

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E417422

BETTY GERALD (BARNETT), EMPLOYEE	CLAIMANT
DOUGLAS TOBACCO, EMPLOYER	RESPONDENT NO. 1
NATIONAL FIRE IC OF HARTFORD, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JUNE 16, 2008

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 No. 1 represented by the HONORABLE LEE J. MULDROW, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed June 28, 2007. In said

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she sustained an additional two percent (2%) whole body impairment as the result of her October 4, 1994 compensable injury. (sic) this two percent (2%) whole body impairment award is in addition to her previously adjudicated thirteen percent (13%) whole body impairment.
4. The claimant has proven by a preponderance of the evidence that the major cause of her additional two percent (2%) anatomical impairment was her October 14, 1994 compensable injury.
5. The additional two percent (2%) anatomical impairment awarded herein was controverted by Respondents No. 1, and therefore a full statutory attorney's fee should apply.
6. Claimant has failed to prove by a preponderance of the evidence that her physical condition has changed in such a way to justify a modification of the wage loss previously awarded in this claim.
7. Since claimant has failed to prove a change in her physical condition, claimant has also failed to prove by a preponderance of the evidence that she is now permanently and totally disabled.

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.

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 on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

Therefore we affirm and adopt the June 28, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

The majority has affirmed and adopted an Administrative Law Judge's decision finding that the claimant did not establish that she was entitled to additional wage loss or permanent and total disability benefits based upon a change in circumstances. After a de novo review of the record in its entirety, I find that the claimant has met her burden of proof in this regard, therefore, I must respectfully dissent from the majority decision.

In prior litigation, which did not conclude until 2002, after two appeals to the Arkansas Court of Appeals, it was determined that the claimant sustained an anatomical impairment of 13% to the body as a whole and a wage-loss impairment of 50% to the body as a whole. The claimant has alleged that a subsequent back surgery has increased her level of permanent impairment and that this increase entitles her to a reconsideration on the amount of disability benefits she was previously awarded. The claimant contends that she is entitled to permanent and total disability benefits or, in the alternative, additional anatomical impairment in the amount of 15% to the body as a whole and a substantial increase in the amount of her wage-loss disability.

Previously, the claimant underwent laminectomies at L4-L5 in 1995, and at L5-S1 in 1996. The claimant's prior award of permanent disability benefits was based upon these two surgeries and her resulting vocational impairment.

Subsequent to the claimant's earlier award of permanent disability benefits, her spinal condition deteriorated further. Eventually, she came under the treatment of Dr. Edward Saer, a Little Rock neurosurgeon. In June 2005, Dr. Saer performed a multi-level fusion on the claimant which involved using bone grafts from the claimant's left hip and insertion of rods to fuse her spinal levels from L4 to S1. Later, Dr. Saer opined that the claimant had an impairment rating of 15% to the body as a whole. Unfortunately, in his report setting out this impairment rating, Dr. Saer did not explain whether this 15% included the prior impairment ratings, or was intended to be in addition to those impairment ratings, or specifically explain what section, or sections of AMA Guides to the Evaluation of Permanent Impairment that he relied upon in developing that impairment rating.

The claimant contends that the impairment rating assessed by Dr. Saer was in addition to her prior

extent of permanent impairment. The respondent contends that this 15% includes the prior 13% and the result is that the claimant has only sustained an additional 2% impairment to the body as a whole as a result of Dr. Saer's surgery. In regard to her wage loss disability, the respondent denies that the increase in impairment caused by Dr. Saer's surgery resulted in any increase in the claimant's loss of wage-earning capacity.

The Commission can reconsider a prior award of permanent impairment pursuant to Ark. Code Ann. §11-9-522 (d). That section provides as follows:

In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

I find that the claimant has clearly established a change of circumstances in this case. Specifically, her physical condition has been altered by the multi-level fusion performed by Dr. Saer. This surgical procedure was performed after the claimant had been assessed with an impairment rating of 13% to the body as a whole. While the amount of this impairment

rating will be discussed further below, regardless of how much the impairment rating is increased, the operative fact is that it was increased as a result of the fusion surgery. This is clearly the type of change contemplated by the statute which gives the Commission discretion to revise prior awards of permanent disability benefits. Even the respondent concedes that, at the very least, the claimant's permanent impairment has increased. In my opinion, this finding is sufficient for the claimant to meet her burden of establishing a change in physical condition.

In O'Hara v. J. Christy Construction Company, 94 Ark. App. 143, 227 S. W. 3d 443 (2006), this Commission held that a claimant had not established a change of physical circumstances where he testified as to increasing pain and loss of function in his leg because of a nerve injury. The Commission concluded that in order to establish an entitlement to relief under Ark. Code Ann. §11-9-522 (d), the claimant must show objective evidence of an increased impairment. The Court of Appeals reversed the Commission and held that objective evidence of anatomical impairment was not required to establish a change in circumstances. All that was necessary was for the claimant to show that an

increase in his symptoms resulted in additional impairment even if the impairment was only vocational in nature. The Court also concluded that it was not necessary to establish an increase in impairment rating to establish a claimant's entitlement to additional wage-loss disability.

In the present case, the claimant is primarily asking for an increase in wage-loss disability or an award of permanent and total disability benefits. I find that the present situation is even more compelling than the one in O'Hara. Here, this claimant has admittedly sustained additional permanent impairment because of a worsening of her original condition. She is also seeking additional wage-loss disability benefits. Under the rationale used by the Courts in the O'Hara decision, we are compelled to reconsider our earlier decision regarding the claimant's entitlement to permanent disability benefits.

While a specific impairment rating is not necessary for the claimant to establish a change of circumstances, it is important to determine her current degree of impairment to fully analyze her present claim. In June 2005, the claimant underwent a multi-level fusion. Her treating physician, Dr. Edward Saer, opined

that this resulted in a 15% anatomical impairment. In determining the extent of a claimant's permanent impairment, we are not bound by a numerical rating by a doctor, nor is one even required. Johnson v. General Dynamics, 46, Ark. App. 188, 878 S. W. 2d 411 (1994).

The first question is whether the impairment assessed by Dr. Saer includes, or is in addition to, her prior impairment. In my opinion, the impairment rating guides make it clear that impairment ratings for surgeries such as the laminectomy the claimant previously underwent, and those based upon fusion surgeries such as she underwent in June 2005, are to be considered separately.

I reach that conclusion because surgeries to correct intervertebral disc lesions are covered in Section 2, Table 75 of the Guides. Surgeries for spinal stenosis, segmental instabilities, spondylolisthesis, fracture, or dislocation are covered under Section 4 of that table. It appears to me that the Guides' intent is that an injured party should receive a separate impairment based upon these two different types of surgeries because there is an obvious difference between the type of injuries they are referring to. Specifically, the treatment of a disc lesion is intended

to reduce pressure on nerve roots, but leaves the spinal vertebrae intact. A fusion, on the other hand, changes the physical structure of the spine by inserting metal rods and bone grafts. The result is that after a spinal fusion, the patient will lose a substantial amount of flexibility and motion, something less likely to occur with a surgery focused only on treatment of a herniated disc.

Also, since the injuries are set out in different sections of the table, it seems that it was intended that they be treated separately. Had all of the claimant's multiple surgeries been of the same type, I would agree that they should be considered together. For example, the disc surgeries the claimant underwent in 1995 and 1996 would both be considered under Section 2, and result in a 13% impairment. That is, a single level disc surgery entitles her to 10% plus an additional 1% for a second level, plus 2% for the second operation. This results in a total impairment of 13%. Pursuant to Section 4, the fusion surgery the claimant underwent in 2005 results in an impairment of 12% to the body as a whole plus an additional 1% since it involves two levels (L4-L5 and L5-L3) for a total of 13%.

Further, under the evaluation system used in the Guides, in order to combine the two impairments of 13%, reference should be made to the Combined Values Chart contained on Page 322. That chart reflects that when two 13% impairments are combined, the resulting impairment is 24%. Therefore, I find that, following Dr. Saer's fusion surgery, the claimant's permanent physical impairment was 24% to the body as a whole. Since Respondent No. 1 has previously accepted and paid a 13% impairment rating to the body as a whole, I believe that they should be ordered to pay the claimant an additional 11% impairment to the whole body based upon the combined value of her two separate impairments.

The next issue is the claimant's entitlement to additional wage loss or permanent and total disability. In this regard, the claimant testified that the first two surgeries she underwent were for treatment of her back pain. However, after those surgeries, she began developing pain in her right leg. By the time she starting seeing Dr. Saer in 2005, the pain had become nearly unbearable. She testified that she could not walk or sit down for any period of time. The pain and disability from her right leg became so severe, she was forced to spend a considerable amount of time in bed.

She stated that her right leg improved substantially following the surgery. Unfortunately, in order to perform the fusion surgery, Dr. Saer had to remove bone from her left hip. The claimant began developing significant problems with her left leg in the form of pain radiating from her hip to her left knee. This pain became very debilitating and to a great extent mimicked that which she had previously felt in her right leg.

According to the claimant, her condition is worse now than it was following her original permanent impairment award in 2002. In fact, she testified that there is no physical activity that she can undertake at the present time. That was also the opinion expressed by Dr. Chris Alkire, an orthopedic surgeon in Texarkana, who saw the claimant for follow-up treatment for her spinal condition. Dr. Alkire set out that opinion in his report of May 30, 2006.

The respondent does not even contest the claimant's lack of function. Their only argument is that she is no worse off now than she was when the original assessment was made. However, this argument disregards the fact that she underwent a spinal fusion in 2005, which, as outlined above, materially changed her physical condition and resulted in a substantial

increase in her degree of permanent impairment. In fact, the respondent has admitted that the claimant has sustained an additional amount of anatomical impairment as a result of this injury. The respondent also overlooks that the claimant's leg problems had deteriorated substantially since her earlier disability award.

In summary, I find that the claimant has established that her condition has deteriorated since her original award of permanent disability benefits. Specifically, the pain and limitation that she developed first in her right leg because of the spinal neuropathy, and then later in her left leg following the spinal fusion surgery, is clearly a change of circumstance due to her injury. The respondent, while asserting that this deterioration is merely a result of the natural aging process, ignores the limitation imposed by the spinal fusion surgery. In the event that the claimant is not permanently and totally disabled, I think that it is obvious that the claimant's spinal fusion has resulted in additional permanent impairment which has a combined value of 24% to the body as a whole, an increase from her prior impairment rating of 13% to the body as a whole.

In conclusion, I find that the claimant has established a change in her circumstances which justifies an increase in her prior award of permanent disability benefits. I find that her declining condition entitles her to receive permanent and total disability benefits.

For the aforementioned reasons I must respectfully dissent.

---

PHILIP A. HOOD, Commissioner