

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E609015

CATHY L. WRIGHT, EMPLOYEE	CLAIMANT
MCMILLAN, TURNER, MCCORKLE & CURRY, EMPLOYER	RESPONDENT NO. 1
EMPLOYERS MUTUAL CASUALTY CO., INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED DECEMBER 15, 2006

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

Claimant represented by the HONORABLE GARY DAVIS,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD  
WORLEY, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal and claimant cross appeals an  
opinion and order of the Administrative Law Judge filed  
June 28, 2006. In said order, the Administrative Law  
Judge made the following findings of fact and  
conclusions of law:

1. There was a May 8, 1996, compensable  
injury.

2. The compensation rates are \$189/154.

3. Respondents No. 1 accepted a 10% permanent impairment rating.

4. Claimant's healing period ended on February 21, 2002.

5. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled but has shown by a preponderance of the evidence that she has sustained a 20% diminished wage loss disability above the 10% anatomical rating.

6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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 June 28, 2006 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the Majority's finding that the claimant is entitled to 20% in wage loss benefits. However, I find that the claimant is entitled to wage loss benefits in excess of 20%. Accordingly, I must respectfully dissent from their decision to deny the claimant additional wage loss benefits in excess of 20%.

The claimant was 53 years old at the time of the hearing. The claimant testified that she had work experience that was primarily clerical in nature. She testified that she has an 11<sup>th</sup> grade education, but completed approximately 20 college hours related to the business/secretarial field. The claimant testified that she has worked her entire adult life, with a brief two-year period where she stayed home with her children. The claimant further testified that even during that time period she worked sporadically and on a part-time basis.

The claimant worked for the respondents as a secretary. Her job duties included answering the phone, preparing documents, filing documents, and lifting

boxes. The claimant injured herself on May 8, 1996, when she was retrieving a file. The claimant testified that she bent down and when she stood back up she had unbearable pain in her back.

The claimant underwent conservative treatment but had no relief in symptoms. The claimant was released to return to light duty work, but could not perform her job duties due to pain. Her last day of work was September 18, 1996. On August 5, 1999, Dr. Jim Moore assigned the claimant a 10% impairment rating. However, she subsequently underwent a decompression and a hemilaminectomy, but the rating was not changed. The respondents accepted the 10% rating, but deny payment of any other permanent partial benefits.

Since the surgery, the claimant has continued to receive various forms of medical treatment, including physical therapy, steroid injections, and taking various medications. The claimant's symptoms have not resolved and diagnostic testing indicates the claimant has scarring in her spine. Specifically, on February 8, 2002, a myelogram indicated the claimant had, "tethering of the left L5 and S1 root sleeves suggestive of scarring." Dr. Ackerman has diagnosed the claimant with failed back syndrome and indicated that the claimant

suffered from scarring. On February 21, 2002, Dr. Ackerman placed the claimant at MMI. He indicated as follows,

The problem with this case is that she has exceeded the maximum healing time for this injury. It was explained to the patient that she will have pain for the rest of her life, related to the scarring, and she will need long-term pain management.

Likewise, on May 16, 2003, Dr. Anthony E. Russell opined that the claimant's MRI scan showed, "a very subtle foraminal narrowing appeared to be consistent with her symptoms." He further indicated that the claimant had undergone a decompression but that her symptoms had not subsided.

On April 6, 2005, Heather Naylor performed a vocational rehabilitation evaluation. She reported the claimant told her she had no plans to returning to work in the future. Naylor noted the claimant had a history of working in a sedentary capacity and indicated that pursuant to opinions of Dr. Freifeld, Dr. Pruitt, and Dr. Gilliam, the claimant had been released to return to work in a sedentary capacity. She further noted the claimant continued to go through treatment in the form of pain medications and periodic epidural injections. Naylor noted the claimant complained of difficulty bending or lifting anything with a weight in excess of

that of a milk jug. With regard to pain, the claimant reported that on a good day her pain was at a 7 out of 10. She further indicated that any activity caused an increase in pain and that she had to alternate positions frequently when active. She also reported difficulty sweeping, mopping, vacuuming, and doing laundry.

Naylor indicated the claimant was taking Oxycontin, Oxycodone, Flexeril, Zynox (sic), Promethazine, Premarin, Hydrochlorothiazide, and Lisinopril. She further noted that the claimant reported that her medication sometimes made her feel, "goofy" and noted the claimant was using a cane. The claimant testified this list was correct, except that she also has to take Quinine to prevent spasm-like symptoms in her legs.

At the time of the hearing, the claimant testified that she felt unable to work because of her pain and inability to focus. When questioned about her vocational rehabilitation report, the following exchange occurred.

Q And actually, a couple of times, in looking through the report, I notice that she indicates in here that you don't have any plans on returning to work. Is that pretty much accurate?

A At this point. I mean it's not that I don't want to. I don't see I could possibly do it.

The claimant also testified about her current symptoms. She testified that since a short period of time after her injury, she has suffered from shooting pain in her left leg. She said that within the past year she had also developed symptoms in her right leg. She further indicated that she constantly suffers from sharp pain in her low back. The claimant said that if she has a "good day", she can go to pick up medicine or to buy groceries. However, on a "bad day" she is unable to drive at all and simply has to lay down.

The claimant in the present case contends that she is permanently and totally disabled. The Majority rejects this argument and awards the claimant 20% wage loss benefits. The Majority, by virtue of affirming and adopting the decision of the Administrative Law Judge, essentially adopts the opinion of Heather Naylor, and concludes that the claimant is able to return to work. They further rely on Naylor's assessment that the claimant can return to work and conclude that while they find the claimant's pain to be real and legitimate, she is unmotivated to return to work. In my opinion, the Majority's reliance on Naylor is in error. Furthermore,

I find that the claimant is motivated to return to work, but that her level of pain prevents her from being able to return to work.

Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). If the employee is totally incapacitated from earning a livelihood at that time, he 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).

Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 133, 923 S.W.2d 886 (1996). In determining a claimant's eligibility for wage loss benefits in addition to the permanent anatomical impairment rating we may also take into account factors

such as the age, education and work experience of the claimant as well as any other matters reasonably expected to affect their future earning capacity. See Ark. Code Ann. § 11-9-522(b(1)). Among those other elements to be considered on this issue are motivation, post-injury income, degree of pain, general health, credibility, demeanor, and interest in rehabilitation. 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); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

In the present instance the claimant has had two surgeries as a result of her admittedly compensable injury. Likewise, she suffers from scarring which has been confirmed by diagnostic studies. She also suffers from stenosis that was not relieved by her surgery. As a result of these conditions, the claimant has ongoing pain which requires treatment with heavy narcotics such as Oxycontin and Oxycodone. Furthermore, the claimant has to use a cane and testified that her medication has side effects that cause her to need to lay down, become

unsteady on her feet, and to lose her memory.

Additionally, the claimant has difficulty standing or sitting for long periods of time and suffers increased pain when active.

Despite these conditions, the Majority relies on the opinion of Naylor that the claimant can return to work and find that she is unmotivated to return to work. I first find that the claimant is not unmotivated to return to work. Instead, she is simply unable to return to work because of her physical condition and her ongoing pain. As Naylor acknowledged that if the claimant's pain and other symptoms were considered the claimant would be unable to return to work, I find that the Majority erred by not awarding permanent and total disability benefits.

I also find the claimant is not unmotivated to return to work. Instead she is simply realistic about her current ability to become gainfully employed. I note that until the admittedly compensable injury, the claimant was gainfully employed for the overwhelming majority of her adult life, with the exception of a brief period of time she took off to care for her kids. Likewise, she attempted to return to work after her injury. Each of these factors indicates that the

claimant is a motivated individual that is simply not able to return to work because of her physical condition; not because of a lack of motivation.

In their opinion, the Majority relies heavily on the opinion of Naylor. However, I find that Naylor's opinion is flawed for multiple reasons. First and foremost, I find that the Majority erred in failing to consider Naylor's testimony that if the claimant's pain had accurately reported her level of pain and was considered in her ability to return to work, she would be permanently and totally disabled. As previously noted, the claimant's pain level is an appropriate factor in determining wage-loss. In fact, in the case of Whitlatch v. Southland Land & Dev., 84 Ark. App. 399 (2004), the Court of Appeals indicated,

In short, when taking into consideration appellant's limited education, manual-labor employment skills, severe pain in his back and legs, coupled with the side effects of necessary prescription pain medication, in addition to the testimony of his doctors and vocational expert, we are convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission, finding that appellant was anything less than permanently and totally disabled. For these reasons we are compelled to reverse the Commission's decision.  
(Internal citations omitted) (Emphasis added).

Accordingly, I find that even if the claimant were unmotivated to return to work (a finding I do not

make), then pursuant to the Majority's finding that the claimant's pain was legitimate, the claimant should have been awarded permanent and total disability benefits.

Next, I note that Naylor's opinion is diminished in that she relied on the opinions of Dr. Freifeld, Dr. Pruitt, and Dr. Gilliam to conclude that the claimant could return to work. As each of these physicians assessed the claimant prior to her surgeries and prior to her being placed at MMI, I find that Naylor's determination that the claimant could return to work was inaccurate. In fact, it appears that Naylor relied on the opinions of these physicians solely because they released the claimant to return to work. She testified,

Q Why would you rely upon doctors that haven't seen her since 1996 and also since 1998 when we know, number one, that she's had a couple of surgeries since that time, and, number two, she didn't reach maximum medical recovery until 2002?

A Why did I rely on them?

Q Yes, ma'am.

A Probably because that's the ones that stuck out in my mind the most as far as her being released to go back to work.

Furthermore, I note that Naylor was incorrect in her assertion that the claimant had not attempted to return to work since June 14, 1996. In fact, the

claimant worked until September 1996, and then separated her employment because she was unable to continue her job due to her admittedly compensable injury.

The Majority concludes there is no indication of any restrictions on the claimant. However, prior to the surgery the claimant was on a light duty work restriction, and since the time of her surgery there is no medical report indicating that she has been released to return to work, much less releasing her to return to work in her full capacity.

Ultimately, I find the claimant provided credible, consistent testimony regarding her abilities and her symptoms. Due to the claimant's current inability to bend, or to sit or stand for long periods of time, her various medications and the related side effects, and the claimant's high level of pain, I find that the claimant is permanently and totally disabled.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.