BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301857

BRENDA K. RUTHERFORD, EMPLOYEE	CLAIMANT
MID-DELTA COMMUNITY SERVICES, INC., EMPLOYER	RESPONDENT NO. 1
AIG CLAIMS SERVICE, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 24, 2007

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

Claimant represented by the HONORABLE JESSE B. DAGGETT, II, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 did not appear at the hearing before the Administrative Law Judge.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed September 14, 2006. The administrative law judge found that the claimant proved she was permanently and

totally disabled. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove she was entitled to a permanent impairment rating, wage-loss disability, or permanent total disability.

I. HISTORY

Brenda K. Rutherford, age 59, testified that she attended school until the seventh grade. Ms. Rutherford at hearing described her work history: "It was starter clerk at Baird's and everything. I worked there for 31 years. In between there, well, I worked at, you know, the little convenient stores. I'd go in at 5:00 o'clock and work until 10:00. You know, I always had a second job. And then I worked - when Sweet Pea moved to a barbeque place in Clarendon, well, I worked there for about a year at night."

The record indicates that the claimant was treated for depression and anxiety attack in September 1996. In October 1996, the claimant reported sores on her head and a swollen right knee. The claimant was assessed as having a staph infection. A physician assessed "degenerative joint

disease" in October 1996. The claimant complained of back pain and flank pain in August 1997.

The claimant received emergency treatment for an open abdominal wound in September 1998. In November 1998, a UAMS physician examined the claimant and assessed exertional dyspnea, anemia, and abdominal incision breakdown. The impression from a chest x-ray in November 1998 was "mild cardiomegaly, otherwise negative."

The claimant's testimony indicated that she began working as a van driver for Mid-Delta Community Services in April 1999. The claimant testified that the job required lifting and bending.

In September 1999, the claimant was assessed as having anxiety and depression. The claimant began treating with Dr. J. Cazano for anxiety and depression. Dr. Cazano diagnosed the claimant as having Type II diabetes in June 2000. Dr. Cazano diagnosed memory impairment and anxiety in September 2000. Dr. Cazano assessed right hip pain and depression in August 2001. Dr. Cazano diagnosed the following in October 2001: "1. Type II diabetes. 2. Depression. 3. Osteoarthritis, right knee pain." The

claimant reported in April 2002 that she fell and hurt her right knee.

It was stipulated that the employment relationship existed on June 13, 2002, and that the claimant "was involved in an accident on said date when a vehicle she was driving was struck by a train as she was crossing railroad tracks, resulting in significant injuries[.]" An Arkansas Motor Vehicle Collision Report, dated June 13, 2002, indicated that the claimant drove a vehicle into the path of an approaching train. The claimant was cited for failure to yield at a railroad crossing.

The respondent-employer's executive director informed the claimant on June 21, 2002, "Due to your unauthorized use of Agency vehicle on June 13, 2002, your employment with Mid-Delta Community Services, Inc. is terminated effective June 21, 2002."

An x-ray of the claimant's chest was taken on June 27, 2002, with the following impression:

> multiple rib fractures in the upper bony thorax beginning at the third rib and involving at least four ribs. Findings compatible with a small hemothorax but no significant pneumothorax noted. I see no widening of the upper mediastinum or pneumomediastinal changes. Note fractures of these ribs are associated with a tear of the aorta or tracheal bronchial tree.

Dorland's *Illustrated* Medical Dictionary, Edition 28, defines "hemothorax" as "a collection of blood in the pleural cavity." Dorland's defines "pneumothorax" as "an accumulation of air or gas in the pleural space, which may occur spontaneously or as a result of trauma or a pathological process, or be introduced deliberately."

An x-ray of the claimant's pelvis in July 2002 was normal.

The claimant was assessed at Counseling Services of Eastern Arkansas on July 9, 2002. A psychologist's diagnostic impression included acute stress disorder and major depression, and the claimant began mental health therapy.

An x-ray of the claimant's knees was taken in August 2002. The impression from the x-ray of the right knee was severe osteoarthritis, with no evidence of traumatic change following a previous study in April 2002. X-ray of the claimant's left knee showed severe compartmental osteoarthritis with joint effusion.

An x-ray of the claimant's cervical spine was taken in February 2003: "55-year-old female with neck pain, no reported trauma....IMPRESSION: Normal cervical spine."

Dr. Johannes Gruenwald noted the following in March 2003:

> Ms. Rutherford returns today for followup of left knee pain. She was involved in railroad accident in 6/02 when she sustained a laceration of her left leg. She was treated in Memphis TN and has been seeing Dr. Williams since then. She continues to have a soft tissue pain along the anterior leg which she continues to scratch. She was very anxious during the exam and has scratch marks all over her body. When I asked her if she kept the wound covered, she stated she could not do so because she has to scratch around it.
>
> On physical exam, she has a long healing wound on the anterior shin which is very superficial but has not epithelealized. It has very minimal erythema.

Dr. Gruenwald treated the claimant conservatively and noted that x-rays taken that day showed "DJD of the knee."

Dr. Gruenwald examined the claimant on July 31, 2003 and noted, "X-rays obtained today show degenerative joint disease of the right knee. There are no obvious fractures or other derangement of the right knee or of the right shoulder." Dr. Gruenwald assessed, "1. Wound, left knee. 2. Painful right shoulder. 3. Painful right knee."

An MRI of the claimant's lumbar spine was taken in October 2004, with the following impression: "Multilevel degenerative disc disease. 2. Abnormality described at L3-

4, this is favored to represent all degenerative change; however in the appropriate clinical setting, it may be necessary to consider very early or mild discitis."

In December 2004, a physician diagnosed the claimant as having "Moderate Obstructive Airways Disease - Emphysematous Type, Reversible Component." A myocardial perfusion study in December 2004 showed the following: "Normal myocardial perfusion scan, ejection fraction 96%."

A pre-hearing order was filed on January 26, 2005. The claimant essentially contended, among other things, that she sustained a compensable injury on June 13, 2002. The respondents controverted the claim. The parties agreed to reserve for adjudication the extent of the claimant's injuries as well as the claimant's entitlement to indemnity benefits.

Dr. Sudesh Banaji stated in February 2005, "I have examined Brenda Rutherford and have strong indications that she has sustained a closed head injury as a result of her car/train collision. Ms. Rutherford would benefit from a PET scan, with interpretation by a neurologist, as well as testing and diagnosis by a neuropsychologist."

Dr. Jeffrey S. Kreutzer, a professor of neurosurgery and psychiatry, and Dr. Laura Taylor, a postdoctoral fellow in psychology and neuropsychology, provided the following Neuropsychological Evaluation Report in March 2005:

> 1. Review of medical records reveals that Ms. Rutherford was driving a van which was struck by a train on 6/13/02. Posttraumatic amnesia for the accident and events leading up to the accident were reported. Ms. Rutherford was reportedly transported via medflight from an outside hospital to Regional Medical Center at Memphis, with cervical collar and backboard in place. Initial GCS was 14. According to the Regional Medical Center records, Ms. Rutherford sustained a contusion on her left forehead, left flail chest, rib fractures, left pneumothorax, and open left knee laceration. Admission GCS was 15. A series of x-rays and CT scans were conducted on the day of the accident. Head CT scan revealed "left frontal and temporal soft tissue swelling" and "left periorbital soft tissue swelling with opacification of the left maxillary sinus." Cervical spine CT scan showed evidence of "cortical irregularity of right articular process of C6," and a fracture was suspected. Chest CT scan showed right upper lobe lung contusion, left flail chest, 5% pneumothorax, fracture of left ribs two through eight, bibasilar ateleactasis, left hilar calcified lymph nodes, and degenerative changes of the lumbar spine and pelvic bones. Pelvic CT scan revealed degenerative changes of the pelvis and left iliac bone fracture adjacent to the sacrum. Left knee x-ray provided evidence of soft tissue injury without evidence of fracture. Ms. Rutherford underwent debridement and irrigation of the left knee on the day of the accident. Ms. Rutherford was discharged home on 6/15/02 in stable condition. After discharge, she received in-home health care services and was

followed by Stephen Williamson, M.D. and physicians at Mid Delta Health Systems.
2. During the 3/17/05 evaluation, the patient completed the Concussion Screening Inventory (CSI) which identifies sequelae commonly associated with concussion injury. Ms. Rutherford reported injury to her head as a result of the 2002 accident. Reportedly, she sustained a contusion to her left forehead....The pattern of symptoms reported is consistent with concussion injury.
3. Ms. Rutherford and her sister-in-law completed the Neurobehavioral Functioning Inventory for the March 2005 neuropsychological evaluation.... Her report of symptoms is consistent with the sequelae of closed head injury....

In conclusion, Ms. Rutherford sustained a concussion injury consequent to a car versus train accident in June 2002. Comprehensive neuropsychological testing revealed residual impairments in the areas of oral fluency, reading, arithmetic, conceptualization, immediate and sustained attention and concentration, delayed auditory and visual memory, auditory and visual learning, remote memory/fund of information, commonsense/safety reasoning, visuoperception, construction, visuoconstruction, and bilateral motor speed and dexterity. Since the June 2002 accident, Ms. Rutherford has been disabled from working. Ms. Rutherford is often in great pain, and her ability to perform activities of daily living has been compromised. Her brother has taken on the role of her legal guardian, and he manages her finances. She requires assistance with household responsibilities, driving, and medication management. Ms. Rutherford is emotionally distressed in reaction to her disability and activity restrictions, and her emotional well being is an area of significant concern. Ms. Rutherford reports symptoms of severe depression and anxiety, which are consistent with DSM-IV diagnoses of Depressive Disorder NOS and Posttraumatic Stress Disorder, Chronic. Psychotherapy is strongly encouraged,

> and ongoing medication management appears warranted.

Dr. John P. Howser, a neurosurgeon, examined the claimant in March 2005:

> My impression after the evaluation was that she had sustained a cerebral contusion, labyrinthine contusion, TMJ problem, cervical sprain and lumbar sprain.
> In my opinion, she needs neuropsychological testing, an EEG, an EMG of the left leg with nerve conduction times, endocrinology consult, ophthalmology consult, a dental consult and a plastic surgery consult for the skin that has failed to heal over the leg as mentioned above. The MRI of the lumbar area was reviewed and it was abnormal revealing a ruptured disc anteriorly at L3. There were end plate changes at L4-5 with a canal stenosis and facet arthropathy at that level with ligamentum flava hypertrophy. The same thing was present to a lesser degree at L2 and L5. There was a small synovial cyst on the left which caused some mild to moderate lateral recess stenosis at L2. There was a mild lateral recess stenosis on the right at L3-4. There was a small disc extrusion that extended anteriorly behind the posterior longitudal ligament over the inferior end plate of L3. There was a small broad disc bulge at L5 with some associated ligamentum flava hypertrophy, left greater than right with some right foraminal stenosis of a moderate degree greater on the left....

After a hearing, the administrative law judge (ALJ) filed an opinion on June 8, 2005. The ALJ found, in pertinent part:

> 3. The claimant has proven, by a preponderance of the credible evidence, that her accident and resulting injury on June 13, 2002, arose out of

> and during the course of her employment with Mid-Delta Community Services, Inc....
> 6. The extent of claimant's injuries, as well as claimant's entitlement to appropriate indemnity benefits have been specifically reserved.

Meanwhile, Dr. Edward H. Saer corresponded with Dr. Martin Siems in September 2005:

> I saw Brenda Rutherford on September 9, 2005 at your kind request. She is a 57-year-old woman who is having right-sided lower back pain. She also is having some burning in her left lateral thigh and leg....
>
> Her x-rays show a small left lumbar degenerative scoliosis. She has significant narrowing at L3-4 and a little bit at L2-3 and L1-2. The MRI films done 10/24/2004 in Stuttgart were reviewed. It looks like there may be some motion artifact. She has significant degenerative changes with Modic endplate changes at L3-4 and moderate stenosis there. She has some degenerative changes at the levels and above and below there too.
>
> Marty, her back pain is probably due to the degenerative changes. Her stenosis does not look like it is significant enough that she is going to require any surgical treatment for it. In fact, if the epidural steroid injection did not help then surgery is probably not going to either. I do not see anything in the back that would account for the burning in her left lateral leg, and that may not be spinal in origin. Some EMG/NCV studies may be helpful in trying to pin that down. We will check with Dr. Lal and see if he wants to pursue that....

In an opinion filed October 5, 2005, the Full Commission affirmed and adopted the administrative law

judge’s June 8, 2005 decision. It has been stipulated that “the decision is now final and the law of the case.”

Bob White, a Vocational Specialist, provided a Vocational Assessment on February 25, 2006:

> In reviewing the medical records of Brenda Rutherford what leaps out is the number of physical and emotional/psychological problems this lady has incurred - systolic hypertension, multi-level degenerative disc disease, diabetes type II, degenerative changes of the pelvis and left iliac bone fracture adjacent to the sacrum, shortness of breath, generalized de-conditioning, obesity, hypertension, asthma, closed head injury, major depression, acute stress disorder, chronic pruritis, etc.
>
> Physically, Brenda Rutherford would be limited to no more than sedentary activity as that term is defined by the U.S. Department of Labor.
>
> Vocationally she was only qualified for entry level unskilled work. Unskilled work - learned through observation, short demonstration and less than 30 days, requires little or no judgement, is learned by rote, supervision is concrete with few variables, with no more than one or two step directions.
>
> Cognitively it is questionably (sic) if Brenda Rutherford could follow one to two step directions or read material off a page and follow directions.
>
> Emotionally/Psychologically - she has severe deficits in judgement, attention and concentration, working under supervision and with co-workers, behaving in an emotionally acceptable manner, reacting predictably in social situations.
>
> Overwhelmingly - most of these problems seem to have manifested themselves or deteriorated since

> Ms. Rutherford's MVA - as by report - she had worked for 36 years with two employers successfully.
>
> Brenda Rutherford based on a combination of physical, cognitive, psychological, emotional and social impairments is not capable of return to any employment, has no recreational or avocational interest and cannot even engage in minimal activities of daily living.

Dr. Barry D. Baskin provided an Independent Medical Evaluation on March 20, 2006:

> She was involved in a work related automobile accident 6/13/02....There are multiple parts of her medical record that have not been forwarded to me. This independent medical evaluation is based on the records that are available at this time....I am asked to provide independent medical evaluation and render opinions regarding the patient's permanent partial impairment as a result of her motor vehicle versus train accident and also to provide orders for a functional capacity evaluation, which has not been done at this time....
>
> Records from the Grand Prairie Health Clinic and Dr. Steven E. Williamson dated 6/21/02 indicate that Brenda was involved in an accident June 13, 2002 and his records state that she had a laceration of the left knee and leg down into the knee joint on the left, broken ribs on the left side, a puncture to her lung, and bruising all over her body. The extent of her head injury is not known. She was referred by the railroad to the University of Virginia where she was seen by Dr. Kurtcher, a neuropsychologist for neuropsychological evaluation. She was told that she had "brain damage". She has had some mild residual memory problems. She states this is variable from day to day....She recently has had treatment at the St. Vincent's Wound Clinic for

> some sores on her left leg. She states that these are not related to the accident of 6/13/02....
>
> She sustained blunt trauma. She had, as best I can tell from the scant medical records that are provided and from the history of Ms. Rutherford and her sister-in-law who is with her today, other injuries including blunt trauma to her chest with rib fractures, deep laceration to the left knee, increasing low back pain with a history of low back pain preexisting the accident but much worse since the accident....
>
> I would like to get more records on her, primarily the neuropsychological testing. I will be able to comment further, and also I will comment further on her functional status once I get the functional capacity evaluation that has been apparently done at Health South....

It was stipulated that the claimant's healing period ended on March 20, 2006.

On April 17, 2006, Dr. Baskin provided an Addendum To Independent Medical Evaluation:

> Since Ms. Rutherford was seen in independent medical evaluation March 20, 2006, I have received extensive medical records pertaining to Ms. Rutherford that I did not have at the time of the initial IME....
>
> Having reviewed these records and reviewed the patient, it is my opinion that this patient did sustain blunt trauma to her chest with multiple rib fractures and pulmonary contusions and a complex laceration to the left knee that required surgical debridement and closure and then delayed healing which I believe is likely due to the patient's diabetes and poor wound healing, in addition to the fact that she has a propensity, which she verbalized to me, of picking at the

wound. It is apparent that Ms. Rutherford suffered from a significant degree of anxiety and depression and even complaints of memory loss prior to her motor vehicle accident of 6/13/02. She has been diagnosed on more than one occasion by psychological assessment of having post traumatic stress disorder. She was already experiencing a lot of depression and anxiety as noted above prior to her accident and in particular since the death of her husband approximately 1 year prior to the accident. Based on my evaluation and after reviewing the neuropsychological and psychological testing done here in Arkansas, it would be my opinion that Ms. Rutherford probably does have symptoms consistent with post traumatic stress disorder. I do not think that her lumbar spine problems are the result of the accident of 6/13/02. I think they are preexisting. I do not think the arthritis of either one of her knees is due to the accident of 6/13/02 and that both of the knees had preexisting arthritis. The laceration of the left knee has caused her to undergo some wound care and has cost her some degree of pain, although I think that this patient would likely require total knee arthroplasties regardless of the 6/13/02 accident. Based on my review of the cognitive testing, it is apparent that this patient does not function at a high cognitive level. It is unclear, however, in my opinion, if she has sustained a traumatic brain injury. A PET scan was suggested in the evaluation by her physician on Forrest City. In my clinic experience and having reviewed the literature, PET scans are more diagnostic of traumatic brain injury when they are done fairly soon after the accident as opposed to being done several years later. I do not think a PET scan would add any credible diagnostic determination as to whether this patient has sustained a traumatic brain injury.

I believe that Ms. Rutherford has impairment of the left knee secondary to the deep laceration and residual pain. I believe that she has impairment

> as a result of her accident with regards to probable post traumatic stress disorder. I do not find, based on the review of the records, that we can say with reasonable medical probability that she has sustained a traumatic brain injury. I do not think that there is substantial objective data to warrant a diagnosis of TBI. I would certainly be happy to refer Ms. Rutherford to a local neuropsychologist, Dr. A.J. Zolten, for further neuropsychological testing if that is desired by the referring attorneys. This concludes my review and completion of Ms. Brenda Rutherford's independent medical evaluation....

A pre-hearing order was filed on June 28, 2006. The claimant contended that she was permanently and totally disabled as a result of her compensable injury. Respondent No. 1 contended that the claimant was not permanently totally disabled. The pre-hearing order indicated that "Respondent No. 2 did not take a position and will defer to the outcome of litigation."

A hearing was held on August 4, 2006. The claimant testified that she had undergone a total knee replacement in her right leg and that she anticipated knee-replacement surgery on the left. The claimant testified on cross-examination that she was physically unable to return to work. Bob White, the vocational specialist, testified for the claimant. Mr. White reiterated his opinion that the

claimant "could not even go back to entry and unskilled work at even a sedentary level."

The administrative law judge filed an opinion on September 14, 2006. The ALJ found, in pertinent part:

> 3. The claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled within the meaning of the Arkansas workers' compensation laws.
> 4. The claimant has proven, by a preponderance of the credible evidence, that her June 13, 2002, compensable accident and resulting injuries are the major cause of her disability.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4)(A)(Repl. 2002) defines "compensable injury":

> (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.] A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i).

Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003), citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the administrative law judge previously found that the June 13, 2002 accident "and resulting injury" arose out of and during the course of the claimant's employment with the respondent-employer. The ALJ explicitly reserved "the extent of claimant's injuries" as well as the claimant's entitlement to "appropriate indemnity benefits." The Full Commission affirmed and adopted these findings. The ALJ has now found that the claimant is permanently and totally disabled. The respondents note on appeal that there has been "no finding of fact about what injuries claimant sustained; which injuries resolved incompletely, leaving claimant with a specific degree of permanent physical impairment; or what residual, specific permanent impairment produced permanent total disability[.]"

It is therefore necessary in the instant matter to adjudicate the extent of the claimant's injuries pursuant to Ark. Code Ann. §11-9-102(4)(A) *et seq*. The Commission has

found that, on June 13, 2002, the claimant sustained an accident and injury which arose out of and during the course of the claimant’s employment with the respondent-employer. The record indicates that the claimant drove a company vehicle into the path of an approaching train. The initial medical record before the Commission is an x-ray of the claimant’s chest taken June 27, 2002. The x-ray showed multiple rib fractures which were “associated with a tear of the aorta or tracheal bronchial tree.”

The claimant’s knees were x-rayed in August 2002. Osteoarthritis was seen in the claimant’s right knee with no evidence of traumatic change following a pre-injury diagnostic study. X-ray of the claimant’s left knee showed severe compartmental osteoarthritis with joint effusion. The evidence does not demonstrate that the joint effusion seen in the claimant’s left knee was the causal result of the June 13, 2002 accident. Nor does the evidence show that the claimant sustained a bony injury to either knee.

In March 2003, Dr. Gruenwald reported that the claimant had sustained a laceration of her left leg as a result of the June 13, 2002 accident.

An MRI of the claimant's lumbar spine in October 2004 showed multilevel degenerative disc disease.

Dr. Kreutzer and Dr. Taylor examined the claimant in March 2005. These physicians reviewed medical records from June 13, 2002 and noted, "Ms. Rutherford sustained a contusion on her left forehead, left flail chest, rib fractures, left pneumothorax, and open left knee laceration." It was noted that a CT scan from June 2002 revealed "left frontal and temporal soft tissue swelling" and "left periorbital soft tissue swelling with opacification of the left maxillary sinus." Chest CT from June 2002 had shown, "right upper lobe lung contusion, left flail chest, 5% pneumothorax, fracture of left ribs two through eight, bibasilar atelactasis, left hilar calcified lymph nodes, and degenerative changes of the lumbar spine and pelvic bones. Pelvic CT scan revealed degenerative changes of the pelvis and left iliac bone fracture adjacent to the sacrum. Left knee x-ray provided evidence of soft tissue injury without evidence of fracture." Dr. Kreutzer and Dr. Taylor also stated that the claimant "sustained a concussion injury consequent to a car versus train accident in June 2002."

We also note Dr. Howser's impression in March 2005 that the claimant had "sustained a cerebral contusion, labyrinthine contusion, TMJ problem, cervical sprain and lumbar sprain." Dr. Howser also opined that an MRI showed "ruptured disc anteriorly at L3." But Dr. Saer opined in September 2005 that the claimant's back pain was "probably due to the degenerative changes."

Finally, the Full Commission notes the findings of Dr. Baskin beginning in March 2006. Dr. Baskin reviewed medical reports from June 21, 2002 indicating that the claimant "had a laceration of the left knee and leg down into the knee joint on the left, broken ribs on the left side, a puncture to her lung, and bruising all over her body." Dr. Baskin stated in April 2006:

> [I]t is my opinion that this patient did sustain blunt trauma to her chest with multiple rib fractures and pulmonary contusions and a complex laceration to the left knee that required surgical debridement and closure and then delayed healing which I believe is likely due to the patient's diabetes and poor wound healing, in addition to the fact that she has a propensity, which she verbalized to me, of picking at the wound.... I do not think that her lumbar spine problems are the result of the accident of 6/13/02. I think they are preexisting....I do not find, based on the review of the records, that we can say with reasonable medical probability that she has sustained a traumatic brain injury. I do not think

> that there is substantial objective data to warrant a diagnosis of TBI....

The record before the Full Commission indicates that the claimant sustained the following physical harm as a result of the June 13, 2002 compensable injury: multiple rib fractures; laceration of the left leg; contusion on left forehead; left pneumothorax; left frontal and temporal soft tissue swelling; left periorbital soft tissue swelling; right upper lobe lung contusion; and left iliac bone fracture. The record does not demonstrate that the claimant sustained a cervical or lumbar injury as a result of the June 13, 2002 compensable injury. We also place significant weight on Dr. Baskin's opinion that the claimant did not sustain a traumatic brain injury.

The claimant does not contend that she sustained a compensable mental injury or illness pursuant to Ark. Code Ann. §11-9-113. The evidence does not otherwise demonstrate that the diagnosed conditions of acute stress disorder, major depression, or post-traumatic stress disorder were compensable pursuant to Ark. Code Ann. §11-9-113.

We note the parties' stipulated that the claimant's healing period ended on March 20, 2006. The claimant does

not contend that she is entitled to additional medical treatment pursuant to Ark. Code Ann. §11-9-508(a).

B. Impairment/Disability

"Permanent impairment" has been defined as any functional or anatomical loss remaining after the healing period has ended. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003), citing *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). To assess anatomical impairment, the Commission has adopted the American Medical Association Guides to the Evaluation of Permanent Impairment, (4th ed. 1993). *See*, Ark. Code Ann. §11-9-522(g)(1)(A); Workers' Compensation Rule 099.34.

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). "Major cause" means "more than fifty percent (50%) of the cause." Ark. Code Ann. §11-9-102(14). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c)(B).

The administrative law judge found in the present matter, "The claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled within the meaning of the Arkansas workers' compensation laws." The Full Commission reverses this finding.

The parties stipulated that there was an accident on June 13, 2002. The claimant drove a company vehicle into the path of an approaching train. A subsequent x-ray of the claimant's chest showed multiple rib fractures. We have detailed *supra* the other subsequently reported injuries, including a laceration of the claimant's left leg reported by Dr. Gruenwald in March 2003. In March 2005, Dr. Kreutzer and Dr. Taylor reviewed records from 2002 and stated that the claimant had sustained the following injuries: (1) a forehead contusion; (2) a flailed chest; (3) rib fractures; (4) a pneumothorax in the claimant's lung; and (5) a left knee laceration. (Dorland's defines "flail" as "abnormal mobility.") These doctors also opined that the claimant as suffering from several mental conditions.

Dr. Baskin provided an independent medical evaluation beginning in March 2006. Dr. Baskin stated in April 2006, "I believe that Ms. Rutherford has impairment of the left

knee secondary to the deep laceration and residual pain. I believe that she has impairment as a result of her accident with regards to probable post traumatic stress disorder."

Citing *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000), the respondents state that the claimant "has offered no medical or other evidence that she has sustained any specific percentage of permanent physical impairment." The Full Commission agrees with the respondents. We can find no tables in the Guides indicating that the claimant is eligible for a rating to her leg or any other anatomic region. There is no permanent rating for a left leg laceration. Nor do we find that the claimant sustained a permanent ratable injury to her chest, ribs, cervical or lumbar spine, hip, or head. Further, even if the claimant did sustain a compensable mental injury, which the claimant does not allege, the Guides do not show a rating for any of the diagnosed mental conditions.

Based on our *de novo* review of the entire record and the relevant provisions of Act 796 of 1993, the Full Commission reverses the administrative law judge's award in the instant matter of permanent total disability. The Full Commission finds that the claimant did not sustain any

permanent rateable condition pursuant to the Guides for evaluating permanent anatomical impairment. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

____
KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

Previously, an Administrative Law Judge found that the claimant was permanently and totally disabled because of injuries sustained in a compensable injury on June 13, 2002. The Majority has reversed that decision. As I understand the Majority's Opinion, they are finding that the major cause of the claimant's permanent impairment was a pre-existing condition, or, that any permanent physical or mental impairment that is a result of her injury is not rateable and cannot be the basis for awarding any permanent disability benefits. I believe that those conclusions are not supported by the facts or the applicable provisions of the Arkansas

Workers' Compensation Act and strongly disagree with the Majority's conclusions.

The claimant in the present case was highly functional prior to being struck by a train. Because her accident, she sustained multiple, extremely serious injuries. Due to her injuries she is now unable to work or care for herself. In fact, her injuries were so severe that she has had to have a legal guardian appointed for her. Yet, the Majority, for reasons which I simply cannot understand, has concluded that the claimant did not sustain permanent injuries due to being hit by a train. Common sense and everyday life experience would reasonably indicate that if someone was hit by a train, they are fortunate to even be alive. Certainly, it is difficult to imagine any scenario where a person could be hit by a train, sustain the injuries the claimant did and have no permanent injury. Yet, that is precisely what this Majority has done. Though the claimant admittedly suffered from some pre-existing health problems, to find that the claimant sustained no permanent injury after being hit by a train and having a punctured lung, a leg wound that would not heal, and

cognitive loss as documented by both testimony and the medical evidence, is simply ridiculous.

Furthermore, when one considers the fact that before this incident the claimant held down multiple jobs and that she now requires a legal guardian because she has sustained injuries due to being hit by the train which have seriously impaired her cognitive abilities, the Majority's conclusions become even more preposterous. In short, I am appalled by this decision as the Majority has ignored a multitude of medical records and the testimony of multiple witnesses showing the claimant sustained multiple permanent impairments due to her accident and therefore, I must, therefore, respectfully dissent from the Majority's Opinion.

The claimant was injured when she was struck by a train while doing job-related driving. Immediately after the accident, the claimant was transported to a hospital emergency room where she was treated for multiple injuries, including a severe laceration to her left knee and leg, a blow to her head, broken ribs, a punctured lung, and bruises and contusions over most of her body.

The respondent initially controverted her entitlement to benefits. After a hearing, an Administrative Law Judge found that the claimant sustained a compensable injury and that decision was affirmed by the Full Commission. However, neither the Administrative Law Judge nor the Commission addressed the nature and extent of the claimant's injuries in their decisions.

The claimant contended that she sustained permanent impairment to several different parts of her body. In my opinion, she met her burden of establishing that she sustained permanently disabling injuries to her lower back, left knee, lungs, and head, and that these injuries render her permanently and totally disabled.

There appears to be no dispute that the claimant sustained a severe laceration to her left knee and leg in the accident. Medical reports relating to her injuries clearly state that she had a "soft tissue injury" to her knee. After the accident, the claimant developed problems with her knee including, difficulty in walking, pain, and other symptoms. Eventually, she underwent a knee replacement. The Majority suggests

that this was a pre-existing condition. However, the medical records do not indicate that the claimant ever received any medical treatment or had any ongoing problems with her left knee. It is true that she had previously complained of problems with her right knee and was diagnosed with arthritis in that joint, but there is no evidence that she ever received any medical treatment or complained about any problems in her left knee.

Ark. Code Ann. §11-9-102 (4)(S)(ii)(A) provides that permanent benefits should be awarded only upon determination that the compensable injury was the major cause of the disability or impairment. In this case, there is no evidence that the claimant ever sought medical treatment for any problem with her left knee. While the medical record does indicate that she had some arthritic changes in her knee, there is no indication that she needed a knee replacement or any other medical treatment to her left knee before the injury. Yet, after the accident, the claimant had such a severe laceration to her knee that it took years to heal and developed arthritis to the extent that she had to have a

knee replacement. On that basis, I believe that it is apparent that she did sustain some permanent impairment to her knee in her injury.

Another part of her body which has caused the claimant permanent impairment is her lungs. It is true that the claimant had, in the past, reported to her doctors that she occasionally became short of breath. However, most of the medical reports attribute this to stress or anxiety attacks and did not find that the claimant was suffering from any particular lung impairment. Also, while the claimant had been a smoker for a number of years, she had quit several years before her compensable injury.

The medical records establish that, at the time of the accident, the claimant sustained broken ribs which punctured her lungs. The records reflect that the claimant had fluid build-up in her lungs and that she received treatment for this injury. At the hearing, she testified that after the accident, she became chronically short of breath and was unable to carry out even the slightest exertion without significant breathing difficulties. Once again, this is a condition

which is permanently disabling to the claimant and resulted in some permanent impairment.

Another body part of the claimant's injured in the accident was her lower back. Once again, the Majority attempts to attribute these problems to a pre-existing condition. However, there is no evidence that the claimant ever sought or received any significant medical treatment to her lower back prior to her job-related accident. However, a lumbar MRI performed on the claimant after her injuries demonstrated that at the L3 region of her spine, she had a ruptured disc with a small disc extrusion. The MRI also revealed that she had a small disc bulge at L5. The MRI also revealed certain degenerative changes in the claimant's lumbar spine. However, it seems unlikely to me that a disc herniation with a disc extrusion would have been entirely degenerative in nature. Further, there is no evidence that the claimant had such severe problems with her spine prior to the injury. Once again, the relevant medical evidence clearly indicates that the claimant sustained an injury to her lower back which resulted in objective evidence of an impairment.

The most disabling aspect of the claimant’s injury is caused by her closed-head injury. This is, in my opinion, also the area where the Majority has committed the most egregious error in applying the law. After the accident, the claimant was diagnosed with a concussion. Later, the claimant developed significant cognitive problems, most notably involving memory loss, inability to concentrate or focus on tasks at hand, as well as chronic depression, and a propensity to develop sudden, severe anxiety attacks. Prior to the injury, the claimant had been gainfully employed with the respondent for approximately two years and, prior to that, had been continuously employed for a period of 31 years with the same employer. The claimant also testified that for most of her working life she held down at least two jobs and had always been able to manage her own affairs. However, after the injury, she was unable to keep track of her money and could no longer manage her checkbook. In fact, her problems in this area became so severe that her brother had to be appointed as her personal guardian in order to take charge of her financial affairs. The claimant also

testified that she had a hard time remembering details, dates, and had a hard time keeping track of anything. She also testified that she was frequently depressed and had a very hard time dealing with crowds or any type of stress.

As a result of these problems, the claimant sought and received psychological counseling and treatment from the Counseling Service of Eastern Arkansas. While receiving treatment from that facility, the claimant was seen by a number of different staff psychiatrists who diagnosed her as suffering from major depression and post traumatic stress disorder. Various doctors at that facility prescribed her medications, including Zoloft and Prozac, as well as providing counseling services.

The claimant was also seen by Dr. Sudesh Banaji, an internist at Forrest City, Arkansas. In a report dated February 23, 2005, Dr. Banaji stated that his examination of the claimant led him to believe that she had sustained a closed-head injury as a result of her compensable accident. Dr. Banaji recommended that

she undergo a PET scan to diagnose her injury. Unfortunately, this test was never performed.

The claimant later underwent a neuropsychology evaluation by Dr. Jeffery Kreutzer and Dr. Laura Taylor at the Virginia Commonwealth University Medical Center. After giving the claimant a thorough examination, including an array of neuropsychological tests, the doctors opined that the claimant was suffering from cognitive disorder, chronic post traumatic stress disorder, and recurrent major depressive disorder. The doctors specifically related these conditions to the appropriate sections of in the Diagnostic and Statistical Manual of Mental Disorders. The doctors also specifically related the onset of these conditions to her job-related accident.

Once again, I believe the evidence in this case clearly establishes that the claimant sustained a compensable, organic brain injury in her accident. The claimant’s brain condition was well documented throughout the course of her treatment and during her neuropsychological testing. In my opinion, the claimant’s presentation with bruising is objective

evidence supporting a finding of compensability and permanent impairment. Likewise, the concussion was objective. Finally, the neuropsychological testing itself, is objective in nature, and shows the claimant's memory decline and headaches are due to a brain injury. In fact, in my opinion, the Majority has unjustifiable and erroneous ignored the facts and law on the issue regarding whether the claimant sustained a permanent impairment due to her brain injury.

Apparently, the Majority has concluded that the claimant had no objective signs of a permanent brain injury. This is simply wrong. There are two relevant cases that are directly on point. They are Watson v. Tayco, Inc., 79 Ark. App. 250, 86 S.W. 3d 18 (2002) and Wentz v. Service Master, 75 Ark. App. 296; 57 S.W. 3d 753, (2001). In Wentz, the claimant worked as a cleaner. She was injured when she fell and hit her head and the right side of her face on a concrete floor. She did not seek immediate medical attention but was later diagnosed with a concussion. A short time after being injured, the claimant presented to the hospital and reported having headaches and changes in her mental

status. She was referred to a neuropsychologist. A neuropsychological evaluation was performed and the claimant was diagnosed with having an organic brain disorder that was secondary to a closed-head injury. The doctor responsible for testing the claimant testified that the results of the neuropsychological evaluation were dependent on the claimant's voluntary responses. However, he also indicated that the claimant was not intelligent enough to manipulate the results of the test and indicated that it was virtually impossible to manipulate the results of such a test. Id.

In Wentz, the Administrative Law Judge found that the claimant sustained compensable injuries to the jaw and face but that she had not sustained a compensable brain injury. The Commission affirmed and adopted the decision as their own. On appeal, the Court of Appeals reversed and remanded the case, finding that the claimant had sustained a compensable brain injury. In making this finding, the Court noted that the claimant's physical symptoms of nausea, vomiting, and light sensitivity did not present until after she fell. They further noted that the claimant was noted to have

cognitive defects after falling and that her intellectual capacity had decreased. They also called attention to the fact that the claimant had been diagnosed with a concussion and specifically noted that during a fall it would be conceivable for a claimant to have jarring of the brain. Id.

In the case of Watson, the claimant was restocking cartons when she was hit on the back of the head by a metal plate that fell. The claimant presented at the emergency room with weakness, nausea, dizziness, blurred vision, and tingling in the upper extremities. The claimant was referred to have neuropsychological testing and was diagnosed with an organic brain injury. The respondents controverted the claim. At the time of the hearing, the claimant testified that she suffered from cognitive problems and suffered loss of balance and headaches. She also said that prior to her injury she had not experienced such symptoms. Id.

In Watson, the Administrative Law Judge found the claimant had not sustained a compensable brain injury. That decision was affirmed by both the Commission and the Court of Appeals. The Court

specifically noted that the only objective evidence of a closed head injury was found in the form of the neuropsychological testing. The Court indicated that without other objective evidence to establish a closed-head injury, there was insufficient evidence to show that the claimant sustained a compensable injury. The Court went on to distinguish the holding of Wentz by noting that in Wentz other evidence in the form of medical testimony showed objective evidence of a brain injury and that such was sufficient to show a compensable injury. Id.

I find this case to be more similar to Wentz than Watson. In this case it cannot be reasonably argued that the claimant did not sustain a permanent organic brain injury. There is a plethora of objective evidence showing that the claimant took serious blows to her head. Not only did she describe symptoms in accordance with that type of injury, the medical record documents reflect that she sustained a concussion, a type of injury often associated with organic brain injuries. In fact, in Wentz, the Court placed great emphasis on the fact that the claimant had sustained a

concussion in concluding that she sustained a brain injury. Further, the claimant's neuropsychological testing is objective evidence of a permanent injury. The neuropsychological testing carried out by Drs. Kreutzer and Taylor establish the nature and extent of her psychological and cognitive impairment. As previously noted, the Court in Wentz explicitly indicated that such is objective evidence of an injury. Certainly, in the present case, it is evidence of a permanent and debilitating condition. Furthermore, as their evaluation is diagnosed pursuant to the Diagnostic and Statical Manual (DSM), the diagnosis is in full accordance with the Workers' Compensation Act for establishing this type of an injury.

The Majority seems to place far too much emphasis on the fact that the claimant had previously suffered from depression. While it is true that the claimant had complained of panic attacks and depression in the past, these sort of problems were not anything that affected the claimant's vocational or personal functioning. As indicated above, the claimant had been continuously and gainfully employed throughout her adult

life and was in full possession of her faculties and managed her own affairs prior to the injury. It was only afterward, that it became necessary for her to have a court-appointed guardian to manage her affairs and manage her personal finances. Clearly, the claimant's mental impairment became severely disabling after her injury and can only be attributed to the effect of her job-related accident. In my opinion to reach any other conclusion is simply not a rational or logical interpretation of the facts of this case.

My review of the Majority's Opinion convinces me that they are essentially ignoring all of the relevant medical evidence that establishes the permanent nature of claimant's injury. To the extent that this evidence cannot be ignored, the Majority concludes that the injuries are not "rateable" and that the claimant is, therefore, not entitled to any permanent disability benefits. As authority to that proposition, the Majority sites, Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S. W. 3rd 882 (2000).

That conclusion is fallacious for two reasons. First, the claimant's various physical impairments are

rateable. As indicated above, the claimant has sustained an injury to her knee that resulted in a knee replacement; a measurable loss of lung function; objective impairment in the form of ruptured and herniated discs in her lumbar spine; and, chronic depression and loss of cognitive function. While it is true that these conditions were not rated by the claimant's physicians, all of those conditions are rateable under the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). To the extent that the claimant's anatomical impairment is relevant to those conditions, I remind the Majority that the Court of Appeals has held that it is our duty to convert an anatomical impairment to an impairment rating. See, Johnson v. General Dynamics, 46 Ark. App. 188, 878 S. W. 2d 411 (1994).

Second, there is no need to determine the extent of the claimant's anatomical impairment since the benefits she is seeking are for permanent and total disability. The Connell decision relied upon by the Majority deals with permanent partial disability in excess of the anatomical impairment, or what we more

commonly refer to as wage-loss disability. In the Connell case, the Court held that claimants are not entitled to wage-loss disability unless they have a rateable anatomical impairment. The Court reached that conclusion because Ark. Code Ann. §11-9-526 (b)(1) specifically states that such benefits must be "in excess of the employee's percentage of permanent physical impairment. . .". However, in the present case, the claimant is requesting benefits for total disability pursuant to Ark. Code Ann. §11-9-519. The language quoted above does not appear in that statute. In fact, Ark. Code Ann. §11-9-519 (A) specifically states:

> In cases of total disability, there shall be paid to the injured employee during the continuance of the total disability 66 2/3% of his or her average weekly wage.
>
> (e)(1) states:
>
> Permanent total disability" means inability because of compensable injuries or occupational disease, to earn any meaningful wages in the same or other employment.

Nowhere in this section is there any reference made to an anatomical impairment rating. Obviously, the

legislative intent was that claimants who are permanently unable to return to work are entitled to benefits for permanent and total disability. Whether a permanently disabling condition has been rated, or can be, is irrelevant in deciding if a claimant is permanent and totally disabled. The question is whether this particular claimant is able to return to the work force.

It is obvious that the permanent disability the claimant has sustained to her various body parts and, most particularly, the effects of her head injury, render her totally disabled from working. In fact, I do not believe that this point is even seriously in question. Further, it is clear to me that, by far, the major cause of disability sustained by the claimant is the result of her compensable injury. I believe that the claimant's past job history gives clear evidence that she was a hardworking individual who did not have any significant difficulty in carrying out a long-standing factory job or her duties with the respondent prior to her injury. However, as evidenced at the present time, injuries sustained in this accident are

preventing her from working. In my opinion, these conditions are all clearly permanent in nature and entitle her to receive permanent and total disability benefits.

As previously indicated, I am greatly disturbed by the Majority's failure to acknowledge that the claimant sustained lasting, permanent injuries as a result of her accident. Though the Majority has indicated that the Guides do not provide for any ratable conditions, any person with any knowledge whatsoever of the Guides, would find such a notion to be ludicrous. Rather, what is apparent, is that the Majority has simply refused to consider the medical evidence in this case showing the claimant sustained permanent injuries, including a debilitating organic brain injury. Furthermore, I find that the Majority has erroneously held, in effect, that because the claimant did not seek a physician to rate her for conditions, which are obviously permanent and ratable pursuant to the Guides, then she sustained no permanent impairment. Rather than awarding her permanent and total disability benefits for which she is obviously entitled, they have simply used

her pre-existing conditions as an excuse to deny her benefits. In my opinion, this is tragic as I have difficulty imagining circumstances in which it is more clear that a person sustained permanent injuries for which they are entitled to compensation.

For the reasons set out above, I believe that the Majority erred in denying the claimant the requested permanent and total disability benefits. For that reason, I respectfully dissent from the Majority's Opinion.

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PHILIP A. HOOD, Commissioner