

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611873, F801650 & F903362

THELMA HENDERSON,
EMPLOYEE

CLAIMANT

AMFUEL,
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

F.A. RICHARD & ASSOCIATES, INC.,
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED JUNE 6, 2011

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Texarkana, Arkansas.

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

Respondent No. 2 represented by the HONORABLE CHRISTY L.
KING, 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 January 5, 2011. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Commission has jurisdiction over these
claims.
2. Any claim for additional benefits for the

claimant's right carpal tunnel syndrome injury sustained in 2002 (Commission Claim No. F310193) is barred by the statute of limitations.

3. The employee-employer-insurance carrier relationship existed on June 19, 2006, at which time claimant sustained a compensable left shoulder injury. Claimant reached MMI for the left shoulder injury on February 27, 2007, and was assigned a 4% anatomical rating to the body as a whole. Respondent No. 1 paid the assigned 4% rating to the whole body.
4. The claimant's average weekly wage of \$592.39 for the 2006 injury entitles her to compensation rates of \$395.00/\$296.00.
5. The employee-employer-insurance carrier relationship existed on November 6, 2007, at which time claimant sustained a right shoulder injury. Claimant reached MMI for this injury on July 22, 2008, and was assigned a 4% anatomical rating to the body as a whole. Respondent No. 1 paid the assigned 4% rating to the whole body.
6. The claimant's average weekly wage of \$622.41 for the 2007 injury entitles the claimant to compensation rates of \$415.00/\$311.00.
7. The employee-employer-insurance carrier relationship existed on April 30, 2008.
8. The claimant's average weekly wage of \$667.86 for the alleged 2008 injury entitles the claimant to compensation rates of \$445.00/\$334.00.
9. The claimant received a change of physician on January 23, 2008.
10. The claimant's appropriate anatomical impairment rating for her bilateral shoulder injuries and surgeries is 12% rated to the body as a whole rather than the 8% rated to

the body as a whole assigned by Dr. Charles Pearce and accepted and paid by Respondent No. 1.

11. The claimant has failed to establish by a preponderance of the credible evidence that she sustained an injury to her lumbar spine on June 19, 2006. The claimant has therefore also failed to establish that any medical treatment that she has received for her lumbar spine has been reasonably necessary for her compensable injuries sustained on June 19, 2006, or that she is entitled to benefits for the impairment rating assigned to her lumbar spine by Dr. Dewitt Fortenberry.

12. The claimant has established by a preponderance of the credible evidence that she sustained an injury to the left side of her neck (left sternocleidomastoid muscle) and to her upper back (trapezius muscle) on June 19, 2006. However, the claimant has failed to establish that she sustained an injury to the disc at the C3-4 level of her spine on June 19, 2006, and the claimant has not established that she developed any injury or aggravation on June 19, 2006, to the stenosis at the C3-4 level of her spine with which she was diagnosed in 2008. The preponderance of the credible evidence indicates instead that the claimant's spinal stenosis became symptomatic seven months later in January of 2007 when she developed radicular symptoms in both of her upper extremities and in both of her lower extremities. The preponderance of the credible evidence indicates that the claimant's need for medical treatment associated with her spine and radicular symptoms beginning on January 19, 2007, was for symptoms associated with her stenosis that became symptomatic in January of 2007, so that no additional medical treatment beginning on January 19, 2007, was reasonably necessary for the claimant's neck and upper back injury sustained on June 19, 2006.

13. The claimant is not entitled to benefits from the respondents for the 5% permanent impairment to the body as a whole assigned by Dr. Fortenberry for the claimant's cervical spine. The preponderance of the evidence establishes that the guarding and non-verifiable radicular symptoms for which Dr. Fortenberry assigned the claimant a 5% impairment rating for her cervical spine are symptoms associated with her spinal stenosis that became symptomatic beginning in January of 2007, and are not related to the neck and upper back injury that the claimant sustained at work on June 19, 2006.
14. The claimant has failed to establish that she sustained temporary disability associated with her compensable neck and upper back injury or with her bilateral shoulder injuries from January 22, 2007, through February 19, 2007, or from July 31, 2008, through October 31, 2008. The preponderance of the credible evidence establishes that the claimant's disability beginning on January 22, 2007, was instead caused by the claimant's spinal stenosis which became symptomatic with both bilateral upper extremity radiculopathy and bilateral lower extremity radiculopathy beginning between January 19, 2007, and January 22, 2007.
15. The claimant has failed to establish by a preponderance of the credible evidence that she sustained either ulnar nerve injuries or carpal tunnel syndrome arising out of her employment on or about April 30, 2008.
16. The claimant has failed to establish that she sustained any degree of permanent disability attributable to her compensable bilateral shoulder injuries and/or attributable to her compensable neck and upper back injury.
17. The claimant's attorney is entitled to a controverted attorney's fee on the additional 4% impairment rated to the body as a whole awarded herein for the claimant's bilateral

shoulder injuries and on any underpayment of past indemnity benefits calculated by the parties.

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.

Therefore we affirm and adopt the January 5, 2011 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.

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. After a de novo review of the record, I agree with the majority that the claimant has not proved carpal tunnel syndrome injuries. I also agree that the claimant has not proven a back injury. However, it is my opinion that the evidence clearly shows that the claimant sustained a cervical injury to the C3-C4 disc on June 19, 2006, the date of the specific incident involved in this claim. As such, I would award the claimant all benefits associated with a compensable cervical injury, including a 5% permanent impairment rating. I also agree with the majority that the claimant has a 12% whole body impairment rating for her compensable shoulder injuries. As the claimant has significant permanent impairment, I must respectfully dissent from the majority's failure to award the claimant wage-loss disability benefits. I would award the claimant wage-loss disability benefits in the amount of 35%. It is for the above outlined reasons that I must respectfully concur, in part, and dissent, in part, from the majority opinion.

Compensability of Cervical Injury

For the claimant to establish a compensable injury as a result of a specific incident which is

identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

On June 19, 2006, the claimant was sitting on a stool, building fuel cells. She stood up to go around the cell and her foot got caught in the stool that the cell was sitting on. She tripped in a running position and ran into a table that was in front of her. Her head went under the table and it struck her left shoulder and "kind of twisted her up" and she fell to the floor. The claimant's accident report, completed on June 19, 2006, refers only to a bruised left shoulder; but, the next

day, Dr. Franklin Roberts described the accident as hurting the claimant's left shoulder, neck and back. Dr. Roberts performed x-rays on the claimant's cervical spine that day. In his next report, dated June 30, 2006, the x-rays came back essentially normal with an impression of cervical spondylosis. The doctor noted a limited range of motion in the claimant's neck. The claimant went on to treat for her more acute left shoulder injury, treatment which resulted in surgery. However, the claimant's neck problems did not subside. On November 22, 2006, the claimant reported to Dr. Cathryn Gonzalez with complaints of significant pain in the left side of her neck. Dr. Gonzales diagnosed the claimant with left-sided neck pain with muscle tightness and spasm, gave the claimant a steroid shot and steroid therapy, and refilled her prescription for Flexeril. Dr. Gonzales also started a course of physical therapy. On January 4, 2007, the claimant's attorney wrote the respondent a letter indicating that Dr. Gonzales had recommended an MRI of the claimant's neck and asked the respondent to reconsider its denial of the MRI. On January 22, 2007, Dr. Ivy McGee recommended a C-spine MRI with contrast. This test was never performed.

In the meantime, the claimant sustained a right shoulder injury which was accepted as compensable and treatment, including surgery, was rendered. The claimant recovered from the right shoulder injury, but was still suffering from neck pain. Finally, on June 14, 2008, an MRI, initially recommended on November 22, 2006 was performed. The MRI report reads:

INDICATION: neck pain

TECHNIQUE: T1-T2 sagittal, T2 axial,
T1 axial

FINDINGS: all sequences reviewed.
C2-3 disc mild posterior bulging.
C3-4 disc posterior herniation with impingement of the neural foramina bilaterally, cord compression. C4-5 disc mild posterior bulging. C5-6 disc mild posterior bulging. C6-7, C7-T1 disc normal. Soft tissue shadows normal. Medullary cervical and cervical thoracic junctions normal. Cervical spinal curvature normal. Facet joints normal.

IMPRESSION: C2-3 disc mild posterior bulging. C3-4 disc posterior herniation with impingement of the neural foramina bilaterally, cord compression. C4-5 disc mild posterior bulging. C5-6 disc mild posterior bulging.

On July 8, 2008, the claimant saw Dr. Reza Shahim, who recommended she undergo cervical epidural steroid injections. The claimant underwent an epidural

steroid injection with Dr. Kenneth Rosenzweig on July 23, 2008.

On March 11, 2009, Dr. Ivy McGee wrote:

...

5. X-rays can show arthritis, dislocations and fractures, but they absolutely **can not** image nerve damage, disc damage, or other soft tissues that are detailed by MRI. An Xray was the only study that the insurance company would approve for this patient. The insurance company essentially dropped the ball on thi9s matter when they denied the requests of not one but two qualified physicians (in 2006 and 2007) who deemed the MRI study necessary for clinical correlation for a definitive diagnosis for this patient.

6. I most definitely believe that the herniated disk and nerve impingement in Mrs. Henderson's neck is a direct result of the injuries sustained by Mrs. Henderson at work on June 19, 2006. Her symptoms from June 2006 to the present date have been consistent with the injury sustained and reported to all the doctors who examined her. It is unfortunate that it has taken three years for this patient to finally have radiographic proof of her injury.

Based on the medical record and the opinion of Dr. McGee, corroborated by the credible testimony of the claimant, I find that the claimant sustained a compensable cervical injury in the June 19, 2006 work

incident. On November 29, 2009, Dr. Dewitt Fortenberry assessed the claimant as having a 5% permanent impairment rating for her cervical spine injury. I would award this impairment rating and factor it into my consideration of wage-loss disability.

Wage Loss Disability

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).

Here, the claimant is 56 years old. She has a high-school education. She started working for the respondent's predecessor in 1974. Before going to work in the plant in 1974, the claimant worked approximately three months in a sewing factory. She has a 17% whole body impairment rating; 12% for the bilateral shoulders, and 5% for the neck. The claimant simply cannot physically perform the work she used to perform for the respondent-employer. She is highly motivated to return to work, having taken a tax-preparing course and participating in a job retraining program. Based on the claimant's high level of physical impairment, age, education, work experience and motivation to return to work, I find that the claimant is entitled to wage-loss disability in the amount of 35%.

For the aforementioned reasons I must concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner