

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201034 & F306091

MINNIE P. BREWER, EMPLOYEE	CLAIMANT
BRADLEY SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 16, 2009

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

Claimant represented by the HONORABLE NELSON V. SHAW,
Attorney at Law, Texarkana, Texas.

Respondent No. 1 represented by the HONORABLE BETTY J.
HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part;
adopted in part.

OPINION AND ORDER

The claimant appeals and Respondent No. 1 cross-appeals
an administrative law judge's opinion filed May 22, 2008.

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 reasonable and are hereby accepted as fact.
- 3) Respondent No. 1 has been forthcoming with information to the claimant. Specifically, I find that Respondent No. 1 has committed no wrongdoing with regard to the independent medical evaluation from Dr. Rosenzweig conducted on June 12, 2007. Further, I find that the independent medical evaluation conducted by Dr. Rosenzweig, and found at Respondent No. 1's Exhibit 2 to be valid, and therefore find that the claimant did sustain a 7% whole person impairment as a result of her compensable injury.
- 4) Claimant has reached maximum medical improvement; however, claimant is entitled to continued pain management from Dr. Shahim or to such doctors Dr. Shahim may refer the claimant for pain management. Additionally, claimant has proven by a preponderance of the evidence that she is entitled to all medical treatment related to her back that is contained in the record herein, including but not limited to those services provided by Dr. James Arrington, as such services were pain management and were reasonable, necessary, and related to claimant's compensable injury. Respondent No. 1 is directed and ordered to pay for all pain management related to the claimant's back contained in the record herein and all future pain management as recommended or referred by Dr. Shahim in the future once those bills are properly submitted to Respondent No. 1 for payment. Additionally, although Dr. Shahim is not recommending surgery at this time, should Dr. Shahim in the future recommend surgery related to the claimant's compensable back

injury said surgery would also be the responsibility of Respondent No. 1.

- 5) Claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability benefits in excess of her 7% whole body impairment rating. Therefore, the issue of Second Injury Fund liability is rendered moot.

Based on our *de novo* review of the entire record, the Full Commission opines that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed, except for the following language in Finding No. 4: "Additionally, although Dr. Shahim is not recommending surgery at this time, should Dr. Shahim in the future recommend surgery related to the claimant's back injury said surgery should be the responsibility of Respondent No. 1." The Full Commission reserves the issue of the claimant's entitlement to additional medical treatment in the form of low-back surgery. We otherwise find that the findings of fact made by the administrative law judge, except for the language as quoted above in Finding No. 4, are correct and are adopted by the Full Commission.

Based on our *de novo* review of the entire record, the Full Commission affirms and adopts the administrative law

judge's opinion filed May 22, 2008, except for the administrative law judge's award of prospective surgery as recommended by Dr. Shahim. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING & DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I agree that the claimant is entitled to additional reasonably necessary medical treatment as awarded by the majority. However, after a de novo review of the record, I find that the majority did not consider the claimant's age, education and work experience when assessing the claimant's entitlement to wage-loss disability, therefore, I must

respectfully dissent from the majority's failure to award wage-loss disability benefits.

Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. §11-9-522 (b) (1). Such other matters include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

The determination of wage-loss disability is fact intensive. While the majority, by affirming and adopting the

opinion of the Administrative Law Judge, appears to have considered "other matters," particularly the fact that the claimant is receiving Social Security Disability benefits, it is clear that the majority, by affirming and adopting the Administrative Law Judge, did not consider the primary factors of the claimant's age, education and work experience.

The claimant is 53 years old. She did not complete the tenth grade. She does not have a GED certificate, nor does she have any specific vocational training. The claimant worked for the respondent as a custodian, a physical job which involved mopping, and picking up items, including furniture. Prior to working for the respondent, the claimant worked at a cotton gin where she used a needle to sew tags on cotton. This job required her to stand while she performed the sewing duties. Next, the claimant was employed by Bryce's Cafeteria in Texarkana, where she worked the drive-through window. This particular job also called upon her to stand, serving food and operating the register. The third job where the claimant worked was for Homestead Manor, a nursing home in Stamps, Arkansas. This job required the claimant to perform housekeeping work, which

included washing floors, mopping floors, cleaning rooms, and washing down beds.

The claimant was given a 7% whole body rating by Dr. Rosenzweig. The claimant's testimony and the medical evidence clearly show that the claimant has difficulty with various physical movements, such as walking, standing, and using her arms. The claimant testified that she had weakness in her left leg, which she attributed to her job-related injuries. In addition, the claimant testified to loss of hair on her head, depression, and uncontrolled bowel movements. She attributes each of these problems to the job-related back injuries. As such, I find, based on the claimant's age, education and work experience, in conjunction with the "other matters" considered by the majority, it is clear that the claimant has presented evidence sufficient to support an award of wage-loss disability benefits.

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

PHILIP A. HOOD, Commissioner