

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203060

FELICIA TRAVIS,
EMPLOYEE

CLAIMANT

METHODIST NURSING HOME,
EMPLOYER

RESPONDENT NO. 1

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT DISABILITY
TRUST FUND

RESPONDENT NO. 2

SECOND INJURY FUND

RESPONDENT NO. 3

OPINION FILED JULY 7, 2006

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

Claimant represented by the HONORABLE EDDIE H. WALKER,
Jr., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL
WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE TERRY
PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and Respondents No. 1 cross appeal
an opinion and order of the Administrative Law Judge
filed December 1, 2005. In said order, the

Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The prior opinion is res judicata and the law of this case.
3. Respondent No. 1 has accepted 17 percent to the body as a whole.
4. The claimant's healing period ended on April 8, 2005.
5. The claimant is entitled to a weekly compensation rate of \$218.00 for temporary total disability and \$164.00 for permanent partial disability.
6. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
7. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss in the amount of 10 percent over and above her physical impairment rating of 17 percent. This would entitle the claimant to a total disability rating of 27 percent to the body as a whole.
8. There is no Second Injury Fund liability found in this matter.
9. Respondents No. 1 should pay this claimant wage loss in the amount of 10 percent over and above her impairment rating.
10. Respondents No. 1 have controverted this claimant's entitlement to wage loss.
11. The claimant's attorney is entitled to the maximum statutory attorney's fees based on the benefits awarded herein.

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

We therefore affirm the December 1, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl.

2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

The Majority is affirming and adopting a decision of an Administrative Law Judge finding that the claimant is only entitled to additional permanent disability benefits in an amount equal to 10% to the body as a whole. They are also affirming the Judge's determination that Respondent No. 3, Second Injury Fund, (Fund), has no liability for those benefits. While I concur with the Majority's finding that the Fund has no liability for any permanent disability benefits, I respectfully dissent from the finding that the claimant is not permanently and totally disabled.

The claimant sustained a severe job related injury to her lower back, the treatment of which required her to undergo two separate back surgeries and resulted in her having a spinal fusion from the L2 vertebra to the L5 vertebra. The claimant's treating physician who performed her lumbar surgery was Dr. Arthur Johnson, a Fort Smith neurosurgeon. Dr. Johnson opined that the claimant had sustained an anatomical impairment of 17% to her whole body as a result of her spinal injury and the resulting surgery. In addition, Dr. Johnson prepared a return to work form dated April 13, 2005, in which he outlined the claimant's physical restrictions. In that report, he indicated that during a work day, the claimant could not stand or sit more than two hours at any given time. He also indicated that she could not be expected to remain on her feet for more than two to four hours during the work day and limited her total work day to less than six hours. The form also stated that the claimant could do simple grasping but could not perform the tasks of pushing or pulling and could only occasionally bend, squat, or kneel and could not climb. He concluded his report by limiting her to sedentary work with a ten pound lifting maximum.

Prior to her injury, the claimant had been employed in the nursing home industry as a certified nursing assistant. According to the vocational assessment prepared by the respondent's expert, Ms. Tonya Owens, this type of work would be in the medium category. Also, as testified to by the claimant, she occasionally would be required to lift, or to assist in the lifting of very heavy patients and remain on her feet much of her shift. Her other prior jobs were in the fast food or convenience store industry. While she may retain some functional capacity to perform those types of jobs, as noted by her and Ms. Owens' vocational report, most of those jobs are in the medium category or require an employee to remain standing for a long time. The claimant's limitations obviously preclude her from returning to either type of employment.

The claimant testified that she has limited mobility and is in constant pain. As a result, she takes a variety of pain medication and her daily activities are limited. For ambulation, she usually relies upon the assistance of a cane or a motorized scooter. She explained that these aids are necessary since she still has problems with her legs "giving out" and causing her to fall without either a cane to steady herself or the scooter to support her.

In assessing the claimant's return to work possibilities, Ms. Owens stated that the claimant is only able to perform part-time employment. She likewise noted that the claimant's pain medication, which causes her to become drowsy and unable to focus on her work, would be an impediment to her finding employment. However, Ms. Owens was of the opinion that the primary problem the claimant had in returning to work was the claimant's belief that she was not physically capable of working. Under cross-examination, Ms. Owens also admitted that since employers were often looking for reliable employees, the claimant's inability to work a regular schedule and the fact that her pain medication made her drowsy and sometimes impaired her ability to function, could lower her abilities even in the flexible area of part-time employment.

The Majority is expressly adopting the Administrative Law Judge's findings and concluding that the claimant's wage loss disability only equals 10% to her body as a whole because, as stated by the Administrative Law Judge, "The claimant is intelligent, capable, well-spoken, and ... capable of being trained or educated to do work well within her physical limitations if she were motivated to do so." However, the Administrative Law Judge also noted that the

claimant's back problems did limit her activities and that the claimant had few transferrable job skills. While considering that the claimant has a high school education and is no longer physically capable of performing the job duties of the occupation in which she had been trained, the Judge stated that the claimant was fortunate in that she is intelligent, articulate, and young.

While it is certainly to the claimant's credit that she has a pleasant and attractive personality, it is indisputable that her injury has significantly limited her vocational ability and precludes her from all of her past employments. Further, the argument that the claimant's employability would be enhanced if she was retrained is, in my opinion, irrelevant since no such program of retraining or reeducation is being offered to her. The respondent and the Majority are merely speculating that, if the claimant underwent a program of reeducation or retraining, she would be more employable than she is now. However, I note that the claimant's education is limited to a high school diploma and, according to tests given to her by Ms. Owens during her vocational evaluation, the claimant's reading level is only at a high school level and her spelling and mathematic abilities are the equivalent to that of a

junior high student. Likewise, the claimant has no training or skills with computers, office equipment, or any other clerical or secretarial skills that might qualify her for more sedentary employment.

While the claimant may be articulate and personable, those traits do not substitute for being able to stand, walk, bend, or lift heavy objects. Since all of the claimant's past employment required her to do those things, it seems highly speculative to assume that her personality alone will somehow qualify her for jobs for which she has no training, experience, or the physical ability to perform.

In short, I believe the Majority has erred in its conclusion that the claimant is only entitled to wage loss disability in the amount of 10% to the body as whole. I find that her severe physical limitations, lack of transferrable job skills, and limited education preclude her from reentering the work force in any type of gainful employment. I believe the claimant has established her entitlement to permanent and total disability benefits and I, therefore, must respectfully dissent from the Majority's opinion.

SHELBY W. TURNER, Commissioner