

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704374

DOROTHY LONG, EMPLOYEE	CLAIMANT
CONTINENTAL EXPRESS, EMPLOYER	RESPONDENT NO. 1
GIBRALTAR NATIONAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 14, 2010

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

Claimant represented by the HONORABLE ANDY L. CALDWELL,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE MELISSA WOOD,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's
opinion filed September 14, 2009. The administrative law
judge found that the claimant had sustained a 7% anatomical
impairment rating and wage-loss disability in the amount of
50%. After reviewing the entire record *de novo*, the Full

Commission finds that the claimant proved she sustained anatomical impairment in the amount of 7% and wage-loss disability of 20%. We find that Respondent No. 1 is liable for the claimant's wage-loss disability. There is no Second Injury Fund liability in the present matter.

I. HISTORY

Dorothy Long, age 60, testified that she had graduated from high school and that she had also received a vocational diploma for hairdressing. Ms. Long testified that she attended truck driving school in 1988 and became employed as a truck driver the same year.

The parties stipulated that the claimant sustained a compensable back injury on April 24, 2007. A physician saw the claimant on April 24, 2007 and assessed "Lumbar pain with radicular symptoms." An MRI of the claimant's lumbar spine was taken on April 27, 2007, with the following impression:

1. Annular disc bulging and a small central disc protrusion at L4-5 contributing to mild central canal stenosis.
2. Moderate annular disc bulge and osseous endplate spurring at L5-S1, with no definite S1 nerve root impingement. There is mild bilateral foraminal stenosis.
3. Mild facet arthropathy throughout the lumbar spine.

Dr. Brenda K. Covington diagnosed "1. Lumbar strain. 2. Mild Disc bulges L4-L5 & L5-S1." Dr. Covington planned conservative treatment, including physical therapy and medication. The claimant received physical therapy beginning May 7, 2007. The claimant testified that physical therapy did not improve her condition.

Dr. Ricky L. Hutcheson, D.O., began treating the claimant on June 18, 2007. Dr. Hutcheson's impression was "1. Lumbar strain. 2. Nonorganic symptomatology/symptomagnification. PLAN: At this time, I told her that I am going to keep her on deskwork for a week but I want her to go get the MRI scan. I am going to see her back in a week. If the MRI scan does not show any disk herniation or stuff like that then I am going to look at getting her back to work. She has been off of work since April 2007. She will either need to consider getting back to work or getting a different job. She has already had physical therapy for 12 visits without any significant relief of her symptoms."

The claimant followed up with Dr. Hutcheson on June 26, 2007: "The MRI scan showed some disc bulges, but nothing that I feel like anything needs to be done about. Again, I

actually had the report today; I did not have the actual films. At this point I am going to get an FCE on her. We will keep her on the same restrictions until we get the FCE."

A Functional Capacity Evaluation was done on June 29, 2007, and Lifting Restrictions were recommended: "50 lb Occasionally/30 lb frequently." The following conclusions resulted from the Functional Capacity Evaluation:

Ms. Long demonstrated a consistent effort with testing. The results of this evaluation are a RELIABLE representation of her current functional capabilities. Based on her demonstrated dynamic lifting and carrying abilities, Ms. Long is classified in the MEDIUM PDC strength level for work. Based on a formal job description provided, her job as an OTR Truck Driver with Continental Express is classified in the VERY HEAVY PDC strength level for work. Ms. Long DOES NOT MEET the strength/lifting/carrying demands, but she DOES MEET the positional demands of her job. The above listed Lifting/Carrying Restrictions are recommended for working. No Positional Restrictions are recommended due to meeting the job demands.

Dr. Hutcheson provided an Impairment Rating on July 14, 2007:

Ms. Long is a 58-year-old female that sustained an injury while working for Continental Express. The injury occurred on 04/25/07. She was subsequently treated with conservative care, but failed conservative care. She had an FCE done on 06/29/07. It showed she gave a reliable effort.

It showed that she did not meet the strength, lifting and carrying demands of her job. She has restrictions of lifting 50 pounds occasionally and 30 pounds frequently. There are no positional restrictions. Based off the FCE she did have some limitations in the lumbar range of motion which resulted in a 6% whole person Impairment Rating. At this point I have nothing additional to add. She can go back to work with the above restrictions.

The parties stipulated that "Medical expenses, temporary total disability benefits and a 6% rating to the body as a whole have been accepted." The claimant testified that the respondent-carrier told her there were no restricted-duty jobs available. The parties stipulated that the respondent-employer was no longer in business.

The claimant's testimony indicated that Respondent No. 1 had paid the 6% rating.

Dr. Ahmad Nematbakhsh, D.O., examined the claimant on April 2, 2008:

Examination shows that the patient is a pleasant 58-year-old female who is morbidly obese. She walks with a normal gait. She does not have any sign of myelopathy or any sign of foot drop. She does not have any sign of weakness in her legs. She has good range of motion of the lumbar spine, but as she flexes from zero to about 10 degrees she gets pain and then when she passes the point she feels more comfortable. She is pointing to her whole entire lumbar spine for the painful area. I am concerned that she has two points of subjective complaints, which I cannot explain objectively. As I touched the skin and

superficial soft tissue she is complaining of low back pain. Also as I put pressure on her head and push her head down she is complaining of low back pain. I am concerned about symptom magnification in these two occasions. The patient has muscle strength 5 out of 5. She has negative straight leg raising. As I lift up her leg she is complaining of low back pain. She has no sign of muscle atrophy. She has no sign of muscle weakness. Her skin is normal. There is no sign of chronic denervation or nerve pathology. She has no sign of radiculopathy or myelopathy in our office today.

Studies: X-ray of the lumbar spine was obtained and reviewed which shows that the patient has degenerative disk disease from L1 through sacrum with osteophyte formation. The patient also has had an MRI in 2007, which I do not have, but the report discussed the disk bulge at L4-L5 with mild stenosis as well as disk bulge at L5-S1 with facet disease. Unfortunately I do not have those MRI reports.

Dr. Nematbakhsh's impression was "1. Low back pain.
2. Morbid obesity...I am not going to change her work status at this time until I review her MRI. Her restrictions remain the same as the ones Dr. Hutcheson gave in the past."

Dr. Nematbakhsh reported on May 1, 2008:

I have received the MRI for Dorothy Long dated April 27, 2008. The MRI evaluation showed that the patient has severe degenerative disk disease with large osteophyte formation at L5-S1 with bone spur formation at L5-S1 in the foramen, which causes her to have foraminal stenosis at L5-S1. She has modic changes at L5-S1, which is the sign of degenerative arthritis. She has a large

osteophyte formation and I would not expect any motion at this level. She does not have a herniated disk at L5-S1. At L4-L5 she has very minimal disk herniation. It is central. It does not touch any nerve root. The nerve root has no compression on it. There is no central or foraminal stenosis. This is a very small-herniated disk.

In response to her question regarding her pain I believe the patient has severe degenerative osteoarthritis at L5-S1 with bone-on-bone deformity with bone marrow edema at L5-S1. This is the cause of her back pain. Further treatment should be done with her primary insurance because of the severe degenerative disk disease at L5-S1. With regard to the very small-herniated disk at L4-L5 this does not cause any radiculopathy. The disk herniation is quite small. The literature supports that a small-herniated disk, as of this date, is usually an incidental finding as it has been shown that people with no back pain who have had MRIs do have degenerative disk disease and small-herniated disk at L4-L5 quite often.

I have given her the percentage to 60% because of the arthritis, 20% because of her morbid obesity, and 20% because of her Workmen's Compensation injury. I have given her 2% impairment rate because of her back pain. I have not been asked to set the patient at MMI so the patient has had a month of therapy. I would appreciate if the patient follows up with me after physical therapy to discuss her treatment options with her.

Dr. Nematbakhsh filled out a Form AR-3, Physician's Report, on May 7, 2008 and opined that the claimant had reached maximum medical improvement. Dr. Nematbakhsh indicated that the claimant could return to work on May 8, 2008 with the permanent restriction, "No lifting more than

30 pounds." Dr. Nematbakhsh opined that the claimant had sustained a permanent anatomical impairment of 2%.

The claimant's testimony indicated that she began training in about June 2008 to become a CNA.

The record contains a Change of Physician Order dated August 20, 2008: "A change of physician is hereby approved by the Arkansas Workers' Compensation Commission for Dorothy E. Long to change from Dr. Ahmad Nematbakhsh to Dr. Larry Horvath[.]" The parties stipulated that "on August 20, 2008, the Medical Cost Containment Division approved a change of physician to Dr. Larry Horvath."

Dr. Larry D. Horvath, D.O., consulted with the claimant on September 9, 2008:

We were asked to take a look at this 59-year-old female in regards to residual back and leg pain, permanent injury she suffered back in 2007. She was a truck driver closing her doors on her truck when she experienced back pain, this occurred in Arkansas. She was treated as a Workers' Comp injury. Basically, there is a full chart here. She has more recently seen Dr. Nematbakhsh, ortho-spine. He certainly did not think there was any surgery, and really did not have any other options either. I am really sure what she is here for. She is on no medications. She has a pain scale about 7. Her worst thing is doing dishes and that she has not been able to find a new job here. Her pain drawing is low back pain with some numbness in the right leg. She has an MRI dating back to 2007.

I have reviewed that. I agree with the interpretation that shows facet disease. I do not see really any disk disease attributing to this nor do I see any nerve root entrapment to explain the right leg numbness. As I said, she is on no medications according to her....

Dr. Horvath's impression was "Chronic lumbar strain secondary to workers' comp injury. RECOMMENDATIONS: At this point in time, there is nothing further than I can see that could be done. She certainly does not need any surgical intervention. She is on no medications. Her obesity certainly contributing to some of this and her lack of activity but I do not see any purpose, anything that can be done to improve that at this point in time. If we can be of any further help, please contact me. She has already reached MMI and I leave her on a light duty, 30-pound limitation."

Dr. Horvath indicated on a Form AR-3, Physician's Report that he agreed with the 2% rating assessed by Dr. Nematbakhsh.

The claimant testified that she began working as a Certified Nurse's Assistant in September 2008. The claimant testified that this employment did not violate her 30-pound lifting restriction.

Tanya Rutherford Owen provided a Vocational Evaluation on March 3, 2009:

Ms. Dorothy Arlene Long, a 59-year-old female, was referred by Ms. Melissa Wood, attorney at law, for the purpose of a vocational analysis. The vocational analysis consisted of a telephone interview with Ms. Long on February 19, 2009, a review of labor market data in the Largo, Florida area, a review of available medical records, and a transferable skills analysis.

Ms. Long sustained a low back injury while working as a truck driver for Continental Express. The injury occurred when Ms. Long was closing the back doors of the truck when she felt a pop with sharp pain, and numbness down one leg....At the time of the injury, Ms. Long lived in Tennessee, but relocated to Largo, Florida in September of 2007.

She has not worked as a truck driver since April 27, 2007. In August 2008, she completed training as a certified nurse's assistant and began work as a companion/home health aide in September 2008. She is currently employed full time in that capacity....

She was diagnosed with dyslexia in high school. She had a motor vehicle accident in 1973. She sustained a broken nose. She also had thyroid surgery and gallbladder surgery....Ms. Long has undergone no surgery since the event....

On February 27, 2008, Ms. Long contacted me and explained that she had contracted MRSA from her patient. She is currently unable to work and is receiving medical care for this condition....

Based upon receipt of receipt of restrictions in 2008 by Dr. Horvath and Dr. Nematbakhsh, she is limited to a 30 pound lifting limitation. Ms. Long's work history has consisted of work as a truck driver, which is rated as medium

level work, according to the Dictionary of Occupational Titles (D.O.T.)....

In 2007, the functional capacity evaluator determined that she did not meet the physical requirements for the driving job at Continental Express. I have not reviewed the job description for this company. However, on February 19 and February 20, 2009, I conducted vocational research for truck drivers in the Largo, Florida area....Of the eight employers providing data, four require lifting in excess of 30 pounds and four did not require lifting. It appears that Ms. Long would qualify for work as a truck driver without violating the 30-pound lifting limit.

Based upon a review of data published by the Florida Agency for Workforce Innovation (Labor Market Statistics 2008), there were 3,630 tractor-trailer truck drivers in Tampa-St. Petersburg-Clearwater statistical area earning a median annual wage of \$38,830 or \$18.67 per hour. An entry level worker can expect to earn \$11.73 per hour while an experienced worker can expect to earn \$21.91 per hour....

I engaged Ms. Long in a discussion about return to work. Ms. Long notes that her vocational history has consisted mostly of work as a truck driver. I discussed return to work as a truck driver with Ms. Long. In her opinion, she could not return to work as a truck driver because of the bouncing up and down in the seat. We discussed working as a courier and she indicated if she could drive a regular vehicle, she could likely perform this work.

She conducted an independent job search and as a result of her efforts, has procured and maintained full time employment as a home health aide. Prior to finding work as a home health aide, she applied with local staffing companies and reviewed the local newspaper for work. She ultimately decided

to participate in training as a home health aide, which she was able to complete in one week.

I inquired if Ms. Long would participate in a vocational rehabilitation program if recommended and she indicated that she would be agreeable to vocational rehabilitation services.

SUMMARY

Ms. Long's work history has consisted primarily of work as a truck driver. She has a lifting restriction of 30 pounds, which will restrict her access to this type of employment. She has acquired skills as a result of her work experience that transfer to lighter work, such as courier or dispatcher. The occupations, with accompanying wage data, are outlined above.

I have also outlined resources for rehabilitation services. These services are offered in the Largo, Florida area at no charge to Ms. Long. I believe that these services would benefit her in her vocational efforts....

A pre-hearing order was filed on May 21, 2009. The claimant contended that she had "sustained wage loss in excess of the permanent impairment rating. After the injury, the claimant returned to work as a CNA at reduced wages."

Respondent No. 1 contended that the claimant was "physically capable of returning to work as identified by the rehabilitation specialist and is not entitled to any wage loss. Alternatively, in the event of an award, the Fund has liability."

Respondent No. 2, Second Injury Fund, contended there was "no liability pursuant to Ark. Code Ann. §11-9-525(a)(3). The claimant's health history includes latent arthritis and dyslexia, which is not a disability. Furthermore, the Fund contends there is no combination of disabilities to produce Fund liability pursuant to *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988)."

The parties agreed to litigate the following issues: "loss of earning capacity, Fund liability, attorney's fees."

Ms. Owen wrote a **PROGRESS REPORT #2** on June 16, 2009 and stated, "During this reporting period, this counselor has made 49 employer contacts and as a result has identified 6 potential job leads. These leads have been transmitted to Ms. Long for her follow-up."

A hearing was held on June 26, 2009. The claimant testified that she was no longer working as a CNA, because the claimant had contracted a staph infection from the client she was caring for. The claimant testified on direct examination:

Q. You said you are no longer employed as a CNA, explain to us why you are no longer a CNA.

A. Well, number one, I can be highly contagious. I am really afraid to give it to somebody....

Q. What were you making as a CNA?

A. Ten dollars (\$10.00) an hour.

Q. And how many hours were you working?

A. I was working seven (7) days a week, eight (8) hours a day.

Q. What were you making as a truck driver for Continental at the time of your injury?

A. A little over seventy-seven thousand (\$77,000.00) a year. I don't know exactly, but it was definitely over....

Q. Is it your understanding that you can return to work as a CNA?

A. Not too many, as far as I know. People will not hire me if they find out I have MRSA....

Q. Ms. Long, can you drive a truck now? In your opinion?

A. Physically, I don't think now, in fact, I know I cannot sit in one spot any length of time without having pain. I have to get out and walk around. And the jostling of the truck, no there's no way I could drive anymore.

Q. Is that because of the complaints with regard to your back, or because of the complaints with your shoulder as a result of the MRSA, or both?

A. Well, right now both, definitely.

Tanya Rutherford Owen, the vocational counselor assigned to the claimant, testified at the hearing. The attorney for Respondent No. 1 questioned Tanya Owen:

Q. In your opinion, do you think Ms. Long can work as a truck driver?

A. What I found, and I did this survey in February of 2009, and I contacted 12 employers in her area, and four of them didn't respond. Eight employers who responded, four of which said the lifting in excess of 30 pounds would not be an issue, four said it would be an issue. So I surveyed 12, eight responded, half said it would be an issue, half said it would not. So there appear to be jobs that the 30-pound limitation would not be a barrier to entry....

Q. On page six of your report, which is our page 31, it says that truck driving is rated as medium level work. Is that right?

A. That's right.

Q. How do you know?

A. Oh that's according to ... I'm sorry ... according to the Dictionary of Occupational Titles, so the job would involve lifting, pushing, pulling, carrying up to 50 pounds....

Q. Based on the records you have reviewed and your talk with Ms. Long, do you see any reason what she couldn't go back to a job where she could drive a truck without lifting as she has done before?

A. And she told me this in my initial interview with her that she felt like because she had not lifted in the past that it wasn't necessarily her barrier, that she felt like it was the bouncing up and down.

Q. Okay. But what do you think?

A. So from her perspective, that was the issue. You know the doctors had said 30 pounds and the employers have said that can be accommodated. So from my perspective, I think there are jobs.

The claimant's attorney cross-examined Tanya Owen. Ms. Owen testified that she believed the claimant to be motivated to return to work, because the claimant returned to work following the compensable injury.

An administrative law judge filed an opinion on September 14, 2009. The administrative law judge found, among other things, that the claimant had sustained a 7% anatomical impairment rating. The administrative law judge found that the claimant had sustained wage-loss disability in the amount of 50%. The administrative law judge found that the wage-loss award was "solely the responsibility" of Respondent No. 1.

Respondent No. 1 appeals to the Full Commission.

II. ADJUDICATION

A. Anatomical Impairment

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.2d 823 (2003), citing *Johnson v.*

General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-

704(c) (1) (B). Ark. Code Ann. §11-9-102(16) provides:

(A) (i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

(ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty[.]

Ark. Code Ann. §11-9-522(g) (1) provides:

(A) The commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not include pain as a basis for impairment.

The Commission has therefore adopted the Guides to the Evaluation of Permanent Impairment (4th Ed. 1993) published by the American Medical Association. See *Workers' Compensation Laws And Rules, Rule 099.34*. The Commission is authorized to decide which portions of the medical evidence

to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. See *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003), citing *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001). The Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Id.*

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4) (F) (ii) (a). "Major cause" means "more than fifty percent of the cause," and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In the present matter, an administrative law judge found that the claimant was entitled to a 7% anatomical impairment rating. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable back injury on April 24, 2007. A subsequent MRI of the claimant's lumbar spine showed abnormalities including annular disc bulging and a small central disc protrusion at L4-5. Dr. Nematbakhsh reported on May 1,

2008, "At L4-L5 she has very minimal disk herniation." Table 75 of the Guides, page 3/113, at II. C., assigns a 7% impairment of the whole person for "unoperated herniated nucleus pulposus." The Full Commission finds that the claimant proved she was entitled to a 7% anatomical impairment rating. We find that the 7% anatomical impairment rating in the present matter was supported by objective and measurable physical findings which were not under the claimant's voluntary control, namely the MRI of the claimant's lumbar spine taken after the compensable injury. We find that the compensable injury was the major cause of the 7% anatomical impairment rating. The Full Commission notes that Respondent No. 1 has already accepted and paid a 6% rating assessed by Dr. Hutcheson. The administrative law judge's decision is affirmed.

B. Wage Loss

In considering claims for permanent partial disability benefits exceeding 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) (Repl. 2002). An administrative law judge found in the present matter that the claimant sustained wage-loss of 50%. The Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 20%.

The claimant is age 60 and has a high school diploma. The majority of the claimant's work history involves driving a truck. The parties stipulated that the claimant sustained a compensable back injury on April 24, 2007. Dr. Hutcheson placed the claimant on desk work beginning approximately June 18, 2007. The claimant participated in a Functional Capacity Evaluation (FCE) on June 29, 2007. The FCE indicated that the claimant had lifting restrictions of 50 pounds occasionally, 30 pounds frequently. The claimant was reliable during the Functional Capacity Evaluation. The FCE evaluator concluded that the claimant did not meet the strength/lifting/carrying demands for an over-the-road truck driver but could meet the "positional demands" of the job. Nevertheless, the claimant credibly testified that the respondent-employer would not return her to restricted duty. The parties in fact stipulated that the respondent-employer is no longer in business.

The Full Commission has found that the claimant sustained a 7% anatomical impairment rating as a result of the compensable injury. Dr. Hutcheson, Dr. Nematbakhsh, and Dr. Horvath noted that the claimant had permanent work restrictions. Tanya R. Owen provided a vocational analysis on March 3, 2009 and concluded, "Ms. Long's work history has consisted primarily of work as a truck driver. She has a lifting restriction of 30 pounds, which will restrict her access to this type of employment...." The claimant testified at hearing that she was unable to earn the wages the claimant had previously earned as a truck driver.

The Full Commission has taken into account the claimant's anatomical impairment of 7%, as well as the claimant's relatively advanced age, high school education, work experience mainly as a truck driver, and permanent lifting/work restrictions after the compensable injury. The Full Commission finds that the claimant has sustained wage-loss disability in the amount of 20%. Although the claimant does have permanent lifting restrictions as a result of the stipulated compensable injury, Tanya Owen has identified a number of job leads for the claimant within the claimant's permanent physical restrictions. The record demonstrates

that the claimant is capable of returning to gainful employment even with her permanent physical restrictions. We therefore affirm, as modified, the administrative law judge's award of wage-loss disability. The Full Commission finds that the compensable injury was the major cause of the claimant's 20% 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. See *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, "4. There is no combination of disabilities or impairments to invoke the liability of the fund. The wage-loss Award is solely the responsibility of Gibraltar National Insurance." The Full Commission affirms the administrative law judge's finding that Respondent No. 2,

Second Injury Fund, is not liable for the claimant's wage-loss disability. The first hurdle for Second Injury Fund liability has been overcome in the present matter, in that the claimant suffered a compensable injury while employed with Respondent No. 1. The second and third hurdles have not been overcome. The evidence does not demonstrate that the claimant had a permanent partial disability or impairment prior to the compensable injury. The record does not show that the instant claimant's childhood dyslexia was a permanent partial disability or impairment. The record does not show that the claimant was a "handicapped worker" in accordance with Ark. Code Ann. §11-9-525(a)(1) at the time of the claimant's compensable injury. Moreover, the third hurdle for Fund liability was not overcome, because the record does not show that a disability or impairment combined with the recent compensable injury to produce the claimant's current disability status. The claimant testified at hearing, "I had a very good healthy life until my back was hurt."

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained anatomical impairment in the amount of 7% and wage-loss

disability in the amount of 20%. The claimant proved that the compensable injury was the major cause of her disability and impairment. We find that Respondent No. 1 is solely liable for the claimant's wage-loss disability. Respondent No. 2, Second Injury Fund, is not liable in the present matter. The Full Commission therefore affirms the administrative law judge's opinion as modified. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal, 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.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I concur, in part, but must respectfully dissent, in part, from the majority opinion. I agree with the majority's

affirmation of the seven percent permanent anatomical impairment rating and of the absence of Second Injury Fund liability. However, I would also affirm the Administrative Law Judge's award of fifty percent wage loss.

The majority has reduced the Administrative Law Judge's award of wage-loss disability benefits from fifty percent to twenty percent. Given the claimant's age, education, work history, physical condition and limitations, I find that the majority's award is woefully inadequate to represent the losses she has sustained.

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In order to be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d

727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

In Taggart v. Mid America Packaging and Continental, 2009 Ark. App. 335, the Arkansas Court of Appeals remanded a claim to the Full Commission, finding that there was not substantial evidence to support a wage-loss award of only twenty percent. The claimant was unable to obtain a release allowing her to return to work without restrictions, and she was terminated from her employment.

She had a two percent impairment rating for her leg injury, and a seven percent permanent partial impairment for her lumbar spine injury. The claimant's income for the year prior to her injury was \$67,721.07. At the time of her hearing, she was studying for her associate's degree and earning \$5.15 per hour, twenty hours per week, in a public elementary school. She had applied without success for jobs with the Arkansas Department of Human Services and with Wal-Mart. She planned to study social work, with her ultimate goal being a master's degree in the subject, with which she could expect to earn \$28,000 to \$35,000 per year as a social worker. Other evidence showed that the claimant was capable of performing certain sedentary occupations, with annual salaries ranging from approximately \$32,590 to \$34,620. The majority of the Full Commission awarded wage-loss disability in the amount of twenty percent to Taggart.

The Court of Appeals noted that the decision did not address the claimant's pre-injury income in more than a cursory fashion. The Court stated that, where the evidence in the record clearly showed that the most the claimant would be able to earn was \$35,000 per year, an amount significantly less than her pre-injury earnings, the record

did not support a finding of only twenty percent wage loss. On remand, the Full Commission awarded fifty percent wage-loss disability. Taggart v. Mid-America Packaging, Full Commission Opinion Filed June 12, 2009 (WCC No. F406472).

The present claim before the Full Commission is quite similar to the Taggart claim. The claimant, prior to her injury, earned \$77,000 per year, but after her injury, and the respondent employer's refusal to rehire her, she required retraining as a certified nursing assistant in order to find employment, at a wage of half what she earned as a driver. The vocational expert testified that the claimant faced obstacles due to her age and physical condition that would increase her difficulty in finding employment as a truck driver. The expert's evaluation report included a labor market survey of jobs in the claimant's location based upon the claimant's transferable skills, revealing three types of jobs with a median annual wage of between twenty thousand and thirty thousand dollars, less than half of what she was earning prior to her injury. As in Taggart, the claimant proved by a preponderance of the evidence that she sustained wage-loss disability in the amount of fifty percent. There is not substantial evidence

to support a finding of twenty percent wage loss in this claim. I find that the claimant sustained at least a fifty percent wage-loss disability.

After my de novo review of the entire record, I must respectfully dissent from the majority opinion awarding only twenty percent wage-loss disability benefits. I do concur with the majority's award of a seven percent permanent anatomical impairment rating and its finding that there is no Second Injury Fund liability.

PHILIP A. HOOD, Commissioner