

**NOT DESIGNATED FOR PUBLICATION**

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 MARCH 10, 2009

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: Affirmed and  
Adopted.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and  
remanded for reconsideration of the above-styled claim.  
*Rutherford v. Mid-Delta Community Services*, CA 07-1175  
(May 28, 2008). The respondents appealed an opinion and

order of the Administrative Law Judge filed September 14, 2006. 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 and contained in the Prehearing Order filed June 28, 2006, are hereby accepted as fact.
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.

Based on our reconsideration and *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. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the September 14, 2006 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion 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).

The claimant's attorney is entitled to fees for legal services pursuant to 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 opinion affirming and adopting the decision of the Administrative Law Judge. This claim is presently before the Commission on Remand from the Court of

Appeals. In an opinion delivered May 28, 2008, the Court of Appeals reversed the finding of the Full Commission that a claimant must establish a compensable permanent impairment rating as a pre-requisite to a determination of permanent and total disability. The Court specifically stated:

The Commission's decision denying appellant's claim for PTD benefits is hereby reversed, and this claim is remanded for further proceedings, including, *inter alia*, whether appellant is totally and permanently unable to earn any meaningful wages in the same or other employment, and, if so, whether her compensable injury is the major cause of such disability.

As noted by the Court in their opinion, the claimant was only "asserting a single legal issue for our resolution: is a permanent partial impairment rating a prerequisite to a claim for PTD?" It was on this single issue that the claimant appealed and the court ruled.

Our September 24, 2007, opinion which resulted in the claimant's appeal to the Court of Appeals, made two specific findings under the subheading II. Adjudication, A. Compensability and B. Impairment/Disability. It is only from this second

finding that the claimant appealed to the Court of Appeals and that the Court Ruled upon. Accordingly, the finding from our September 24, 2007, opinion regarding compensability remains the law of the case and is *res judicata*.

"*Res Judicata* means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction." McCurry v. First Presbyterian Church, Full Commission Opinion filed November 3, 2008 (AWCC No. F304774); JeToCo Corp. v. Hailey Sales Co., 268 Ark. 340, 596 S.W.2d 703 (1980). The doctrine of *res judicata* applies to the decisions of the Commission. Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996). "The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time." Gibbs v. Moffatt Logging, Full Commission Opinion filed September 12, 2007 (AWCC No. F403435).

In our opinion we specifically found:

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 then went on to find that the claimant failed to prove by a preponderance of the evidence that she sustained a permanent physical impairment rating resulting from any of the these compensable injuries. It is this second finding which claimant contested on appeal. The specific finding of fact with regard to the claimant's compensable injuries is therefore a matter which has been decided and which cannot be reopened on remand. Lunsford v. Rich Mountain Elec. Coop., 38 Ark. App. 188, 832 S.W.2d 291 (1992). In Lunsford, the claim

had previously been to the Court of Appeals and was reversed and remanded for additional findings. In the second appeal to the Court of Appeals, the Court stated:

Regardless of what the Commission may have intended, the Commission found in its previous opinion that the appellant believed Dr. MacDade had cleared the activity. Having once so found, the Commission cannot now say that the appellants' testimony was not sufficiently credible to permit such a finding, because the doctrine of res judicata, which is applicable to the decisions of the Commission, forbids the reopening of matters once judicially determined by competent authority.

Moreover, whatever has been before the appellate courts and disposed of in the exercise of its jurisdiction is considered settled. "The Commission cannot change its findings of fact on remand." White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W.2d 649 (2001).

Accordingly, I find that on remand we must look to our previous finding of compensability to determine whether any of these injuries merit a finding of permanent and total disability. As the Administrative Law Judge made a broader, more sweeping finding with regard to which injuries were compensable I

find that we cannot affirm and adopt the findings and conclusions of the Administrative Law Judge as his findings are clearly contrary to our specific finding of compensability.

The claimant's compensable injuries only consist of 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. We specifically found that the claimant did not sustain a compensable injury to her a cervical or lumbar spine nor did she sustain a traumatic brain injury. Accordingly, I am not persuaded to find "in accordance with the facts" that the claimant has proven by a preponderance of the evidence that these compensable injuries have rendered the claimant permanently and totally disabled. Therefore, I must respectfully dissent from the majority opinion.

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Karen H. McKinney, Commissioner