

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F111222

JUDITH WRIGHT, EMPLOYEE	CLAIMANT
TWIN LAKES NURSING & REHABILITATION CENTER, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 13, 2007

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

Claimant represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 1, 2006.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about September 26, 2001.

3. The respondents accepted a compensable cervical strain injury and controverted additional benefits as of January 31, 2002.

4. If called to testify as a witness, the claimant's husband's testimony would corroborate the claimant's testimony.

5. I find that a preponderance of the evidence establishes that the claimant was a full time employee while employed by Twin Lakes Nursing and Rehabilitation Center, that she earned \$5.60 per hour on September 26, 2001 and that she worked 72.5 hours of overtime in 28 weeks and 3 days. I therefore find that the claimant's average weekly wage was \$245.42.

6. I find that the claimant has failed to establish by a preponderance of the credible evidence that she sustained any degree of compensable physical or mental injury in excess of the admittedly compensable cervical strain accepted by the respondents.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, 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). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

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Commissioner Hood 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 findings regarding the claimant's average weekly wage and the decision to award additional temporary total disability benefits due to an underpayment by the respondents. However, I must respectfully dissent from the balance of the decision.

The claimant sustained an admittedly compensable injury on September 26, 2001, as a result of a fall while at work. The respondent, after initially accepting the claim, controverted her entitlement to benefits based upon an alleged organic brain injury, traumatic carpal tunnel syndrome, and cervical spinal damage. After a hearing, an Administrative Law Judge held that the claimant had not met her burden of establishing the presence of any conditions entitling her to any periods of temporary disability or medical treatment not already provided by the respondent-employer. However, the Judge did find that the respondent

had incorrectly computed the claimant's benefit rate and that she was entitled to additional total disability benefits as a result of an underpayment during the periods of total disability already accepted by the respondent. The respondent was ordered to pay an attorney's fee based upon the underpayment. The claimant appealed and the respondent cross-appealed all portions of the Administrative Law Judge's Opinion adverse to themselves. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own. Having thoroughly reviewed the Administrative Law Judge's decision and the trial testimony and evidence made part of the record, I agree with the Majority's opinion with regard to the claimant's average weekly wage. However I must respectfully disagree with the remainder of the decision.

In my opinion, the claimant has shown his entitlement to benefits based upon a carpal tunnel injury which she alleges was sustained in her fall. According to the claimant's undisputed testimony, when she fell, she struck her knees, wrists, and head on the floor. Not

surprisingly, much of her initial complaints dealt with the injuries to her head and face, including a severe laceration. She also complained about other problems including pain in her neck and arms and related neurological problems. In fact, many of her physicians referred her for neurological evaluations to determine whether she injured other parts of her body in her fall. Eventually, NCV tests determined that she suffered from carpal tunnel syndrome in her left arm.

The Majority denies and dismisses this portion of her claim. However, it is not clear to me why they take this position. The respondent has not contended that the claimant's fall did not occur as described. Further, given the way the claimant fell, striking her hands on a concrete floor, a traumatic carpal tunnel injury is a likely result. Additionally, the NCV test objectively established the presence of carpal tunnel syndrome less than two months following the injury. Since the claimant's job did not appear to be particularly rapid or repetitive, and no other risk factors were present for carpal tunnel syndrome, there

seems to be no other reason for her to have developed carpal tunnel syndrome.

I further find that the claimant has sustained a compensable injury to her cervical spine. There is no evidence that the claimant had ever suffered from cervical pain prior to her fall at work. After the accident, the claimant suffered from severe neck pain and has continued to require treatment for those symptoms, indicating that the claimant's need for treatment is directly related to her fall. Additionally, the claimant submitted to an MRI which revealed the claimant suffered from a bulging disc in her cervical spine. Dr. Burton testified that the asymmetric nature of the bulge in the claimant's disc was consistent with a traumatic injury and that a bulge could cause significant pain. Furthermore, Dr. Burton testified that the claimant's need for treatment related to her cervical spine was due to her fall at work. Accordingly, since the respondents have stipulated that the claimant sustained a compensable cervical strain, the claimant continued to suffer from symptoms associated with her cervical spine, and

Dr. Burton has opined the claimant's need for treatment is directly related to her fall, I find that the Administrative Law Judge's decision regarding the claimant's cervical spine should have been reversed.

The remaining issue, and the one most critical to the resolution to this case, is the claimant's contention that she sustained an organic brain injury as a result of her fall. In establishing the nature and extent of this injury, the claimant has relied, primarily, but not exclusively, on the diagnostic testing performed by Dr. Van Smith, a neuro-psychiatrist practicing in Mountain Home, Arkansas. Dr. Smith found, based upon the testing he performed on the claimant, that she had suffered an injury to her brain in her job-related fall. However, the Majority rejects Dr. Smith's conclusion and finds that the claimant had not met her burden of establishing that she suffered a brain injury in her fall. In reaching this conclusion, the Majority states, "My understanding is that her psychological testing, without more, is not adequate to establish an organic brain injury by objective findings... ." The

Majority supports that conclusion by citing Watson v. Tayco, Inc. 79 Ark. App. 250, 86 S.W.3d (2002). However, in my opinion, the Majority has misconstrued Watson as well as other cases in point. In Watson, the claimant had alleged that she sustained a brain injury as a result of being struck by a metal plate which fell on her. The claimant later asserted that she was entitled to benefits based upon neuropsychological testing indicating that she had an organic brain condition. The Court of Appeals affirmed the Commission's denial of this claim noting that the testing, by itself, was not sufficient to establish such an injury without other objective evidence to establish a closed-head injury.

In my opinion, the Majority has misunderstood what the Court meant when it held that neuropsychological testing alone could not establish a compensable injury. The significance of the Watson case was that the job-related incident did not result in any objective evidence of a closed-head injury. The Watson case relied upon an earlier decision, Wentz v. Service Master, 75 Ark. App. 296, 57

S.W.3d 753 (2001). The facts in that case are almost identical to those in the present claim. In Wentz, the claimant, who was employed by a janitorial service, testified that while cleaning up a floor she slipped and fell, striking the right side of her face and head on a cement floor. In evaluating this accident, the Court noted that the claimant was approximately 5'3" tall and weighed 135 pounds and said, "When a person of that size and stature falls head first onto a concrete floor, it is conceivable that her brain will suffer some jarring." The Court also went on to say that, "If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the Commission's refusal to make an award." In reversing the Commission's decision in Wentz, the Court stated that since the evidence clearly established that the claimant in that case had begun experiencing problems after her fall, and since the medical opinions were certain and definite that her injuries were

the result of her fall, a causal relationship existed between the result of the injury and her work activities. The Court then held that fair minded persons could not reach the same conclusion as the Commission did in denying Ms. Wentz her benefits.

In the present claim, the Majority makes the same mistake that the Commission did in denying the Wentz claim. They conclude that neuropsychological testing was insufficient to establish an injury to the claimant's brain. They also misunderstand the holdings of Wentz and Watson in finding that there had to be other evidence of the claimant's brain injury. In fact, those cases held that there merely had to be objective evidence that would lead one to conclude that a claimant had suffered a closed-head injury. In the present case, there is no dispute that the claimant fell heavily to the floor, striking her head. This is evidenced not only by the claimant's testimony, but by the severe laceration on the claimant's head which was established both by the medical reports and photographs made part of the record.

In my opinion, denying the claimant benefits in this case is tantamount to disregarding the ample objective evidence of an injury, including testimony, pictures, and documentary evidence of the claimant's physicians outlining that she sustained a fall, striking her head on a concrete floor. Likewise, Dr. Smith's neuropsychological testing indicates that the claimant did sustain a closed-head injury resulting in an organic brain injury. Under those facts, I believe that this Commission should have been compelled to find that the claimant met her burden of establishing a compensable injury of this nature. To reach any other conclusion is reversible error. For that reason, I would have reversed the Administrative Law Judge's denial of benefits in this case and directed the respondent to provide the claimant all reasonable and necessary medical treatment from, or at the direction of, Dr. Smith or other authorized physicians, as well as provide her all appropriate temporary and total disability benefits based upon her physician's restrictions.

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_____Accordingly, I respectfully concur in part and
dissent in part.

PHILIP A. HOOD, Commissioner