

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005412

MELANIE KELLEY,
EMPLOYEE

CLAIMANT

COOPER ENGINEERED PRODUCTS,
EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MARCH 7, 2007

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

Claimant represented by the HONORABLE FLOYD M. THOMAS, JR.,
Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE MICHAEL DENNIS,
Attorney at Law, Pine Bluff, Arkansas.

Decision of the administrative law judge: Affirmed, as
modified.

OPINION AND ORDER

The respondent appeals from an administrative law
judge's opinion filed May 9, 2006. The respondent appeals
that portion of the administrative law judge's decision
wherein he found, "The claimant has proven by a
preponderance of the evidence that she has sustained
permanent impairment of 14% to the body as a whole as a
result of her compensable injury; that this determination is

supported by objective and measurable physical findings; and that her compensable injury is the major cause of her impairment. The claimant has proven by a preponderance of the evidence that she sustained, as a result of her compensable injury, wage loss of 86% over and above her permanent anatomical impairment rating of 14% to the body as a whole for a total impairment of 100%. The claimant has therefore proven by a preponderance of the evidence that she is totally disabled."

After reviewing the entire record *de novo*, the Full Commission affirms as modified the opinion of the administrative law judge. We find that the claimant has proven by a preponderance of the evidence that she sustained, as a result of her compensable injury, wage loss of 28% over and above her permanent anatomical impairment rating of 14% to the body as a whole, for a total impairment of 42%.

I. History

The claimant, age 38 (6-20-68), worked for the respondent as the new job coordinator in its engineering department. On February 7, 1999, the claimant sustained an

admittedly compensable neck injury after being hit in the head by a steel core bar that weighed over 400 pounds. The claimant reported compression of her neck and back on the Form N, which was completed on February 9, 1999. The respondent accepted the claimant's neck injury as compensable and paid appropriate benefits and compensation.

The claimant returned to work for the respondent and worked some nine months (until November of 1999). At which point, she was laid off. The claimant applied for and drew 26 weeks of unemployment insurance benefits.

On August 27, 2001, the claimant underwent a cervical fusion at C5-6, which was performed by Dr. Richard Jordan, for which benefits were paid. A couple of weeks after her neck surgery, on September 11, 2001, the claimant was involved in a motor vehicle accident wherein she was rear-ended while driving on Highway 82. Although the claimant denies any new injuries to her neck or back, she admits to being paid for the damage to her car and to receiving a \$7000.00 settlement for the personal injuries she received in the wreck, as her healing period was delayed and she was required to wear a neck brace after this accident.

This claim became the subject of two prior hearings, which related to the claimant's healing period, the compensability of her alleged back injury, and her entitlement to a proposed L5-S1 percutaneous discectomy. In an opinion dated May 7, 2003, the Commission found that the claimant's healing period had not ended and found her back condition to be a compensable injury. The claimant was also awarded temporary total disability from May 15, 2000, through a date yet to be determined. No further appeals were filed. Pursuant to an administrative law judge's opinion filed March 9, 2004, the Commission found that the claimant failed to prove by a preponderance of the evidence that the percutaneous discectomy proposed by Dr. Thomas Hart was reasonably necessary in connection with her compensable injury. The claimant appealed this decision to the Full Commission. On July 12, 2004, the Full Commission affirmed and adopted the opinion of the administrative law judge.

The claimant sought treatment from Dr. Hart on her own. On May 5, 2004, Dr. Hart performed a percutaneous discectomy at L5-S1. On March 7, 2005, the claimant was seen by Dr. Hart for follow-up care. At that time, the claimant

reported to Dr. Hart that she had received little benefit from the procedure, as she had continued complaints of back pain. The claimant underwent a second percutaneous discectomy with Dr. Hart on March 17, 2005, with no significant benefit. Since this time, the claimant has continued under treatment with various doctors due to continued complaints and problems with her work-related injury.

On August 24, 2005, the claimant underwent an electrodiagnostic study, with the following impressions and recommendations:

IMPRESSIONS:

This is an abnormal study. There is evidence of bilateral, chronic L5-S1 radiculopathy. The absent [sic] of bilateral superficial peroneal sensory nerves is of unclear significance at this time, especially in view that both sural sensory nerves were present.

RECOMMENDATIONS:

Continue with conservative treatment, with NSAID, pain meds and muscle relaxant. Consider physical therapy for strengthening and stabilization exercises of her back.

A hearing was held in this matter on February 23, 2006. During the hearing, the claimant gave testimony. The claimant agreed that when her compensable injury occurred,

she was working on a press with some other people when the core bar fell and hit her in the top of the head as she tried to install it. The claimant further agreed to having undergone surgery to her neck with Dr. Jordan who put in some internal devices in her neck. The claimant admitted to attempting to return to work for the respondent after her injury. According to the claimant, the respondent laid her off in November of 2000 due to her position having been eliminated.

The claimant testified she has treated with Dr. Hart. In addition to the percutaneous discectomy, the claimant testified Dr. Hart has performed some epidural injections, and a lot of the shots with the dye into the disc and that type of thing. As to her current symptoms, the claimant testified that she has ongoing headaches, on the average of two to three days on a weekly basis. The claimant testified that she suffers from constant neck pain that radiates into her shoulders. According to the claimant, she also suffers from constant low back pain and mid-thoracic pain where her ribs are located. The claimant admitted to treating with Dr. Ezell for her headaches. However, she essentially

testified that Dr. Jordan is now handling all of her treatment at this point. According to the claimant, she takes Maxalt for her headaches, Norco for pain, and a muscle relaxer called Soma. The claimant admits to taking other medications when she gets into a pain cycle. The claimant testified that her ribs had to be popped back into place after the accident. The claimant testified that she has had an epidural done on her back, which was performed by Dr. Jordan. According to the claimant, since her injury, she does very little around the house, as she has now moved back in with her parents. The claimant testified that she does very little driving and is unable to sit, stand or walk for prolonged periods of time.

The claimant testified that she is a high school graduate and has approximately six or eight years of college. She testified that immediately after high school she went to college and worked on a medical technologist degree. However, prior to graduating, Great Lakes (a chemical plant in El Dorado) offered her a job in their quality lab and she accepted it. According to the claimant, she was required to run chemical analyses on the materials

that were being manufactured by the plant, as she worked in this position for about three years at the main plant. After this, the claimant moved to the south plant and worked in an experimental lab, testing different products. The claimant next worked at Americable (an industrial electrical cable manufacturer) in the lab performing similar testing duties as she had performed for Great Lakes. The claimant testified that she was hired by Cooper to replace the lab manager. The claimant was transferred to the respondent's engineering department, and then went back to school for her engineering degree for a job she was already performing. According to the claimant, at the time of her injury, she was considered a Class 9 supervisor or management trainee. The claimant testified that at the time of her injury, she was making around \$600 or \$700 a week. The claimant admitted that she was a salaried employee and not an hourly employee, as she worked in management.

On cross-examination, the claimant admitted that she had almost finished her medical technology degree before going to work for Great Lakes. The claimant also admitted to taking engineering classes while working for the

respondent. The claimant testified that she is probably at least a year away from her bachelor's degree in engineering. The claimant admitted that she has not attempted or checked into completing either of those degrees since her injury, nor has she applied for a job anywhere else since her injury. The claimant admitted to receiving Social Security Disability benefits. The claimant agreed that she had a history of migraine headaches prior to her injury.

After the hearing, the administrative law judge accepted a letter into evidence that had been proffered by the claimant. This letter was authored by Dr. Richard Jordan, and was dated February 13, 2006. In this letter, Dr. Jordan assigned the claimant a 9% permanent impairment to the body as a whole for her operated, but still symptomatic cervical disk, and a 5% permanent impairment to the body as a whole for her unoperated lumbar spine for a combined total permanent impairment of 14% to the body as a whole. Dr. Jordan wrote, "She continues to show evidence of permanent medical impairment and it is obvious that she will never be able to retain gainful employment."

Prior to the hearing, a Prehearing Conference was held in this claim on November 7, 2005. Pursuant to that conference, a Prehearing Order was entered on that date. The Prehearing Order reflects the stipulations entered by the parties, which include the following:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee/self-insured employer relationship existed at all relevant times, including February 7, 1999.
3. That the claimant sustained a compensable injury to her back and neck.
4. That the respondent accepted the February 7, 1999 injuries as compensable and paid benefits.
5. That this claim was the subject of prior Opinions by the Commission, including an Administrative Law Judge Opinion filed March 9, 2004 and affirmed and adopted by the Full Commission on July 12, 2004, and an Administrative Law Judge Opinion filed May 7, 2003.

The parties agreed that the issues to be litigated at the hearing were limited to the following:

1. Additional temporary total disability benefits.
2. Whether the claimant is entitled to additional permanent partial disability benefits.

3. Whether the claimant sustained wage loss in excess of her permanent anatomical impairment rating.
4. Enforcement of the Commission's prior Orders.
5. Controversion and attorney's fees.

The claimant contended in pertinent part, that she has permanent partial disability of twenty-five percent (25%) to the body as a whole.

The respondent contended in pertinent part, that the claimant has received a permanent partial impairment of six percent (6%) to the body as a whole as a result of the compensable injury; and that the respondent has not intended to controvert the claimant's entitlement to permanent partial disability benefits in the amount of six percent (6%) to the body as a whole as a result of the compensable injury; that respondent has not intended to controvert the claimant's entitlement to permanent partial disability benefits in the amount of six percent (6%) or to benefits awarded in prior Commission Opinions.

The administrative law judge found, in pertinent part, "The claimant has proven by a preponderance of the evidence that she has sustained permanent impairment of 14% to the

body as a whole as a result of her compensable injury; that this determination is supported by objective and measurable physical findings; and that her compensable injury is the major cause of her impairment. The claimant has proven by a preponderance of the evidence that she sustained, as a result of her compensable injury, wage loss of 86% over and above her permanent anatomical impairment rating of 14% to the body as a whole for a total impairment of 100%. The claimant has therefore proven by a preponderance of the evidence that she is totally disabled."

The respondent appeals to the Full Commission.

II. Adjudication

Wage-loss disability

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). Ark. Code Ann. § 11-9-522(b) provides:

(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future

earning capacity.

Ark. Code Ann. § 11-9-519(e) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

The respondent takes this appeal from the administrative law judge's finding of permanent and total disability. Specifically, the administrative law judge found, "The claimant has proven by a preponderance of the evidence that she sustained, as a result of her compensable injury, wage loss of 86% over and above her permanent anatomical impairment rating of 14% to the body as a whole for a total impairment of 100%. The claimant has therefore proven by a preponderance of the evidence that she is totally disabled." In the present matter, the Full Commission finds that the claimant failed to prove she was permanently and totally disabled.

The instant claimant is only 38 years old. She is a high school graduate, and has several years of college. The claimant has a prior work history primarily as an industrial

lab technician/clerk, which required her to test raw materials and the finished product. At the time of her injury, the claimant was required to perform job duties for the respondent in its engineering department as the new job coordinator. In this position, the claimant was required to perform office-type work and some hands on duties of mini runs and first runs for customer samples. The claimant's compensable injury resulted in her having to undergo surgery in the form of a cervical fusion at C5-6. On August 24, 2005, an electrodiagnostic study revealed bilateral, chronic radiculopathy at L5-S1. The claimant has also undergone extensive reasonable and necessary conservative treatment in the form of various pain medications, muscle relaxers and steroid injections. In addition, the claimant has sought treatment on her own in the form of two percutaneous discectomies which were performed by Dr. Hart. The administrative law judge correctly found that the claimant's healing period ended on August 4, 2003. At which point, Dr. Hart essentially opined that no other treatment would be helpful/appropriate, except for a percutaneous discectomy, a procedure found not to be reasonably necessary by the

Commission. Dr. Jordan assigned the claimant a 14% permanent impairment rating to the body as a whole for her compensable neck and back injuries. While we recognize that Dr. Jordan has opined that the claimant is not capable of returning to work, we do not think any weight should be attached to this opinion given all of the evidence to the contrary. In addition to this, Dr. Jordan has not cited any physical condition or limitations that would prevent the claimant from returning to work at a sedentary level. The claimant admitted that she has not sought work after being laid off by the respondent in November of 1999. Moreover, there is no probative evidence before the Commission demonstrating that the claimant is precluded from returning to gainful employment as an industrial lab technician or other suitable work. The claimant now draws Social Security Disability benefits. The Full Commission finds that the claimant's lack of motivation in pursuing work as a lab technician or other suitable work substantially impedes our assessment of the claimant's loss of earning capacity.

Therefore, based on the claimant's age, education, work experience, anatomical impairment rating of 14% to the body

as a whole, her lack of motivation to return to work as a lab technician or other suitable work, and considering she has no physical condition or limitations that would prevent her from working at a sedentary level, the Full Commission finds that the claimant has failed to prove by a preponderance of the evidence that she has suffered wage-loss disability in the amount of 86%, thereby rendering her permanently and totally disabled. Instead, we find that the claimant has proven her entitlement to wage-loss disability of 28% in excess of her 14% anatomical impairment for a total impairment of 42%.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she is entitled to wage-loss disability in the amount of 28% in excess of her 14% anatomical impairment rating. We hereby affirm, as modified the decision of the administrative law judge.

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 Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 as provided by Ark. Code Ann. § 11-9-715 (b) (Repl. 1996).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Special Commissioner Wilson concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant

failed to prove by a preponderance of the evidence that she was entitled to permanent and total disability benefits. However, I must dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she was entitled to an award of 28% in wage loss disability benefits. In my opinion, the claimant has failed to meet her burden of proof.

The record reveals that the claimant's educational history demonstrates that she is capable of performing employment that did not require heavy manual labor. The claimant is only 38 years old and has demonstrated the ability to be successful in highly technical areas of study. The claimant was only one year away from obtaining a BS degree in chemical engineering when she was injured. She has made no attempt to return to any employment at all. When I consider the claimant's age, education, training and the medical evidence, I cannot find that the claimant is entitled to any wage loss disability benefits. Accordingly, I must

respectfully dissent from the majority opinion awarding the claimant wage loss disability benefits.

MIKE WILSON, Special Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur in the Majority's decision to find that the claimant sustained anatomical impairment in the amount equal to 14% to the body as a whole and awarding wage loss benefits. However, I respectfully dissent from the Majority's decision to modify the Administrative Law Judge's finding that the claimant was permanently and totally disabled to an award of wage-loss disability benefits in an amount equal to 28% to the body as a whole.

As outlined in the Majority's Opinion, the claimant was injured when a piece of machinery fell on her head, causing her to sustain severe injuries to her

cervical and lumbar spine. As a result of those injuries, the claimant has undergone multiple surgical procedures in an attempt to alleviate her symptoms. Unfortunately, while the claimant has seen some improvement, she still suffers from severe and intractable pain, as well as limitations on her mobility, endurance, and functional ability.

At the time of her injury, the claimant was employed in the testing lab of the respondent employer. Her job involved overseeing the introduction of new products and installation of related production equipment. It was in this latter capacity that the claimant sustained her compensable injury.

The only evidence presented regarding the claimant's present ability to return to these duties was the claimant's own testimony. She credibly testified that her condition caused her to suffer from chronic, debilitating pain. She also has a loss of movement because of stiffness and an increase in the pain level when she becomes active. She also takes numerous pain

medications and other drugs which impair her ability to function normally.

There does not appear to be any dispute that the claimant's condition would prevent her return to her former employment. The respondent did not offer rebuttal evidence showing any job the claimant could still perform, nor did they offer any vocational evidence regarding the claimant's residual employment abilities. In addition, the respondent employer did not offer the claimant any other job within the company nor was the claimant provided, or offered, any vocational assistance to obtain some type of retraining so she could return to the job market. I also find it significant that there was no evidence in the medical record or in any of the testimony from this hearing, the claimant's two prior hearings, or documentary evidence, which indicates that any of the claimant's functional disability is caused by any condition other than that associated with her job-related accident.

In consideration of those factors, I am at a loss to understand why the Majority feels it appropriate

to substitute an award of wage-loss disability in place of the Administrative Law Judge's determination that the claimant was permanently and totally disabled. It is readily apparent to me that the claimant is simply not able to return to any type of gainful employment. While it is to be hoped that at some time in the future her condition will improve so that she will be able to find a meaningful job, it is apparent that the claimant is not at that stage at the present time, nor is it likely that she will be there within the foreseeable future. This is clearly a case in which a claimant has been rendered permanently and totally disabled by a job-related injury.

The only basis offered by the Majority for its finding is that the claimant is not permanently and totally disabled is an alleged lack of motivation to return to her former employment and that she "has no physical condition or limitation that would prevent her from working at a sedentary level." In my opinion, neither of these conclusions are supported by the record. As noted above, the claimant did attempt to

return to her former job as a Lab Technician but was unable to carry out her job duties. Further, the respondent made no attempt to offer her a job. Instead, they terminated her when she was unable to perform her job duties. Also, the Majority finds that the claimant was still within her healing period through August 2003. This was over four years after the date of the claimant's accident. The claimant's treating physician throughout that period indicates that she was totally disabled and could not return to work. Since the respondent paid the claimant temporary total disability benefits or permanent partial disability benefits during this entire period, there does not appear to be any dispute that she could not physically return to work during this time. Also, the claimant's medical records indicate that her condition had not improved substantially since August 2003. This is in spite of the fact that the claimant later underwent further surgical treatment, at her own expense, in an attempt to obtain some relief. While the claimant reported some benefit from this treatment, it did not substantially

improve her condition. Significantly, Dr. Richard Jordan, in his report of February 13, 2006, states that the claimant's condition has not changed nor improved since her August 27, 2001 surgery.

The Majority dismisses Dr. Jordan's report by stating, "We do not think that any weight should be attached to this opinion, given all the evidence to the contrary." The Commission also notes that Dr. Jordan did not cite any specific limitations which would have prevented the claimant from returning to sedentary work. However, as indicated above, there is no contrary evidence to Dr. Jordan's opinion. The *only* evidence presented in the case regarding the claimant's current ability to perform her job was her testimony. None of the medical records introduced at this hearing suggests, in any way, that the claimant could return to her former employment. Also, even though Dr. Jordan does not specifically set out any restrictions for the claimant, he does state that her condition has not improved since 2001. Since the Administrative Law Judge found that the claimant was totally disabled through August 4, 2003, it

would appear to me that Dr. Jordan's report is a conclusive finding that the claimant was still totally disabled through February 13, 2006, the date of his report. I do not believe that Dr. Jordan's failure to specify specific limitations in any way dilutes the basic premise of his report; that the claimant's physical condition is no better than it was in 2001, a time in which she was, indisputably, totally disabled. It is my finding that there is no lack of motivation on the part of the claimant and that the medical evidence in the record clearly establishes that the claimant was totally disabled at all relevant times.

I believe that the Majority's decision to modify the finding that the claimant is permanently and totally disabled to an award of wage-loss disability benefits is seriously flawed. For that reason, I must respectfully dissent from that portion of the Majority's Opinion.

PHILIP A. HOOD, Commissioner