

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005412

MELANIE KELLEY, EMPLOYEE	CLAIMANT
COOPER STANDARD AUTOMOTIVE, INC., EMPLOYER	RESPONDENT NO. 1
ST. PAUL TRAVELERS INS. COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

ORDER FILED FEBRUARY 3, 2011

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

Claimant represented by the HONORABLE FLOYD M. THOMAS, JR.,
Attorney at Law, El Dorado, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL J.
DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY L.
KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed July 9, 2010. The administrative law judge
found, among other things, that the claimant failed to prove
she was permanently and totally disabled. The
administrative law judge found that the claimant failed to

prove she was entitled to additional wage-loss disability benefits. After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove she had suffered a change in physical condition following the Commission's previous assessment of 28% wage-loss disability. We therefore affirm the administrative law judge's finding that the claimant did not prove she was entitled to additional wage-loss disability benefits or permanent total disability benefits.

I. HISTORY

Melanie Elizabeth Kelley, now age 42, testified that she had graduated from high school and had pursued an undergraduate degree in medical technology. The claimant testified that she worked for companies performing chemical analysis and engineering work. The claimant testified that she began working as a laboratory technician for the respondent-employer in approximately April 1995. It was stipulated that the claimant sustained a compensable injury to her neck and back on February 7, 1999. The claimant testified that a heavy core bar "hit me directly on top of my head." The claimant returned to work for the respondent-employer after the compensable injury but the record

indicates she was laid off in November 1999 or November 2000. Dr. F. Richard Jordan operated on the claimant's cervical spine in August 2001, performing a cervical fusion at C5-6.

An administrative law judge filed an opinion on May 7, 2003. The administrative law judge found, among other things, that "2. Claimant earned sufficient wages to entitle her to the maximum compensation rates. 3. On February 7, 1999, claimant was struck in the head by a steel bar which weighed in excess of 400 pounds. 7. Claimant has established ... that she sustained a compensable injury to her lower back on February 7, 1999[.]"

The parties have stipulated that the administrative law judge's May 7, 2003 opinion "is *res judicata* and the law of the case." The parties stipulated that the claimant reached the end of her healing period on August 4, 2003. Dr. Jordan assigned the claimant a 14% anatomical impairment rating in February 2006. An administrative law judge filed an opinion on May 9, 2006. The administrative law judge found, among other things, that the claimant proved she had sustained a compensable 14% anatomical impairment rating. The administrative law judge found that the claimant proved she

had sustained "wage loss of 86% over and above her permanent anatomical impairment rating of 14% to the body as a whole, for a total impairment of 100%....The claimant has therefore proven that she is permanently totally disabled."

The Full Commission filed an opinion on March 7, 2007 which affirmed as modified the administrative law judge's May 9, 2006 decision. The Full Commission found that the claimant did not prove she was permanently totally disabled. The Full Commission determined:

While we recognize that Dr. Jordan has opined that the claimant is not capable of returning to work, we do not think any weight should be attached to this opinion given all of the evidence to the contrary. In addition to this, Dr. Jordan has not cited any physical condition or limitations that would prevent the claimant from returning to work at a sedentary level. The claimant admitted that she has not sought work after being laid off by the respondent in November of 1999. Moreover, there is no probative evidence before the Commission demonstrating that the claimant is precluded from returning to gainful employment as an industrial lab technician or other suitable work. The claimant now draws Social Security Disability benefits. The Full Commission finds that the claimant's lack of motivation in pursuing work as a lab technician or other suitable work substantially impedes our assessment of the claimant's loss of earning capacity. Therefore, based on the claimant's age, education, work experience, anatomical impairment rating of 14% to the body as a whole, her lack of motivation to return to work as a lab technician or other suitable work, and considering she has no

physical condition or limitations that would prevent her from working at a sedentary level, the Full Commission finds that the claimant has failed to prove by a preponderance of the evidence that she has suffered wage-loss disability in the amount of 86%, thereby rendering her permanently and totally disabled. Instead, we find that the claimant has proven her entitlement to wage-loss disability of 28% in excess of her 14% anatomical impairment for a total impairment of 42%. Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she is entitled to wage-loss disability in the amount of 28% in excess of her 14% anatomical impairment rating. We hereby affirm, as modified the decision of the administrative law judge.

The parties have stipulated that the Full Commission's March 7, 2007 opinion "became final on April 9, 2007, as no appeal was taken." Dr. Jordan apparently performed an anterior cervical discectomy and fusion on March 21, 2007. A hearing was held on January 8, 2008. At that time, the parties stipulated that "the claimant's compensation rates are \$375.00 per week for temporary total disability and \$281.00 per week for permanent partial disability." Dr. Jordan informed the claimant's attorney on February 8, 2008 that the claimant had received an additional 3% whole-body impairment for the C4-5 anterior cervical discectomy and fusion. The parties have stipulated that the claimant's healing period (following the claimant's March 21, 2007 surgery) ended on March 21, 2008.

An administrative law judge filed an opinion on April 4, 2008. The administrative law judge found, among other things, that the claimant proved the March 21, 2007 cervical spine surgery was reasonably necessary in connection with the compensable injury. The Full Commission affirmed and adopted the administrative law judge's April 4, 2008 decision in an opinion filed September 23, 2008. The Arkansas Court of Appeals affirmed the Full Commission's decision in an opinion delivered September 2, 2009. *Cooper Standard Automotive, Inc. v. Kelley*, (Ark. App. 9-2-2009), CA09-43.

The parties have stipulated that the Full Commission opinion filed March 7, 2007, the Full Commission opinion filed September 23, 2008, and the Court of Appeals opinion delivered September 2, 2009 are "*res judicata* and the law of the case with the exception of wage rates pertaining to Respondent No. 2."

Dr. Jordan corresponded with the claimant's attorney on January 5, 2010:

Melanie Kelley was last seen on April 25, 2007 for a post operative follow up. She underwent an anterior cervical discectomy and fusion of C4-5 and removal of the plating at C5-6 on March 21, 2007. On that visit she continued to complain

of headaches. The blurred vision was still an issue, although it had improved some since surgery. Following this type of surgery it can take as long as one year to completely heal, which means MMI was reached on March 21, 2008.

With regard to impairment rating, I do not anticipate the rating will decrease, hence the word "permanent." I can not and will not speculate if it will increase.

A pre-hearing order was filed on February 4, 2010. The claimant contended, among other things, that she had "an anatomical rating of at least 21% which is an increase of 7% over her previously adjudicated permanent impairment." The claimant contended that she had sustained "additional wage-loss disability over and above the previous finding of 42% up to and including permanent and total disability." The claimant contended that she was entitled to payment of attorney's fees.

Respondent No. 1 contended, among other things, that "even with the claimant's anatomical impairment increase, the previous award of wage-loss disability in addition to permanent partial impairment results in the claimant having been paid all sums due for permanent impairment."

Respondent No. 1 contended that the claimant had "suffered no additional wage-loss disability." Respondent No. 1 contended that the claimant was "not entitled to additional

benefits and therefore not entitled to payment of attorney's fees."

Respondent No. 2 contended that "1) If the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits. 2) The Death & Permanent Total Disability Trust Fund will state its remaining contentions upon completion of discovery."

The parties eventually agreed to litigate the following issues:

- 1) The extent of the claimant's present anatomical disability rating pursuant to the *AMA Guidelines for the Evaluation of Permanent Impairment*, 4th Edition.
- 2) Whether the claimant is now permanently totally disabled or entitled to wage-loss disability benefits.
- 3) Attorney's fees.

A hearing was held on April 13, 2010. At that time, the claimant contended that her average weekly wage on the date of the compensable injury entitled her to the maximum compensation rate of \$375 for temporary total disability and \$281 for permanent partial disability. Respondent No. 1 contended that the claimant's average weekly wage was \$349 for temporary total disability and \$262 for permanent

partial disability. Respondent No. 1 contended that the claimant's surgery resulted in anatomical impairment of 3% in addition to the previous impairment of 14%. Respondent No. 2 contended that the claimant's average weekly wage at the time of her compensable injury was \$522.61, entitling the claimant to compensation rates of \$349 for temporary total disability and \$262 for permanent partial disability.

At the April 13, 2010 hearing, the claimant testified on direct examination:

Q. Now, Ms. Kelley, you've testified before concerning your physical condition, tell us, at least since the surgery, the last surgery that you had, and, say, once you reached your maximum healing period, can you tell us what symptoms you're currently having, or have you gotten any better since March of 2008?

A. I wouldn't say so. It's hard to put into words, I think, to describe to somebody that doesn't feel what you're feeling, but imagine having a migraine every day. I pretty much spend at least four to five days of the week in the bed, in the dark, quiet. I mean, and that's with the pain killers.

Q. I asked you for the printout of your pharmacy records, it currently looks like you're taking oxycodone?

A. Yes.

Q. And how often do you take that?

A. That's four times a day, I believe.

Q. And then you're taking C-a-r-i-s-o-

A. Carisoprodol, that's a generic for Soma, it's a muscle relaxer, it's four times a day.

Q. Are you taking Amitriptyline?

A. At night, yes, it's supposed to help me sleep.

Q. You're taking one tablet, is that -

A. One to three.

Q. And I see you're taking methadone?

A. Uh-huh....That's for pain, that's long acting, whereas the other is fast acting.

Q. How many methadones do you take a day?

A. I take two, three times a day....

Q. Now, your parents have a church and a private school that they operate, is that correct?

A. They do, and a daycare.

Q. So, is there work available if you could do it?

A. Oh, yes, they would love for me to, if I were able to, yes.

Q. What is it that makes you unable to work either at the daycare or some sedentary job at the church or the school?

A. I would say a number of things. One just being the fact that, just the pain itself, and not being able to concentrate and being in one position for any length of time, but also I would say the medication to deal with the pain....

Respondent No. 1's attorney cross-examined the claimant:

Q. Now, the operation that you had in March of '07, are you better off today than you were, let's say 10 days before that operation?

A. That operation, I wish I had a copy of the MRI from before that operation, because mainly what it did was, it was actually the disk fragments were compressing my spinal cord, where, you know, a normal neck, the normal curvature of the neck, mine was like that.

Q. And we do have the medical reports and things like that. I'm asking about Melanie Kelley, does Melanie Kelley feel better today than she did ten days before that operation?

A. I would say a seven day a week headache went to a five day a week headache, how's that?

Q. Okay, so you're better, some better?

A. As far as that goes.

Q. I know you're not a hundred percent better, but it improved your condition somewhat, that operation, it was worth having done?

A. Yes, it was worth having done, I can say that....

Q. Since 2006 have you applied for any jobs anywhere?

A. No.

Q. Have you sought employment anywhere?

A. No. If I could, I would.

An administrative law judge filed an opinion on July 9, 2010. The administrative law judge found, among other things, that the claimant proved she was entitled to " an additional 3% whole body impairment as a result of her March 21, 2007, surgery." None of the parties appeal this finding. The administrative law judge found that Respondent No. 1 had controverted the additional 3% anatomical impairment and directed Respondent No. 1 to pay "maximum statutory attorney's fees in effect at the time of the claimant's injury in 1999." The administrative law judge found that Respondent No. 1 controverted benefits awarded in the administrative law judge's May 7, 2003 opinion and owed "maximum statutory attorney's fees in effect at the time of the claimant's compensable injuries in 1999." The administrative law judge found that "each time a hearing was required in this matter and from which a subsequent adjudication was rendered, claimant was entitled to a \$400.00 fee on the first \$3,000.00 of benefits awarded after each hearing." Respondent No. 1 does not appeal to the Full Commission any portion of the administrative law judge's findings with regard to fees for legal services.

The administrative law judge found that the claimant failed to prove she was permanently totally disabled, and that the claimant "failed to prove by a preponderance of the evidence that she is entitled to wage-loss disability benefits in excess of her whole body impairment."

The claimant appeals to the Full Commission.

II. ADJUDICATION

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(Repl. 1996). "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e)(1)(Repl. 1996). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2)(Repl. 1996).

Ark. Code Ann. §11-9-713(Repl. 1996) provides:

(a) (1) Except where a joint petition settlement has been approved, the Workers' Compensation Commission may review any compensation order, award, or decision.

(2) This may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award, upon the commission's own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate.

(3) Upon the review, the commission may make an order or award terminating, continuing, decreasing, or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this chapter....

(e) Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition.

Nor shall aging or the effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter...

Neither respondent contends in the present matter that the claimant failed to timely file a request to reopen her case pursuant to Ark. Code Ann. §11-9-713(a) (2). In any event, the Full Commission finds that the claimant did not prove that she had suffered a change in physical condition sufficient to find the claimant permanently totally disabled or to increase the previous award of 28% wage-loss disability. The claimant is only age 42 and has a high school diploma. The claimant testified that she has taken some undergraduate courses in the area of medical laboratory

technology. The claimant began working as a laboratory technician for the respondent-employer in approximately April 1995. It was stipulated that the claimant sustained a compensable injury to her neck and back on February 7, 1999. The claimant described a traumatic injury to the top of her head. The claimant returned to work after the compensable injury but was laid off in November 1999 or November 2000. Dr. Jordan performed a cervical fusion in August 2001 and eventually assigned the claimant a 14% anatomical impairment rating. The parties stipulated that the claimant reached the end of her healing period on August 4, 2003.

In an opinion filed March 7, 2007, the Full Commission found that the claimant did not prove she was permanently totally disabled. The Full Commission found that the claimant proved she sustained "wage-loss disability of 28% in excess of her 14% anatomical impairment." The Full Commission determined that Dr. Jordan had cited no physical condition or limitations which would prevent the claimant from returning to work at a sedentary level. The Commission found no probative evidence demonstrating that the claimant was precluded from returning to gainful employment as an industrial laboratory technician or other suitable work.

The Commission found that the claimant's lack of motivation in pursuing suitable employment was an impediment to assessing the claimant's loss of earning capacity. The parties have stipulated that the Full Commission's March 7, 2007 opinion "became final on April 9, 2007, as no appeal was taken."

Meanwhile, Dr. Jordan performed another operation to the claimant's cervical spine on March 21, 2007. Dr. Jordan subsequently assigned an additional 3% anatomical impairment, and Respondent No. 1 does not appeal an administrative law judge's finding that the claimant sustained an additional 3% anatomical impairment as a result of the March 21, 2007 surgery. Dr. Jordan corresponded with the claimant's attorney on January 5, 2010 and stated that the claimant continued to suffer from headaches but that the claimant's "blurred vision" had improved following the March 21, 2007 surgery. The claimant testified at the most recent hearing, "I pretty much spend at least four to five days of the week in bed, in the dark, quiet. I mean, and that's with the pain killers." However, the claimant admitted on cross-examination that she was able to drive. The record does not demonstrate that the claimant has suffered a change

in physical condition sufficient to increase the claimant's 28% wage-loss award. The evidence does not show that the claimant's stated reliance on narcotic medication is a bar to suitable employment. The claimant has not worked since approximately November 2000. The record demonstrates that this intelligent 42-year-old claimant with some college education is still not interested in returning to work or motivated to seek any employment within her physical restrictions. Such a lack of interest in returning to suitable work indeed impedes an assessment of the claimant's loss of wage-earning capacity. See *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant has not suffered a change in physical condition following the previous award of 28% wage-loss disability. The Full Commission therefore affirms the administrative law judge's finding that the claimant did not prove she was permanently totally disabled. We affirm the administrative law judge's finding that the claimant did not prove she was entitled to wage-loss disability in addition to the 28% previously awarded. Respondent No. 1 on appeal has abandoned its argument

regarding calculation of the claimant's average weekly wage. Since the claimant did not prove she was permanently totally disabled, Respondent No. 2's contention regarding compensation rates is moot. This claim is denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

MIKE WILSON, Special Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion, because I find that the claimant did suffer a change in physical condition since the award of disability benefits on March 7, 2007, and that the claimant is permanently totally disabled and entitled to benefits.

A claimant may seek additional permanent disability benefits based on changed circumstances following a previous adjudication. Arkansas Code Annotated

§11-9-522(d) authorizes the Commission to reconsider the question of functional disability and amend a previous disability award based on facts that have occurred after the original disability determination, provided that "any party" requests reconsideration within one year after the post-award facts have occurred. Furthermore, §11-9-713(a) permits a worker to petition the Commission for modification of a previous award based on change in physical condition. The claimant does not have to prove the change in physical condition by objective findings. See O'Hara v. Christy Construction Co. 94 Ark. App. 143, 227 S.W.3d 443 (2006).

The previous award in this claim is the Full Commission's award of 28% wage-loss disability, in addition to the claimant's 14% permanent anatomical impairment rating, filed March 7, 2007 with no subsequent appeal. The majority now states that the claimant has sustained no change in physical condition since that award. However, on March 21, 2007, after the award, the claimant underwent an anterior cervical discectomy and fusion at C4-5. In February 2008, Dr. Jordan issued an impairment rating of three percent for this surgery. This is a change in physical condition, in and of itself.

Furthermore, at the 2010 hearing, the claimant testified that her headaches had increased in severity. She had three nerve blocks and one radio frequency enervation to attempt to address her headaches, but they continued. After the anterior cervical discectomy and fusion at C4-5, she experienced some improvement, which she explained was a reduction from having a migraine-like headache seven days a week to having a migraine-like headache five days a week.

I submit that the claimant did indeed experience a change in condition, as her headaches increased from an average of two to three days a week, according to the Full Commission opinion dated March 7, 2007, to seven days a week before her discectomy and fusion surgery, and five days a week afterwards. Even though the claimant had some improvement due to the surgery, the net result was still deterioration from the date of the last award.

There is also a significant increase in the claimant's pharmaceutical regimen, when the testimony recounted in the 2007 Commission Opinion is compared to the 2010 testimony. The 2007 Opinion notes that the claimant used Maxalt for her headaches, Norco for pain, and a muscle relaxer called Soma. Contrast this list to the one she gave

in 2010: Oxycodone, a fast-acting pain reliever, four times daily; Carisoprodol, a generic of Soma, four times a day; one to three Amitriptyline tablets at night to help her sleep; and two Methadone, a "long acting" pain medication, three times a day. She saw Dr. Cubbie monthly, for pain management. She had epidurals in her cervical and lumbar spine, three months in row, regularly.

The claimant has suffered a deterioration in her physical condition as evidenced by the increase in her headaches and in her need for an increased pharmaceutical regimen, as well as an additional three percent impairment due to surgery, after the last award. The claimant has satisfied the requirement of a change in physical condition.

The majority has also denied permanent and total disability benefits for this claimant, a decision to which I cannot agree. As listed above, the claimant requires a significant pharmaceutical regimen to attempt to manage her pain, including powerful narcotics. She testified that she had migraine-like headaches five days a week. The pain limited her ability to be active, to concentrate, to be in one position for any length of time, and required constant medication. She would not be comfortable working with the

dangerous chemicals that she used in her job with the respondent-employer, because of the medication she used. She did not think she could sit or stand for thirty minutes straight. Her neck and her low back would hurt, and her cervical problems caused her head to hurt. Walking, carrying items, using the stairs, and cold, made her pain worse. She spent a lot of time in the bathtub, because moist heat helped her pain. Her headaches caused her to be very sensitive to light. During the hearing, she had increasing neck and low back pain and headache. She could not drive on a bad day, but she could drive occasionally. She could not do many activities of daily living. She did not do much at all. She drew Social Security Disability benefits.

The claimant explained that she loved her job, and that she progressed six employment class levels quickly, because of that. She had gone to school to obtain a degree in engineering, while she was working, and was within about a year of finishing. However, she could not continue that coursework, because of her physical limitations and medications. She had not applied for employment, because she could not work. If she could work, she would work. She

had access to a job through her parents' church, school and daycare, but she was unable to perform the work. Lastly, Dr. Jordan opined, in 2006, that the claimant was permanently disabled and, in 2010, that the claimant's impairment would not decrease.

The majority's conclusion that the claimant is not permanently and totally disabled because she is not motivated to work, despite her age, good education, and work history, ignores the important facts that she is heavily medicated daily, able to sit or stand less than thirty minutes at a time, suffering severe headaches five days a week causing her to be bedridden and unable to walk, carry, or use stairs, without an increase in her already constant pain. The claimant has demonstrated significant motivation to get an education and to excel in her work with the respondent-employer, but because of her severe injury, she can no longer perform even a sedentary job. At this point, whatever motivation the claimant has to work is irrelevant, because her body cannot withstand even the demands of light, sedentary duty. The claimant is permanently totally disabled.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner