. Respondent No. 2, the Second Injury Fund, appeals that portion of the Administrative Law Judge's opinion finding that the claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled as a result of her compensable back injury of March 12, 2002, and that this incident constitutes the major cause of her functional disability. Rather, the Second Injury Fund contends that the claimant has failed to prove by a preponderance of the evidence that she is totally and permanently disabled. In addition, the Second Injury Fund contends that the claimant's compensable injury of March 12, 2002, does not constitute the major cause of her functional disability, and that she is, therefore, not entitled to any amount of functional disability benefits based thereupon. Finally, the Second Injury Fund contends that the claimant's failure to cooperate in vocational rehabilitation and/or job

placement efforts eliminates her from entitlement to functional disability benefits, and, that the Second Injury Fund is not liable for the claimant's functional disability under the facts of this case. Respondent No. 3, the Death And Permanent Total Disability Trust Fund, does not appeal.

Our carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled as a result of her compensable injury of March 12, 2002. Moreover, the record reveals that the claimant has failed to meet her burden of proving that she is entitled to additional temporary total disability benefits as awarded. Further, although the record demonstrates that the claimant's compensable injury of March of 2002, resulted in a degree of permanent partial physical impairment, the claimant has failed to establish that this injury is the major cause of any permanent functional disability which she currently claims. Moreover, the claimant has failed to prove by a preponderance of the evidence that she is entitled to functional disability

benefits due to her failure to cooperate in rehabilitation and/or job placement efforts. Therefore, the decision of the Administrative Law Judge should be reversed in its entirety.

During the hearing of March 3, 2005, it was stipulated that the claimant sustained a compensable injury to her back on June 12, 2000, while employed with the respondent employer which resulted in a 10% permanent physical impairment to the body as a whole. It was further stipulated that the claimant suffered a subsequent back injury on March 12, 2002, which resulted in a 7% permanent physical impairment to the body as a whole. The claimant's compensation rates were also stipulated to by the parties.

The record reveals that the two aforementioned injuries were the last of several sustained by the claimant over a period spanning a decade. Essentially, the chronology of the claimant's prior back injuries and ensuing treatment is as follows.

First, the claimant, a registered nurse, allegedly injured her back on July 13, 1992, while lifting a patient. Diagnostic studies conducted in August of 1992, revealed

that the claimant had a small paracentral disc herniation at L4-L5 along the lateral recess with stenosis bilaterally, and a small broad-based herniation at L5-S1 on the left. The claimant was taken off work for six weeks, and referred to physical therapy. On October 22, 1992, the claimant's treating physician, Dr. Kenneth Tonymon, restricted the claimant to light duty and instructed her to avoid any heavy lifting. The claimant was not considered to be a candidate for surgery at that time.

On March 19, 1993, a report from St. Bernard's Medical Center reflects that the claimant had been participating in her physical therapy with "good results", and had returned to work within her restrictions. She still complained, however, of intermittent right lumbar pain and occasional sharp pains into her lower extremities with increased activities. The claimant was referred for additional physical therapy, home stretching exercises, and "backschool". The record is devoid of medical evidence showing that the claimant received further treatment for her back after April 19, 1993, until October 15, 1996.

On October 15, 1996, a lumbar spine CT showed a broad-based bulge compressing the thecal sac at L3-L4. This study also confirmed the previously diagnosed paracentral herniated disc at L4-L5, and the broad based bulge L5-S1, which slightly flattened the S1 nerve root. Otherwise, this study showed no significant changes in the claimant's lumbar spine as compared to her previous CT scan of 1992.

In his report dated December 12, 1996, Dr. Tonymon explained that the claimant had reportedly injured herself while doing a dressing change on a patient. Dr. Tonymon explained as follows:

She felt a pop in her right sacroiliac region with progression into the anterior thigh across to the anterior tibial surface onto the top of the foot.  
(Emphasis added)

Based upon his examination and the results of the recent CT scan, Dr. Tonymon suspected that the claimant suffered from "L3 radiculopathy". Therefore, Dr. Tonymon took the claimant off work and ordered further testing. A lumbar CT disc interspace exam conducted on December 13, 1996, revealed normal findings, in that it showed no spinal

canal and neuroforamina abnormalities, and no disc herniations or significant bone spurs. Pursuant to these findings, Dr. Tonymon continued the claimant off work for one week, placed the claimant back in physical therapy, prescribed her a TENS unit for her right sacroiliac region, and recommended that she use an OBJS Form lumbar support cushion for all seated activities. Furthermore, upon her return to work, Dr. Tonymon placed the claimant on work restrictions which consisted of no lifting, no "on call" duty, and daytime shifts only. A subsequent bone scan, which was conducted on December 30, 1996, returned with negative findings. Although the claimant was reportedly "doing better" as of her January 30, 1997, follow-up appointment with Dr. Tonymon, he excused the claimant from on-call duty for an additional six weeks, and he encouraged her to "really get back with exercises to strengthen her back".

On February 2, 1997, the claimant was seen by her general practitioner, Dr. Donald Guinn, after she had been involved in a motor vehicle accident a week earlier. At that

time she reported pain in her shoulder, as well as having frequent migraine headaches.

In June of 1997, the claimant reported to Dr. Guinn that she had been experiencing pain over her right sacroiliac region. However, the claimant could not recall a specific incident or injury that might have precipitated this alleged new onset of pain. The claimant continued under the treatment of Dr. Guinn for the remainder of 1997 and well into 1998 for other, unrelated health problems.

By the time of her June and July 1998 appointments with Dr. Guinn, the claimant was reporting right flank pain and she was ambulating with a cane. In September of 1998, the claimant returned to Dr. Guinn with complaints of severe left leg pain. An MRI conducted on September 25, 1998, demonstrated bulging in the claimant's lumbar spine at L4-L5 on the right, and at L5-S1 on the left with disc material abutting the S1 nerve root on the right. These findings were consistent with the findings of the previously mentioned diagnostic studies conducted in 1992 and 1996. The claimant was referred to Dr. Steve Swyden for further evaluation.

On October 1, 1998, the claimant presented to Dr. Swyden with complaints of low back pain radiating into her left buttocks and lower left leg, pain in her left ankle and little toe, and left thigh and calf pain. Dr. Swyden assessed the claimant with sacroiliac joint pain, and prescribed her several medications. In his initial narrative report, Dr. Swyden stated that the claimant reported having experienced back pain on September 19, 1998, after working with a patient and leaning over a bed. Dr. Swyden added, "She had no history of injury, but felt sore in the lower back after this incident." Dr. Swyden restricted the claimant from lifting over five pounds, and from certain activities such as stooping, crawling, climbing, bending, prolonged sitting or driving. By the time of her follow-up appointment on October 15, 1998, the claimant reported to Dr. Swyden that she had developed mid-back and left hip pain. On October 19, 1998, the claimant reported tingling in her left leg down to her foot, and on November 11, 1998, she reported persistent mid-back pain, which she attributed to sitting all day while training on a laptop computer at work.

In response to the claimant's persistent and worsening symptoms, Dr. Swyden continued the claimant on a conservative course of treatment, which included physical therapy. However, in a discharge report from St. Bernard's Rehabilitation Services dated November 12, 1998, the claimant's physical therapist wrote that the claimant had been discharged from therapy due to non-compliance. He further wrote:

Symptoms have improved some since initial evaluation; however, progress has been limited and this is due in part to patient's non-compliance with pain management technique and HEP. Physical therapist has discussed compliance twice with patient. Patient discontinued physical therapy following appointment on 11/12/98.

On December 12, 1998, Dr. Swyden discharged the claimant from his care, and referred her back to Dr. Tonymon for evaluation. On the 18<sup>th</sup> of December, 1998, the claimant was complaining of pain in her T-spine, for which she requested an MRI. On December 21, 1998, the claimant alleged to Dr. Corey Diamond that she had been injured by her

physical therapist. The claimant repeated this allegation to Dr. Tonymon during her examination by him on March 30, 1999.

An MRI of the claimant's thoracic spine taken on April 2, 1999, revealed a disc protrusion with impingement on the nerve root at T6-T7. Otherwise, this study was unremarkable. As of her April 7, 1999, appointment with Dr. Tonymon, the claimant complained of left anterior thigh pain extending into her knee, for which Dr. Tonymon could find no plausible explanation. Dr. Tonymon referred the claimant for an evaluation by pain management specialist, Dr. Mark Hackbarth. Further, seeing no surgical indications from her condition, Dr. Tonymon released the claimant from routine follow-up care with him.

Dr. Hackbarth examined the claimant and placed her on Decadron. The claimant returned to Dr. Guinn in May of 1999, who continued to treat her for unrelated health conditions for the following year. Then on May 4, 2000, Dr. Guinn reported a "new problem", specifically, her thoracic spine. Suspecting that the claimant may have a thoracic fracture due to her reported symptoms, which

included pinching in the left hip/thigh region, cramping in her left calf, burning and tingling in her left toes, and left low back pain, he recommended that she may need a bone scan.

The claimant received interim care through the Employee Wellness Clinic at St. Bernards. Then on August 28, 2000, the claimant presented to Dr. Michael Lack, for complaints associated primarily with her right side. At that time, the claimant reported to Dr. Lack that her right leg was occasionally giving way, and that she was experiencing pain in her right thigh. X-rays of the claimant's lumbar spine showed mild narrowing at L5-S1 compatible with mild degenerative disc disease. By September of 2000, the claimant was reportedly again using a cane with which to ambulate around her house, she complained of left foot numbness, and she rated her pain as "10 out of 10".

An MRI of the claimant's lumbar spine taken on September 7, 2000, showed a chronic hard disc herniation at L5-S1 on the left, with some compression of the left SI nerve root, which was consistent with previous findings. On

September 12, 2000, Dr. Lack restricted the claimant to a "sitting job only", with a five pound lifting restriction, and no stooping, bending, or crawling. Subsequently, a therapy discharge report from St. Bernard's Rehabilitative Services dated September 15, 2000, reveals that, although the claimant's physical therapy treatment was apparently helping, the claimant refused to reschedule pending Dr. Tonymon's approval.

On September 20, 2000, The claimant returned to Dr. Tonymon, who assessed her with a left sacroiliac strain in addition to her herniated disc at L5-S1. Dr. Tonymon took the claimant off work for six weeks, pending her return appointment. In the meantime, the claimant received a steroid injection, which was reportedly not successful in alleviating her pain. On November 9, 2000, Dr. Tonymon issued the claimant a return to work slip with restrictions.

The claimant's symptoms did not subside, and on January 25, 2001, she underwent a discectomy at L5-S1 by Dr. Tonymon. Follow up reports from this procedure indicate that it was unsuccessful in alleviating the claimant's

plethora of symptoms. An MRI Of the claimant's lumbar spine taken on April 16, 2001, revealed soft tissue density at the L4-L5 and S1 levels, consistent with scar tissue. Otherwise, the findings from this study were normal. The claimant underwent additional physical therapy, and she remained off work until July 4, 2001. However, she had not been released by Dr. Tonymon at that time to return to work.

On August 2, 2001, the claimant was seen by pain specialist, Dr. Calvin Savu, who strengthened her pain medications to include a low dose of methadone. In spite of injections administered by Dr. Savu, the claimant continued to complain to her treating physicians of her pre-surgery symptoms. Seeing no "objective reason" to keep her from working, Dr. Tonymon did not take the claimant off work.

As of her October 22, 2001, appointment with Dr. Terence P. Braden, III, the claimant informed Dr. Braden that she was experiencing low back and left lower extremity pain, and that she had realized no improvement as a result of her January 25, 2001, surgery. At that time, Dr. Braden stated that the claimant's left arm symptomatology did not

correlate with her area of described mid-thoracic pain. Indicating that "multiple psychological stresses" were contributing to the claimant's condition, Dr. Braden recommended that she be seen by Dr. Dixon of the Psychology Department.

On November 7, 2001, an MRI of the claimant's lumbar spine revealed post-operative changes, with no recurrent bulging disc or other abnormalities. A clinic note dated November 12, 2001, reveals that the claimant discussed with Dr. Tonymon her alleged inability to return to work, and the possibility of her seeking disability benefits. Having nothing further to offer the claimant from a surgical standpoint, Dr. Tonymon released her from his care. On January 24, 2002, Dr. Tonymon assessed the claimant with a 10% permanent partial impairment rating to the body as a whole as a result of her June 2001 injury.

Some 6 weeks later, on March 12, 2002, the claimant allegedly re-injured her back while lifting a patient. The claimant was seen the following day by Dr. Lack, who diagnosed her with a lumbar sprain/strain. A

clinic note from that examination reflects that the claimant could not remember a specific time or incident that caused her alleged injury. Rather, the claimant informed Dr. Lack that her pain had not been severe enough to seek immediate medical attention, so she continued to work her shift. In slight contradiction, later that day the claimant informed staff at the Employee Wellness Center that she had hurt herself at around 6:00 p.m. on the evening of March 12<sup>th</sup>, but experienced no pain from the incident until she got into her van to go home after her shift had ended. Further, Dr. Lack's clinic note of March 14, 2002, reflects that, "after she had some rest", the claimant remembered that her pain commenced at around 9:00 p.m. on the evening of March 12, 2002. At any rate, suspecting that the incident might have exacerbated her previous condition, Dr. Lack continued the claimant on her previous restrictions and he referred her for physical therapy. The claimant failed to appear for six of her scheduled PT sessions, despite the fact that she had been accommodated in her request that her PT be transferred to a nearby Blytheville facility.

On March 25, 2002, the claimant presented to Dr. Guinn with pain into her right leg, and tingling in her right heel. A lumbar CT conducted on March 26, 2002, revealed degenerative disc disease and some post-operative scarring, but nothing acute. On April 1, 2002, the claimant was examined by Dr. A. Roy Tyrer, Jr., who in his report of that examination opined that the claimant was suffering from a lumbar strain superimposed on lumbar spondylosis with recurring exacerbations of chronic lumbar pain. In addition, Dr. Tyrer noted that the claimant was in a remote post-operative status at L5 on the left, with failed back syndrome. Dr. Tyrer took the claimant off work. Subsequently, a lumbar MRI conducted on April 4, 2002, showed that the claimant's condition was unchanged from her previous MRI of November 2001. In addition, an EMG/NCS study conducted on April 8, 2002, showed normal findings regarding the claimant's right lower extremities, with abnormal findings on the left consisting of S1 radiculopathy into the left calf muscle with no evidence of nerve root entrapment.

In his clinic note dated April 15, 2002, Dr. Tyrer stated the following:

IMPRESSION: Post-operative status at L5-S1, left, with minor residual left leg radiculopathy.

I have reassured this lady that I do not think significant additional injury was sustained on March 12, 2002, when she helped move a patient and noted increased back pain with some associated right leg pain. Her present condition seems to be plateaued and comparable to her prior post-operative status before March 12 back strain. I see nothing to suggest that further surgery is indicated or would likely be beneficial and the patient is not at all inclined to consider further surgery.

Since surgery was not being considered at that time, Dr. Tyrer saw no need for a repeat myelogram. Further, Dr. Tyrer cut the claimant back to one Flexiril per day at bedtime and he continued her on her current physical restrictions. In addition, Dr. Tyrer stated that he saw "no contradiction to her returning to light work like she was doing prior to March 12, 2002", although he added that "I think presently she is giving some consideration to not returning to nursing". Finally, Dr. Tyrer concurred with the

claimant's previously assigned 10% physical impairment rating, and he opined that she had reached maximum medical improvement from her March 12, 2002 injury.

The claimant returned to Dr. Tonymon on July 2, 2002. Suspecting that her right-sided herniation at L4-L5 was the root cause of the claimant's sciatica, Dr. Tonymon ordered that she be treated with a series of steroid injections at that level, again under the direction of Dr. Savu. Stating to Dr. Tonymon that the injections she received from Dr. Savu "made her sore" and were of no benefit, the claimant declined to return to Dr. Savu. As of December 10, 2002, the claimant was reporting more left leg pain than right leg pain. At that time the claimant was on "special leave" from work until February 25, 2003, per Dr. Guinn, who continued to treat her for other problems which were unrelated to her compensable injury, including depression, heart problems, and migraines. On January 15, 2003, Dr. Guinn opined that the claimant was physically capable of participating in a functional capacity evaluation.

Two years later, on January 12, 2005, Ms. Edie Nichols performed a vocational rehabilitation evaluation of the claimant, which revealed that the claimant is capable of returning to work in a light to sedentary type position. Ms. Nichols testified during the hearing of March 3, 2005, that her labor market search conducted on the claimant's behalf resulted in her finding several suitable employment opportunities for the claimant, including an opening for a utilization review nurse. Ms. Nichols admitted that the claimant told her that she "loved nursing", but that she did not feel she was physically capable of returning to it. Further, Ms. Nichols stated that she stood ready to assist the claimant in a future effort to obtain suitable employment. Finally, Ms. Nichols agreed that the claimant should only pursue employment in the sedentary to light category.

It is undisputed that the claimant has sustained some degree of permanent physical impairment as a result of her multiple back injuries. As previously stated, it was stipulated that the claimant sustained 10% permanent partial

physical impairment as a result of her compensable injury of June 12, 2000. It was further stipulated that the claimant sustained 7% permanent partial physical impairment as a result of her compensable injury of March 12, 2002. Under our Workers' Compensation laws and cases interpreting that law, an employee must prove by a preponderance of the evidence that she sustained some degree of permanent anatomical impairment as a result of her compensable injury before she can show entitlement to wage loss benefits in excess of her permanent physical impairment. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998); Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). Moreover, if the employee is totally incapacitated from earning a livelihood at that time, she is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the

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

Moreover, so long as an employee, subsequent to her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident, she shall

not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b) (2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c) (1). The purpose and intent of this is to prohibit workers' compensation from becoming a retirement supplement. Id. at (f) (2).

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

Finally, Ark. Code Ann. §11-9-102(4) (F) (ii) (a) (Repl. 2002) provides that permanent benefits shall be awarded only upon a determination that the

compensable injury was the major cause of the disability or impairment. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002). Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999). Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996); McKinney v. Plastics Research and Development, Full Commission Opinion filed Nov. 10, 2004 (E901881).

In the present claim, although it is stipulated by respondent No. 1 that the claimant sustained permanent

partial physical impairments due to her compensable injuries of June 2000, and March 2002, she has failed to prove by a preponderance of the evidence that she is totally and permanently disabled as a result of either of those injuries, or as a result of those injuries combined. The record, which includes 380 pages of medical records in respondent No. 1's medical exhibit alone, is devoid of any evidence that the claimant is, or has been determined to be, currently totally unable to work. On the contrary, the record reveals that, although the claimant has been given some permanent physical restrictions, none of her treating physicians have permanently restricted her from returning to work or engaging in employment activities. For example, in mid-April of 2002, Dr. Tyrer stated that he saw "no contradiction to her returning to light work like she was doing prior to March 12, 2002", although he added that "I think presently she is giving some consideration to not returning to nursing". For the claimant to suggest to Dr. Tyrer a month after her last compensable injury that she was considering not returning to the profession that she

told Ms. Nichols she "loves", weighs heavily against the present proposition that the claimant is motivated to return to employment, particularly in the nursing field wherein she is most skilled. Moreover, on May 30, 2002, some two months after her latest injury, the claimant indicated to Dr. Guinn that she was seeking social security disability benefits at that time. And, as previously mentioned, the claimant indicated to Dr. Tonymon prior to her March 2002 compensable injury that she intended to seek social security disability benefits. The claimant was finally awarded those benefits in June of 2004.

Further, that the claimant was unable to return to work is contrary to evidence contained within the record. For example, in his clinic note dated October 31, 2002, which was 5 months after the claimant's March 2002 compensable injury, pain specialist, Dr. Savu stated:

In my opinion, the claimant will only benefit from an active lifestyle with necessary restrictions to prevent her from further injuring her back. Nevertheless, activity has been proven to be more beneficial in the long run for all patients in her situation. She will be prohibited from lifting weights

over 20 pounds as well as from repetitive twisting, turning, and bending. If she encounters any significant difficulties it would probably signal the need for targeted work-hardening exercises. I do not see any clear indication to recommend a complete rest for this patient at this time. (Emphasis added)

As previously mentioned, Dr. Tonymon indicated in his report dated December 10, 2002, that the claimant advised him that she declined to see Dr. Savu for further treatment. In addition, also as previously mentioned, the claimant indicated to Dr. Tonymon that she was not planning on returning to full time nursing. There is no evidence, however, that Dr. Tonymon restricted the claimant from working at that time. Rather, the record reflects that Dr. Tonymon noted that Dr. Guinn, who was simultaneously treating the claimant for irritable colon, heart problems, migraines, and depression problems during that time, had taken the claimant off work on "special leave" until February of 2003.

Based upon the claimant's multiple statements to her treating physicians throughout the course of her

treatment, even prior to her 2002 injury, it is apparent that the claimant had decided well before the end of her healing period for her March 2002 injury, that she would not return to nursing. This draws reasonable minds to the obvious conclusion that the claimant lacked a strong motivation to return to work subsequent to her latest injury well before she was fully recovered.

The claimant was 50 years old at the time of her hearing. As for her educational background, the claimant testified that she had completed a two year nursing program in order to obtain her RN license, and that she keeps that license current, which requires participating in continuing education. The record shows that the claimant has worked primarily in the nursing field, and Ms. Nichols has indicated that the claimant has many skills within that realm that would easily transfer to a sedentary type position. Although Ms. Nichols was uncertain whether any of the nursing positions about which she has contacted the claimant pay as well as the position she held at the time of her latest compensable injury, the record reveals that the

claimant took a part time nursing position with another facility prior to her having quit working altogether, which actually paid more per hour than her previous position with the respondent employer. This position, which was as a medications assessment RN for Arkansas Methodist Hospital, allowed the claimant to work as many hours as she wanted whenever she wanted. However, the claimant testified that she could work at this job no more than two eight hour shifts per month due to her physical limitations. The claimant testified that she began her employment with Arkansas Methodist in April of 2003, and she quit the following January due to her alleged back pain.

According to the record, the respondent employer offered the claimant positions within her restrictions on two separate occasions. Patient Care Manager for the respondent employer, Ms. Zepha Mattiace, testified concerning the first of these positions as follows:

Q. At some point in March of 2002, did you receive a note from Dr. Lack indicating what [the claimant's] work restrictions were?

A. Yes, we did received (sic) a HR and myself as manager did receive the restrictions from Dr. Lack.

Q. Did you offer a positions to Ms. Boyd to come back to work in 3East, under those restrictions?

A. Yes, I did.

Stating further that she had communicated with the claimant by letter concerning this position, Ms. Mattiace testified....

Q. Okay. When you made this offer to her, what kind of position were you offering to her?

A. What we do is try to look at the individual restrictions to see what we can offer them when they return. So, when they return we sit down and go over each duty that they are allowed to do based on the restrictions.

Q. Was she [the claimant] going to come back as an RN in some type of light duty capacity?

A. Yes.

Q. What would her pay, or rate of pay be, or what did you contemplate her pay to be back on when you sent her this letter on March 28<sup>th</sup>, of 2002?

A. It would be the same that she had prior to that.

Q. And, I think you heard her testify here today that it was twenty two dollars and some change, would that have continued to be the rate of pay as of March 28, 2002?

A. Yes.

Although the claimant had originally indicated that the first job offer paid only around \$7.00 per hour, she finally conceded that when she eventually accepted this offer a year later, she received her same pre-injury pay. The claimant testified that she worked in this first modified position for a total of 27 ½ hours. In the meantime, on November 21, 2002, the respondent had again offered the claimant re-employment within her restrictions. The claimant agreed that she never responded to this second offer.

Then in April of 2003, the claimant accepted the above described position with Arkansas Methodist Hospital. In April of 2004, the claimant stopped working altogether, and the following June began receiving social security

disability benefits. The claimant admitted that she could not have received SSI benefits had she continued working. Further, the claimant admitted that during her social security disability hearing, in addition to her back pain she cited migraine headaches, degenerative cervical disc disease, mitro valve prolapse, hypertension, and hypoglycemia as among the medical reasons why she could no longer work. Finally, the claimant admitted that because she now receives social security disability benefits, she has no intentions of working.

The claimant agreed that she failed to follow-up with any of the job opportunities that Ms. Nichols found for her. Her excuse for not following up with these job opportunities was that they were full-time positions, and that she is physically incapable of working full-time. More specifically, the claimant testified, "... There's no use to apply if you can't do the work ... ". However, the claimant admitted that she plans to babysit her infant granddaughter while her daughter works full-time. The claimant further admitted that she is capable of making the one hour drive to

her mother's home in Pochantos, that she takes periodic trips to Branson, and that she has been camping since she allegedly became totally disabled to work. Among other things, her current activities include daily visits with her grandchildren who live "right across the street", doing household chores, and occasional grocery shopping.

Based upon the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled as a result of her compensable injury of March 2002. Aside from her own self-serving declarations, there is simply no objective medical proof presented in this claim that substantiates that the claimant is unable to work in a sedentary position.

Certainly, if the claimant considers herself physically capable of babysitting an infant forty hours per week, she is capable of less demanding tasks as would be required of her in a sedentary position. Moreover, the claimant drives, takes vacations, does housework, and plays with her grandchildren on a daily basis. Surely, then, if she is capable of performing these types of personal activities,

the claimant is just as capable of performing similar work activities. Finally, based upon the claimant's age, level of skills and abilities, and other factors, the record demonstrates that the claimant is a good candidate to find gainful employment within her restrictions at the same or even higher wages than she earned at the time of her March 2002 compensable injury. This is clearly demonstrated by the fact that after the claimant's compensable injury of March 2002, she not only received 2 bona fide offers by the respondent employer for employment within her restrictions at the same rate of pay, she actually accepted work within her restrictions elsewhere for a higher rate of pay. However, the claimant has expressed through her actions - more particularly by applying for social security disability benefits during the time that she was still recovering from her last injury, and by not accepting and/or following up on bona fide job offerings within her restrictions - that she has no real motivation to return to work. That the claimant lacks motivation is reinforced by her statements to several physicians that she was considering not returning to

nursing, but instead, planning on pursuing social security disability benefits.

As an issue in point, the Second Injury Fund challenges the validity of the claimant's 7% impairment rating, and thus her entitlement to any functional disability benefits. More specifically, the Fund charges that the claimant has failed to prove that her compensable injury of March 2002 resulted in permanent anatomical impairment, and that she is therefore, not entitled to functional disability benefits. The Fund asserts that by stipulating that the respondents have accepted and paid a 7% rating for the March 12, 2002, injury, the Fund was not agreeing that this injury resulted in permanent partial physical impairment. Further, the Fund states that the claimant's injury of March 12, 2002, resulted in a strain or soft tissue injury, which is not ratable. Although the Fund's argument has merit, respondents No. 1 have accepted that the claimant sustained 7% permanent physical impairment as a result of her back strain of March 2002, and benefits have been paid accordingly. Moreover, at the hearing on this

matter, the Fund agreed with the stipulations set forth by respondents No. 1 in their August 18, 2004, Pre-Hearing Questionnaire, said stipulations being incorporated into the record. A review of that questionnaire reveals that respondents No. 1 stipulated to a 7% permanent partial physical impairment as a result of the claimant's March 2002 injury. Therefore, for the purposes of this review, it appears that the claimant's 7% permanent partial physical impairment rating was stipulated by all of the parties.

However, for the above stated reasons, the claimant has not only failed to prove by a preponderance of the evidence that she is permanently and totally disabled as a result of her compensable injury, she has further failed to prove that she is entitled to wage loss benefits above her anatomical impairment. The claimant, subsequent to her injury, returned to work, obtained other employment, and was offered employment at wages equal to or greater than her average weekly wage at the time of the accident. In addition, the preponderance of the evidence reveals that the claimant unreasonably refused to cooperate in rehabilitation

and/or job placement efforts pursuant to Ark. Code Ann. 11-9-505(b)(3). Based upon the above and foregoing, the claimant is not entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Finally, respondents No. 1 appeal the Administrative Law Judge's award of temporary total disability benefits from March 13, 2002 through March 1, 2003. In order to be entitled to temporary total disability benefits, an injured worker must prove that she remained within her healing period and was totally incapacitated to earn wages. Arkansas State Highway Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 582 (1982). Moreover, persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated to earn wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The parties stipulated that the claimant reached maximum medical improvement for her compensable injury of March 2002 on July 17, 2003. Clearly,

therefore, the claimant remained within her healing period during that time for which she was awarded temporary total disability benefits by the Administrative Law Judge.

However, the claimant has failed to prove that she was totally incapacitated from earning wages during the time in question. In March of 2002, the claimant suffered an unscheduled injury to her back in the form of a strain.

Thereafter, the claimant consistently contended that she was physically unable to discharge employment duties. However, the record, particularly the medical evidence, does not support the claimant's contentions. For example, on March 14, 2002, Dr. Lack restricted the claimant to a "sitting job only" with certain other restrictions, but he did not restrict her from working altogether. Again on March 25, 2002, Dr. Guinn took the claimant off work for 10 days pending the outcome of a CT scan. Dr. Guinn informed the claimant that this test revealed some post-surgical scarring "with nothing acute". On March 28, 2002, the respondent employer offered the claimant a position within the restrictions imposed by Dr. Lack. A note from Dr. Tyrer

dated April 1, 2002, reflects that he continued the claimant off work for two weeks because she was "undergoing back studies [and] treatment". However, in his follow-up report of April 15, 2002, Dr. Tyrer stated that, based upon the outcome of recent EMG and MRI studies and his physical examination of the claimant, he saw "no contradiction" to her returning to light duty like she was prior to her March 12, 2002 injury. In addition, Dr. Tyrer opined that the claimant had "plateaued" in regards to her compensable back strain of March 2002, and he pronounced her to be a maximum medical improvement. In his assessment of the claimant on May 30, 2002, Dr. Guinn stated that the claimant was applying for social security disability, and that she was using her diagnosis of mitro valve prolapse as part of her "cause and concern about her heart disease." Dr. Guinn further stated that her disability would be dependent on Dr. Tonymon's assessment, which was scheduled for July 2, 2002. As of that appointment, Dr. Tonymon took the claimant off work pending her next appointment with him in 3-4 weeks. The claimant's next recorded visit with Dr. Tonymon was on

October 29, 2002, some three *months* after her last appointment. Dr. Tonymon continued the claimant off work for another 6 weeks following that appointment. However, on October 31, 2002, Dr. Savu stated that the claimant would benefit from an active lifestyle, and he saw no "clear indication to recommend complete rest" for the claimant at that time. Dr. Savu placed the claimant on a 20 pound lifting restriction, but did not specifically restrict her from working.

On November 21, 2002, the respondent employer again offered the claimant a suitable position within her restrictions, to which the claimant failed to respond. In a clinic note from December of 2002, Dr. Tonymon noted that the claimant had been placed on "special leave" until February 25, 2003, per Dr. Guinn. However, the record reveals that the claimant was being treated during that time for other serious health conditions not related to her compensable back injury, and the record is unclear as to which of the claimant's medical conditions prompted this action by Dr. Guinn. Further, as of January 15, 2003,

Dr. Guinn opined that the claimant was physically capable, at least in terms of her back condition, of undergoing an FCE study.

Clearly, the claimant was considering not returning to nursing, or to any other gainful employment, when she applied for social security disability benefits in May of 2002. And, with the exceptions of her brief stay in the position provided to her by the respondent employer, and her subsequent position with Methodist Hospital, she has not returned to gainful employment. Further, now that she is receiving social security disability income, she has expressed that she does not intend to return to work. Finally, the opinions of the claimant's treating physicians as to the claimant's ability to return to work during that time that she was awarded temporary total disability benefits are conflicting. More specifically, in April of 2002, Dr. Lack opined that the claimant could work with restrictions, in May of 2002 Dr. Tyrer saw no objective medical reason why the claimant could not return to light duty, and in October of that year, Dr. Savu opined that the

claimant should remain physically active. Drs. Tonymon and Guinn, on the other hand, were generous in providing the claimant with off work status due to her continuing complaints, and often while awaiting further diagnostic studies. These studies, however, consistently revealed that the claimant's physical condition, at least in terms of her back, had remained essentially unchanged since her surgery of 2001.

The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). In this case, the opinions of Dr. Lack, Tyrer, and Savu should be given more weight than the opinions of Dr. Tonymon and Guinn concerning the claimant's ability to work during the time in question. This is due, in part, because Dr. Guinn was also treating the claimant for other unrelated health problems during that time that were obviously affecting her overall ability to function. Based on the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that she

was totally incapacitated from working due to her compensable back injury of March 2002, during that time for which she has been awarded additional temporary total disability benefits. Therefore, these benefits should be denied.

Based upon the above and foregoing, the claimant has failed to prove that she is permanently and totally disabled, that she is entitled to wage loss benefits above her anatomical impairment rating, or that she is entitled to additional temporary total disability benefits. Accordingly, the decision of the Administrative Law Judge is hereby reversed.

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**

Based upon my de novo review of the record, I respectfully concur in part and dissent in part from the Majority's opinion reversing the Administrative Law Judge's June 6, 2005 opinion. I respectfully dissent from the Majority's opinion finding that the claimant is not entitled to the additional period of temporary total disability awarded by the Administrative Law Judge, and that she refused to participate in a program of vocational training or rehabilitation. While I concur with the Majority that the claimant has not established that she is permanently and totally disabled as a result of her compensable injury, it is my opinion that she is entitled to wage-loss disability benefits in an amount equal to 70% to the body as a whole.

\_\_\_\_\_The first issue is the claimant's entitlement to additional temporary total disability benefits. The parties stipulated that the claimant had not reached the end of her healing period for her most recent compensable injury until July 17, 2003. On two occasions prior to that date,

St. Bernard's sent the claimant a letter offering her an unspecified job. The first of these letters was dated March 28, 2002, from Zephia Mattiace advising the claimant that she could return to work at a job within the restrictions of Dr. Michael Lack. A second letter from Ms. Mattiace dated November 21, 2002, also offered the claimant a return to work, this time stating the job would be within the restrictions set out by Dr. Kenneth Tonymon. However, at the time both of these letter were sent out, the claimant was being treated by other physicians besides Drs. Lack and Tonymon for other conditions related to her injury. Specifically, the claimant was being seen by Dr. Michael Guinne and Dr. Calin Sadue. In a report dated March 25, 2002, Dr. Guinne had taken the claimant off work entirely. Further, even though St. Bernard's second letter stated that it was within the restrictions of Dr. Tonymon, Dr. Tonymon noted in a report dated December 10, 2002, that the claimant was off work per the instructions of Dr. Guinne until April 25, 2003.

The respondent asserts that the claimant is not entitled to temporary total disability benefits during the disputed period pursuant to Ark. Code Ann. §11-9-526. That statute provides, in essence, that if an injured employee refuses offered employment within his or her capacity, that claimant is not entitled to any compensation unless the refusal is justified. In this case, it is my opinion that the correspondence relied upon by the respondent does not constitute a valid job offer and, even if it did, I do not believe that any such job would have been within the claimant's capacity at the time the offer was made.

The correspondence from Ms. Mattiace does not specify what job the claimant was being offered or what the duties of this unspecified job would be. Further, when Ms. Mattiace testified at the hearing, she still was not able to provide any definitive answer as to what job the claimant was being provided. Ms. Mattiace merely reiterated that whatever the job would have been, it would be within her doctor's restrictions. In my opinion, such a vague and uncertain proposal is not a valid offer of employment.

Not only did St. Bernard's not offer the claimant a particular job, it is not entirely clear what restrictions the claimant was under at the time these letters were sent. Dr. Guinne had directed that the claimant remain off work a few days prior to the date of the first letter sent out by Ms. Mattiace. Likewise, at the time a second offer was made, the claimant was still being seen by various doctors for treatment of her compensable injury and, as noted by Dr. Tonymon, she was still off work through February 2003. The claimant also testified that during this time period her legs were unsteady and she physically had to sit in a recliner or another type of chair to keep her feet elevated and she was hampered by severe pain, stiffness, and general lack of mobility. Obviously, the claimant would not have been able to perform a regular, full-time job with her physical limitations.

Following her work release in late February 2003, the claimant returned to work for a short period of time with St. Bernard's in a light-duty, secretarial-type position. That action indicates that the claimant was not

malingering and was willing to return to work as soon as she was able. Unfortunately, she could not maintain her employment with St. Bernard's because of her pain and other physical limitations. Later, she returned to work for another employer in a full duty, but part-time position.

In my opinion, the Administrative Law Judge's conclusion that the claimant was totally disabled and within her healing period through March 1, 2003 is correct and should be affirmed. I, therefore, respectfully dissent from the Majority's opinion denying temporary total disability benefits.

The next issue is the amount of the claimant's permanent disability. The parties have stipulated that the claimant's compensable injuries resulted in permanent physical impairment in the amount of 10% and 7% to the body as a whole. The claimant asserts that the effects of her permanent impairment have rendered her permanently and totally disabled. However, it is my opinion that the claimant has failed to established that her injuries

rendered her permanently and totally disabled, given her educational background, training, and work experience.

During her employment with St. Bernard's, the claimant was a registered nurse with an Associate Degree in nursing. She had been employed continuously by St. Bernard's since 1989 as a nurse and had an income in excess of \$20.00 per hour. As the claimant described her duties, it included monitoring patients, evaluating their condition, and occasionally providing hands-on assistance to patients when necessary. These other duties required her to occasionally lift patients, as well as supervise nurses and maintain patient charts and hospital records. While this job required occasional lifting and considerable walking and standing, activities clearly beyond the claimant's ability, many of the duties and functions of a nurse in her position involved clerical or monitoring activities which were sedentary or very light. The claimant testified in her trial that it would be possible for a registered nurse to spend her entire shift performing only the lighter tasks.

However, I agree that it is unrealistic to assume that a nurse in her position would be able to entirely avoid the more physical aspects of her job. Consequently, I agree that it is not realistic to assume that the claimant, who has significant lifting restrictions and suffers from severe pain, could return to this type of job. On the other hand, it does appear that the claimant is still employable in the nursing profession. A functional capacity assessment the claimant underwent found that she was able to work in the light to sedentary category. I also note that Edie Nichols, a vocational expert retained by the respondent, indicated a number of light or sedentary jobs which would be available to the respondent using her nursing degree and background. Likewise, St. Bernard's indicated they would be willing to provide the claimant a job which would not require her to engage in any activities outside her physical restrictions. I also note that after her release by Dr. Guinne, the claimant returned to work with St. Bernard's and another hospital. The claimant testified that in April 2003, she went to work at the Arkansas Methodist Hospital, working

part-time. However, this job had been similar to the jobs she held at St. Bernard's and she was unable to maintain a full-time work schedule. Significantly, the claimant testified that the primary reason she stopped working was because of her pending Social Security claim.

While I believe that the claimant may have a degree of residual employability, I do note that all of the jobs highlighted for her by Ms. Mattiace, and the vocational assessment advised by Ms. Nichols, indicate that the claimant's wage rate would be significantly limited at the type of jobs she still might obtain. All of the jobs highlighted by Ms. Mattiace or Ms. Nichols are clerical-type positions and involve much lower pay rates than the claimant would be able to earn had she not suffered an on-the-job injury. The testimony from Ms. Mattiace and the vocational assessment from Ms. Nichols suggest that the types of jobs still available to her are in the range of \$7.00 to \$8.00 per hour. In contrast, the claimant's income at St. Bernard's and later at Arkansas Methodist Hospital suggest that her earning potential was in the range of

\$24.00 to \$25.00 per hour. Since her loss of income amounts to approximately 70% of her pre-injury potential, because of the claimant's job-related permanent impairment, in my opinion, she has sustained a wage loss disability in the amount of 70% to the body as a whole.

The remaining issue is whether Respondent No. 2, Second Injury Fund, would be liable for providing whatever permanent disability benefits the claimant is entitled to as a result of her wage-loss disability. Second Injury Fund liability is set out in Ark. Code Ann. §11-9-525. That section provides, among other things, that the Fund will provide a claimant any permanent disability benefits in excess of those for anatomical impairment under the following circumstances:

1. The claimant suffered a compensable injury resulting in permanent impairment;
2. Prior to the compensable injury the claimant had a preexisting permanent partial disability or impairment;
3. The current and preexisting disability or impairment combine to produce a claimant's current disability status.

In the present claim, there has been little or no evidence presented as to how the impairments from the claimant's compensable injuries combine to cause her current disability. While there is no doubt that the claimant's injuries in 2000 and 2002 both resulted in separate anatomical impairment ratings, her actual physical restrictions are essentially the same both before and after her injury in 2002. In fact, the claimant's restrictions from 2000 should have precluded a return to full-duty employment with the respondent. That conclusion is evidenced by the injury the claimant sustained in 2002 in which she was engaging in similar conduct that resulted in her 2000 injury. In short, it is my opinion, that the evidence establishes that the claimant, following her injury in March 2000, had the same limitations and restrictions that she was under following her 2002 injury. Therefore, I find that there is no combined effects of these two injuries and, consequently, there is no liability on the part of the Second Injury Fund.

In summary, it is my conclusion that the claimant established that she is entitled to additional temporary total disability benefits from March 12, 2002 to March 1, 2003. While it is my opinion that the claimant did not establish that she is permanently and totally disabled, I do find that she demonstrated that she has sustained wage-loss disability benefits in an amount equal to 70% to the body as a whole. Lastly, since I am finding that there is insufficient evidence to establish that the combined effects of the claimant's two injuries resulted in her current disability status, I do not believe that there is any liability on the part of Respondent No. 2, Second Injury Fund.

For the foregoing reasons, I respectfully concur in part and dissent in part from the Majority's opinion.

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SHELBY W. TURNER, Commissioner