

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505561

BARBARA MILLER, EMPLOYEE	CLAIMANT
WHITE HALL SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 18, 2009

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

Claimant represented by the HONORABLE KENNETH E. BUCKNER,  
Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL E.  
RYBURN, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed in part,  
affirmed in part.

OPINION AND ORDER

The claimant appeals and Respondent No. 1 cross-appeals  
an administrative law judge's opinion filed May 21, 2009.  
The administrative law judge found that the claimant did not  
prove she was entitled to additional temporary total  
disability benefits. The administrative law judge found

that the claimant proved she was entitled to wage-loss disability in the amount of 20%. The administrative law judge found that Respondent No. 1 was responsible for the claimant's wage-loss disability. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant did not prove she was entitled to additional temporary total disability. The Full Commission affirms the administrative law judge's finding that the claimant proved she sustained wage-loss disability in the amount of 20%, and that Respondent No. 1 was liable.

#### I. HISTORY

Barbara Lynn Miller, age 52, testified that following graduation from high school she had worked with her cousin "doing weddings" on weekends, and that she worked for three years in "proof and transit" for a bank. Ms. Miller testified that she worked overseas as a keypunch operator for six months, and that she became ill with a staph infection. The claimant testified that she had "a fused left knee since 1980. I had osteomyelitis in both legs and had to have four subsequent surgeries on each leg[.]" Ms. Miller testified that this condition did not cause

difficulty in standing or walking. The claimant testified, though, "I can't run, I can't ride a bicycle, stairs are very difficult on me, but - and I can't squat, but I never could do that very well, anyway." The claimant testified on cross-examination that she was unable to completely straighten her left knee, but that this condition was not painful.

The claimant testified that she sold classified advertisements for a newspaper for two years. The claimant testified that she had an associate's degree in nursing and had worked as a nurse from August 1990 until June 1992. The claimant testified that she had sustained a back muscle strain in the course of her employment as a nurse, but that the injury had resolved.

The claimant's testimony on cross-examination indicated that she worked as a substitute bus driver beginning in about 1993. The claimant subsequently worked as a unit secretary for a hospital. The claimant testified on cross that she had undergone a right total knee replacement in May 2002.

The claimant eventually became employed with White Hall School District as a school bus driver. The claimant

testified that she transported special needs children from White Hall to Little Rock. The parties stipulated that the claimant suffered a compensable injury to her back on May 23, 2005. The claimant testified that she was trying to assist an agitated child: "I reached underneath him, underneath his arms, trying to pull him up to put him into his seat so I could fasten his seatbelt, and he started walking up the side of the bus and walked up onto the roof, and I'm standing there holding his weight."

Dr. Gerald Morris saw the claimant on May 24, 2005: "She states that yesterday afternoon while driving the school bus to Little Rock, her usual job, a student became upset and there was a scuffle on the bus. She noticed today lower back pain. She has had some back problems in the past. X-rays and lumbar scans have shown degeneration of the spine. The last scan was 10 years ago or so. She has not had much trouble with it since. Last year she had pulmonary emboli and had surgery and has had a screen in the vena cava. She also had osteomyelitis of her left knee about 25 years ago and she has a permanently stiffened left leg at the knee." Dr. Morris assessed "Lumbar strain" and stated, "We did lumbar x-rays, they did not seem to be

unusual. We did see a surgical implement in the lower abdomen just in front of the spinal column, which I believe is a part of the surgery done to help her with the pulmonary emboli and deep vein thrombosis she had last year. For all of her problems this is a very vigorous lady and is very motivated and wanting to drive the school bus....I advised her in the benefits of heating pad for 30 minutes at a time, back rub, and hopefully this will clear up very quickly."

Dr. Morris took the claimant off work until June 2, 2005. Dr. Morris assessed "Lumbar strain" on June 8, 2005 and noted, "We have given her a Form-3 saying no driving, continue physical therapy. We will see her back on the 20<sup>th</sup>. In fact school is out and she is not working this summer, but for the purpose of Workman's Compensation this is what we ordinarily would have suggested....We suggested heating pad as before, rest at home, reclining chair position. Hopefully she will be much better in ten days or so." Dr. Morris saw the claimant on June 21, 2005 and assessed "1. Lumbar strain. 2. Intractable pain." Dr Morris recommended referral to a neurosurgeon and took the claimant off work until July 5, 2005.

Dr. Reza Shahim began treating the claimant on June 28, 2005: "Ms. Miller is symptomatic from lumbar spondylosis, which is aggravated by a work injury. I have recommended placing her in an LSO brace and she has axial back discomfort. Since her symptoms have not improved with physical therapy, we will obtain an MRI of the lumbar spine, and based on the MRI she may benefit from epidural steroid injections."

An MRI of the claimant's lumbar spine was taken on July 11, 2005, with the following impression: "Small broad-based right paracentral disk herniation at L5-S1, which migrates slightly superiorly and does abut the right S1 nerve root as it exits the thecal sac." Dr. Shahim reviewed the lumbar MRI and stated on July 19, 2005, "Since this is a small disc herniation and the patient is having significant back pain, I have recommended epidural steroid injections. She has failed physical therapy. We will refer her for epidural steroid injections." Dr. James R. Adametz performed a lumbar epidural steroid injection on August 1, 2005.

Dr. Shahim reported on August 11, 2005 that the claimant's symptoms were worsening. Dr. Shahim saw the claimant on August 25, 2005: "She continues to have severe

low back pain, left hip pain, pain radiating to the posterior aspect of the left leg. She has had epidural steroid injections, physical therapy and bracing with no improvement in her pain control. I reviewed the lumbar spine MRI and she has an annular tear and central disc herniation at L5-S1....I have recommended a discography with steroid injection into the disc at L5-S1. If the discogram shows clear annular tear she may benefit from IDET or a diskectomy."

Dr. Thomas M. Hart examined the claimant on September 23, 2005 and noted, "I agree with Dr. Shahim, she would be a candidate for discography....She may be a candidate for percutaneous discectomy." Dr. Hart performed discography on September 28, 2005.

The claimant followed up with Dr. Shahim on October 4, 2005: "I reviewed Ms. Miller's MRI and she does have a disc herniation at the right L5-S1 superiorly extruded. There is also a central disc herniation at L4-5 and for this reason I have recommended for her to consider open diskectomy....Because of the severity of her symptoms she would prefer to have surgery done and we will plan on a

right L4-5 and L5-S1 diskectomy." Dr. Shahim performed surgery at L4-5 and L5-S1 on October 21, 2005.

The claimant continued to report significant back pain and right hip and leg pain following surgery. The claimant underwent lumbar medial branch blocks on December 20, 2005. The claimant continued to report pain and she underwent radiofrequency nerve ablation on January 16, 2006. Dr. Shahim reported on January 24, 2006, "Ms. Miller has failed lumbar decompression and therapy, and bracing. I will put her in a TENS unit today to help the muscle spasms in the paraspinal musculature. We discussed her next option, which is surgical fusion at L4-5 and L5-S1....We will plan on lumbar fusion at L4-5 and L5-S1."

On February 1, 2006, Dr. Shahim signed the following statement provided by the claimant's attorney: "This lady continues to be under my care for her work related injury. She: B) Continues to remain unable to work because of her work related problem and will continue to be temporarily and totally disabled until further notice." Dr. Shahim noted on February 14, 2006, "Ms. Barbara Miller was denied the fusion operation by workers comp, which was recommended by me." Dr. Shahim noted on March 7, 2006, "Since Ms. Miller has

been denied for lumbar fusion and she has severe disc disease at L4-5 and L5-S1 she is a candidate for dorsal column stimulation to block the pain. Prior to that I will refer her for dorsal column stimulation after we perform a CT lumbar myelogram. I will obtain a myelogram to look at the nerve roots." Dr. Shahim reported on March 23, 2006, "I saw Ms. Miller after her myelography. I reviewed her myelography today with her. She has evidence of facet disease at L4-5 and L5-S1. I do not see any significant nerve root compression....Since she has significant radicular symptoms, I think she is a good candidate for a dorsal column stimulator. The alternative to dorsal column stimulator trials would include narcotic pump placement. I will refer her to Dr. Hart for evaluation."

Dr. Steven L. Cathey examined the claimant on April 20, 2006 and noted in part, "If she decided to continue nonoperative management, it would be my opinion that she has reached maximal medical improvement at this point and is entitled to a 12% permanent partial impairment rating in accordance to AMA Guidelines."

A hearing was held on August 24, 2006. At that time, the parties agreed that the respondents would approve a

spinal cord stimulator. It was agreed that the respondents would bring temporary total disability benefits up to date, and that the respondents would pay the 12% anatomical impairment rating assessed by Dr. Cathey. The parties agreed that the claimant's healing period ended as of August 24, 2006. On August 29, 2006, an administrative law judge signed the following AGREED ORDER:

- 1) The respondent will pay temporary total disability benefits to Barbara Miller through August 24, 2006.
- 2) It is agreed that the healing period ended on August 24, 2006. The respondent will pay permanent partial disability benefits for a 12% rating to the body at the rate of \$154.00 commencing on August 25, 2006.
- 3) Reza Shahim, M.D. is the claimant's treating physician.
- 4) The respondent will authorize and pay for the dorsal column stimulator as prescribed by Dr. Shahim and all associated costs per Rule 30.
- 5) All other issues are reserved.

Counsel for Respondent No. 1 stated at hearing that the respondents began paying permanent partial disability on August 25, 2006.

Dr. Shahim saw the claimant on September 21, 2006:

She continues to have back pain and bilateral leg pain. I had a long discussion with Ms. Miller regarding dorsal column stimulation as an option for treatment of her pain. I do not think dorsal column stimulation will cure or cover all of her pain, but it is a good option for her. A fusion is also unlikely to completely cure all of her symptoms. We discussed trials for dorsal column stimulation. She will have to see whether or not

it covers her pain and how well it covers her pain. I will plan on following up with her after the dorsal column stimulation trials. I also reviewed her flexion, extension x-rays of the lumbar spine which shows no evidence of mechanical instability.

ADDENDUM: AP, lateral and flexion, extension x-rays of the lumbar spine were reviewed and there is degenerative disc disease at L4-5 and L5-S1. No subluxation is noted.

Dr. Shahim noted on November 2, 2006, "I saw Ms. Miller today....Since Ms. Miller's symptoms are primarily currently axial back pain I do not think that a dorsal (sic) column stimulator would be the best option to cover that pain. Previously I had recommended a dorsal column stimulator because of her leg symptoms, but she says that covering her leg symptoms would not get rid of much of her pain. I would obtain a new MR of the lumbar spine to assess the joint degeneration. She has obtained another opinion by a Neurosurgeon who has also recommended a lumbar fusion to her. She would rather have a lumbar fusion done and I will plan on seeing her after the MRI."

An MRI of the claimant's lumbar spine was taken on November 7, 2006, with the following impression:

1. Prior L4-5 and L5-S1 right hemilaminectomies without evidence of residual or recurrent disc herniation.
2. Broad-based disc bulges with bilateral facet hypertrophic changes at the L4-5 and L5-S1 levels

without significant mass effect on the spinal canal or neural foramina. The patient does have a focal prominence on the broad-based disc bulge in the central and right paracentral location at the L5-S1 level that does not cause significant mass effect on the canal or neural foramina.

Dr. Shahim reported on December 14, 2006:

I saw Ms. Miller today. I have reviewed her MRI with her. She does have disc degeneration at L4-5 and L5-S1. I reviewed her discography, which was positive at L4-5 and L5-S1. There is a central disc protrusion at L5-S1. There is an annular tear at L4-5.

DECISION MAKING: Ms. Miller's pain is currently now primarily axial back pain. She has some leg symptoms bilaterally, but it is not very severe. For this reason we have discussed a surgical decompression and fusion. I have described to her the technical aspects for an interbody fusion and pedicle instrumentation. The risks of surgery include infection, bleeding resulting in a hematoma requiring evacuation of the hematoma, paralysis which could be permanent resulting in weakness or numbness, spinal fluid leakage requiring further surgery, further surgery including operating at the same level for recurrent disc disease or adjacent levels due to progression of disc disease, and failure to improve due to chronic irritation or severe disc disease.

I have given her other options. We have discussed a dorsal column stimulator, but since she has primarily axial, sharp back pain that is unlikely to help. We have discussed intrathecal narcotic pump placement, but that should be a last resort if she fails fusion. We have also discussed all other options including facet rhizotomies and minimally invasive injections. She has failed the majority of other treatments and has come to a last resort.

I have explained to her that a two level interbody fusion is a big operation. There is risk of development of adjacent level syndrome.

Since she has a frozen left knee joint, there is quite a bit of stress on the lumbar spine joints and her back symptoms may not resolve with surgery.

Because of the severity of her symptoms she would prefer to have surgery done. I am going to plan a posterior lumbar interbody fusion at L4-5 and L5-S1, with a possible hip graft and interbody cages.

The record indicates that the claimant underwent surgery on or about December 29, 2006. Dr. Shahim noted on January 9, 2007, "Ms. Miller is status post an anterior lumbar interbody fusion at L4-5 and L5-S1. PHYSICAL EXAM: Her incision has healed well. Her staples are removed today. DECISION MAKING: I will obtain x-rays of the lumbar spine. I have recommended to her to avoid bending, twisting and heavy lifting. I have refilled her pain medication and we will plan on following up with her in a month." Dr. Shahim noted following an x-ray on January 9, 2007, "There is a stable posterior interbody fusion at L4, L5 and S1 with pedicle instrumentation."

Counsel indicated that the respondents paid permanent partial disability until January 9, 2007 and reinstated temporary total disability beginning January 10, 2007.

The claimant continued follow-up visits with Dr. Shahim. An MRI of the claimant's lumbar spine was taken on August 30, 2007, with the following impression:

1. Status-post fusion from L4 to S1 with no evidence of canal stenosis or nerve root impingement.
2. No areas of abnormal enhancement are identified. There is mild broad-based central and right paracentral disc protrusion at L5-S1.

The claimant participated in a Functional Capacity Evaluation on October 3, 2007:

The results of this evaluation indicate that Ms. Miller gave a reliable effort, with 44 of 44 consistency measures within expected limits....

CONCLUSIONS

Ms. Miller completed functional testing on this date with reliable results. Overall, Ms. Miller demonstrated the ability to perform work in the LIGHT

Physical Demand Classification as defined by the US Dept. of Labor's guidelines over the course of a normal workday with the limitations noted above....

The claimant followed up with Dr. Shahim on December 6, 2007: "Based on Functional Capacity testing she meets the criteria for light duty. She should avoid heavy lifting. She should avoid repetitive bending and twisting. She may return to work based on light duty criteria. I do think she will continue to have some back and leg symptoms. She has EMG evidence of a radiculopathy. I have refilled her pain

medications. We will stop physical therapy since it is not helping her very much. I'll plan on following up with her in a few months."

The respondents paid temporary total disability benefits until December 12, 2007. The respondents began paying permanent partial disability on December 13, 2007.

Dr. Shahim reported on April 22, 2008:

Mr. (sic) Miller is at MMI, although she continues to have significant symptoms.  
DECISION MAKING: I have asked for authorization for pain management and possible evaluation for dorsal colum (sic) stimulator trial. Although she is at MMI from her fusion, she may still benefit from dorsal colum stimulator trials or narcotic pump trials. Her current impairment rating for surgical treatment at two level lumbar disks with fusion is 12% of impairment of a whole person. We may ask for rehab evaluation to better assess her total body impairment, which may be higher than the 12% I have assigned for her for surgically treated.

The claimant testified that she had applied for work with five potential employers, including the respondent-employer, but had not been hired. "I have gone in and filled out applications and have not received any - any wording from any of the applications."

Dr. Shahim opined on April 24, 2008, "I think Ms. Miller is now MMI from her prior surgery. Based on her functional capacity, she could return to light duty,

although I doubt seriously she will be able to maintain a full time position. She still has chronic back and leg symptoms. I think she is probably a good candidate for dorsal column (sic) stimulator trials or narcotic pump trials. I will attempt to obtain authorization from Worker's Comp for her to be evaluated by Pain Management. I have refilled her pain medication today."

Dr. Hart examined the claimant on June 13, 2008 and noted in part, "Ms. Miller did undergo a 2 level fusion on 12/29/06. That has improved her back where she no longer has the sharp shooting electrical type currents going into her buttock and posterior lateral thigh. Her sleep pattern has improved. She has had improvement in her ambulation, but she is not pain free. She still has some lower back pain complaints, mainly to the paravertebral and upper buttock area."

Respondent No. 1 paid permanent partial disability until July 23, 2008.

Dr. Hart apparently inserted a spinal cord stimulator on about September 10, 2008. The claimant reported good results from this procedure. The claimant testified that

her back pain "has been much, much better since the dorsal column stimulator was put in."

A pre-hearing order was filed on December 17, 2008. The claimant contended that "by Agreed Order dated August 29, 2006, her healing period ended on August 24, 2006, but she re-entered a second healing period on September 21, 2006, when she returned to Dr. Shahim and remained temporarily and totally disabled until April 22, 2008. The claimant had to have a multi-level fusion in December 2006 and according to her treating physician, Dr. Reza Shahim, her healing period did not end until April 22, 2008. The claimant has a 12% impairment rating and the respondent should not be allowed to take credit for any permanent partial disability except from August 25, 2006, until September 21, 2006. This has been controverted. The claimant further contends that she has a significant wage loss that exceeds the impairment rating."

Respondent No. 1 contended that the claimant had been treated and released with a 12% permanent partial disability rating. Respondent No. 1 contended that the claimant had been paid the appropriate periods of temporary total disability and that the claimant's healing period had ended.

Respondent No. 1 contended that if there was any wage loss, then it was the responsibility of the Second Injury Fund.

The Second Injury Fund contended that the claimant's last injury standing alone was the cause of the claimant's current disability. The Fund contended that there was no combination of injuries as required by *Mid-State Constr. Co.*

A hearing was held on February 20, 2009. The claimant testified that she was no longer licensed as a nurse. The claimant testified that she had applied, though unsuccessfully, for work with a florist, "because I've arranged floral exhibits." The claimant essentially testified that she was physically unable to perform full-time work.

An administrative law judge filed an opinion on May 21, 2009. The administrative law judge found, among other things, that the claimant did not prove she was entitled to additional temporary total disability benefits. The administrative law judge found that the claimant proved she was entitled to wage-loss disability in the amount of 20%. The administrative law judge found that Respondent No. 2, Second Injury Fund, was not liable for the claimant's wage-

loss disability. The claimant appeals to the Full Commission and Respondent No. 1 cross-appeals.

## II. ADJUDICATION

### A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period has ended is a question of fact for the Commission. *Id.*

An administrative law judge found in the present matter, "7. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits." The Full Commission does not affirm this finding. The claimant sustained an admittedly-compensable injury to her back on May 23, 2005. The claimant was assessed as having a lumbar strain and was taken off work. The parties stipulated that Respondent No. 1 paid some indemnity benefits. Dr. Shahim performed lumbar surgery on October 21, 2005. Dr. Shahim opined on February 1, 2006 that the claimant was temporarily totally disabled "until further notice." A hearing was held on August 24, 2006. Respondent No. 1 agreed to bring the claimant's temporary total disability benefits up to date, but it was also agreed that the claimant's healing period ended as of August 24, 2006.

The claimant argues on appeal that she re-entered a healing period on September 21, 2006, the date she resumed treatment with Dr. Shahim. Dr. Shahim ordered diagnostic testing, which did not show any new structural changes to the claimant's lumbar spine. The Full Commission recognizes that an employee does not have to present objective medical

evidence in order to prove that her healing period continues. See *Chamber Door Industries, Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997). We are unable to find in the present matter, however, that the claimant entered a new healing period beginning September 21, 2006. Nor did Dr. Shahim opine that the claimant was within a healing period on that date or that the claimant had begun a new healing period.

One of the reports from Dr. Hart indicates that the claimant underwent additional low back surgery on or about December 29, 2006. The respondents reinstated temporary total disability benefits beginning January 10, 2007. The Full Commission finds that the claimant re-entered a healing period and was totally incapacitated from earning wages beginning December 29, 2006. The claimant was therefore entitled to additional temporary total disability benefits beginning December 29, 2006. Dr. Shahim reviewed the results of a subsequent Functional Capacity Evaluation and stated on December 6, 2007 that the claimant could perform light-duty restricted work. Dr. Shahim did not opine that the claimant had reached the end of her healing period. Nor does the record show that restricted light-duty work was

available with the respondent-employer. Respondent No. 1 converted temporary total disability benefits to permanent partial disability on December 13, 2007. The record shows, however, that the claimant remained within a healing period on April 22, 2008. Dr. Shahim reported on April 22, 2008 that the claimant had reached maximal medical improvement. Temporary total disability cannot be awarded after an employee's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). In the present matter, the instant claimant proved she was entitled to additional temporary total disability beginning December 29, 2006 until April 22, 2008.

B. Permanent Disability

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect her future earning capacity. Ark. Code Ann. §11-9-522(b)(1). An administrative law judge found in the present matter, "8. Considering the claimant's age, education, work

experience, medical evidence, motivation, and post-injury income, claimant has proven by a preponderance of the evidence that she is entitled to 20% wage loss benefits sustained as a result of her compensable back injury." The Full Commission affirms this finding.

The claimant is age 52 and a high school graduate. The claimant has a varied work history. She has worked for a bank in proof and transit and has also worked as a keypunch operator. The claimant earned an associate's degree in nursing and worked as a nurse for approximately two years, but the claimant has since let her nurse's license lapse. The claimant has also formerly worked as a substitute bus driver and as a hospital's unit secretary. The claimant eventually became a school bus driver for the respondent-employer, and she suffered a compensable injury to her back on May 23, 2005. Dr. Shahim performed surgery at L4-5 and L5-S1 on October 21, 2005. Dr. Shahim performed an additional lumbar surgery on or about December 29, 2006. Dr. Shahim reported on April 22, 2008 that the claimant was at maximum medical improvement, and he assigned the claimant a 12% anatomical impairment.

We do not agree with Respondent No. 1's argument on appeal that the claimant has sustained zero wage loss or that the claimant can earn more money now than before the compensable injury. Since the claimant's May 23, 2005 compensable injury, she has undergone two low back surgeries and has been assigned a 12% anatomical impairment by her treating surgeon. Despite some varied work experience, the claimant is now in her early fifties with only a high school education and an associate's degree in nursing. The Full Commission finds that the claimant was a credible witness, and we note that the claimant gave a completely reliable effort during her Functional Capacity Evaluation. The Functional Capacity Evaluation indicated that the claimant was able to perform light physical work. Dr. Shahim agreed with that assessment and instructed the claimant to avoid heavy lifting, repetitive bending, and twisting. Dr. Shahim opined on April 24, 2008, "Based on her functional capacity, she could return to light duty, although I doubt seriously she will be able to maintain a full time position." We note the claimant's credible testimony that she had applied for work with several different employers, including the respondent-employer, but had not been successful. Based on

the claimant's middle age, lack of education, anatomical impairment, and motivation to return to work, the Full Commission finds that the claimant sustained wage-loss disability in the amount of 20%. We find that the May 23, 2005 compensable injury was the major cause of all of the claimant's wage-loss disability.

C. Second Injury Fund

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at her present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

An administrative law judge found in the present matter, "10. The preponderance of the evidence demonstrates that there is no Second Injury Fund liability in this case since claimant's permanent partial impairment is directly related to the claimant's last injury standing alone. There is no combination of injuries as required by Mid-State

Construction Co. and therefore there is no Second Injury Fund liability." The Full Commission affirms this finding.

The claimant suffered a compensable injury at her present place of employment on May 23, 2005. The first hurdle according to *Mid-State Constr., supra*, was therefore overcome. The claimant's testimony indicated that she had undergone a left knee fusion in 1980 and that she had undergone four additional surgeries on each leg. The claimant testified that she was unable to completely straighten her left knee. The claimant underwent a right total knee replacement in 2002. The preponderance of evidence in the present matter indicates that the claimant had a permanent partial disability or impairment to both lower extremities prior to the May 23, 2005 compensable injury. Nevertheless, the evidence does not demonstrate that the disability or impairment combined with the compensable injury to produce the claimant's current disability status. Neither the claimant's testimony nor the medical evidence indicated that the claimant's inability to return to full-time work was the result of her prior disability or impairment. The record shows that the major cause of the claimant's disability was the compensable

injury, not the prior disability or impairment. The evidence in the present matter does not demonstrate that the disability or impairment combined with the recent compensable injury to produce the current disability status. The administrative law judge's decision is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to additional temporary total disability beginning December 29, 2006 and continuing until April 22, 2008. The Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 20%, and that the May 23, 2005 compensable injury was the major cause of the claimant's wage-loss disability. Because the prior disability or impairment to the claimant's lower extremities did not combine with the compensable injury to produce the current disability status, the Full Commission finds that Respondent No. 2, Second Injury Fund, is not liable for the claimant's wage-loss disability. Wage-loss disability in the present matter is the sole responsibility of Respondent No.1. We therefore reverse the administrative law judge in part and affirm in part.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's opinion finding that the claimant has proven by the preponderance of the evidence that she was entitled to additional temporary total disability benefits and finding that she was entitled to a wage loss disability benefits in the amount of twenty percent (20%) over and above her permanent anatomical impairment rating. In my opinion, the claimant has failed to meet a burden of proof.

With regard to the additional temporary total disability benefits awarded by the majority through April 22, 2008, it is my opinion that the claimant should only receive temporary total disability benefits through December 13, 2007. In December of 2007, Dr. Shahim, the claimant's treating physician, reported that the claimant could return to light duty work. The evidence demonstrates that the claimant's permanent work restrictions were for light duty work. This was confirmed by the functional capacity evaluation, which demonstrated that the claimant was capable of light duty work. Although Dr. Shahim did not use the magic words "maximum medical improvement" until his report of April 22, 2008, it is crystal clear that the claimant was released to return to light duty work in December of 2007 when Dr. Shahim stated in his report that the claimant was released for light duty work and that she should avoid any repetitive bending, twisting or lifting. In my opinion, the claimant reached the end of her healing period in December of 2007 and, therefore, should not be awarded additional temporary total disability benefits after December 13, 2007.

I also dissent from the majority's award of a twenty percent (20%) loss in wage earning capacity in

addition to the claimant's permanent anatomical impairment rating. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits.

The evidence demonstrates the claimant is a licensed practical nurse and although she does not have a current license, she could get re-licensed in that field and make more money than she was making in any of her previous jobs that she has done working part-time. The claimant is only 51 years old and is very motivated to return to work, according to her testimony. Therefore, I find that the claimant is not entitled to any wage loss disability benefits. If I were to find that the claimant were entitled to any wage loss disability benefits in addition to her permanent anatomical impairment, a finding I do not make, I would affirm the finding that the Second Injury Fund does not have liability for those benefits.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority's opinion.

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KAREN H. MCKINNEY, COMMISSIONER