

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605510

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| SHEILA MILTON, EMPLOYEE | CLAIMANT |
| K-TOPS PLASTIC MANUFACTURING, EMPLOYER | RESPONDENT NO. 1 |
| CHAMPION PROPERTY & CASUALTY INS. CO., INSURANCE CARRIER | RESPONDENT NO. 1 |
| SECOND INJURY FUND | RESPONDENT NO. 2 |
| DEATH & PERMANENT DISABILITY TRUST FUND | RESPONDENT NO. 3 |

OPINION FILED JUNE 1, 2011

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

Claimant represented by the HONORABLE STEVEN McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE ANDY L.
CALDWELL, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by the HONORABLE CHRISTY L.
KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law
judge's opinion filed January 5, 2011. The
administrative law judge found that the claimant proved
she was permanently totally disabled. After reviewing

the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant proved she was permanently totally disabled. The Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 25%.

I. HISTORY

Sheila Irene Milton, now age 50, testified that she attended school through only the eighth grade but subsequently obtained a GED. The claimant testified that she was able to read, write, and perform simple math. The claimant testified that she had worked as a cashier for businesses such as Exxon. The claimant worked at a shoe factory for over 20 years, operating machines and performing manual labor.

The claimant testified that she sustained an injury while working for Wal-Mart in approximately 2004: "I'd stepped off a ladder and thought it was a dislocated hip, and months went by and, apparently, it wasn't my hip. They popped it back in and it was my back[.]" Dr. Harry Friedman performed surgery on January 19, 2005: "Partial hemilaminectomy, L5-S1 on the left with removal of ruptured disk." The pre- and post-operative diagnosis was "Herniated nucleus pulposus, L5-S1 on the

left." The claimant testified that Dr. Friedman "fixed my back....it was instant relief."

The claimant testified that she worked for Dollar General in 2005. The claimant testified that she became employed with K-Tops Plastic Manufacturing, Inc. in February 2006. The claimant testified, "I was hired there to - basically to run a drill....a drill hangs from the wall. I have a box of screws right here, and I have a bottom base of a - of a baby walker flipped upside down and I take the little rollers that - that, you know, that's got four rollers on it and set it to the side."

The parties have stipulated that the claimant sustained a compensable injury on May 5, 2006. The claimant testified on direct examination:

Q. What happened to cause this injury right here we're here for?

A. They bring out these big huge cages full of what I call bottom bases of a baby walker....I'd say they're well over probably three or four hundred pounds, but they have prongs, you know, and they slid on that - the concrete was real smooth, and they just like slid, you know, on the floors....

Q. And then what happened when you were sliding these cages?

A. One day, I don't know if it got hung in a crack or maybe trash under it, something, I was pulling it and, when I did, it come to an

abrupt stop, and when it did, it just kind of twisted[.]”

The claimant testified that she did not return to work for the respondents after May 5, 2006. Dr. Sam E. Murrell performed a left L5 hemilaminotomy and L5-S1 discectomy on September 7, 2006. Dr. Murrell performed a left L5-S1 discectomy with insertion of interbody device on March 8, 2007. Dr. Murrell performed additional surgery on May 1, 2007: “Right L4-5 hemilaminotomy revision with removal of Capstone interbody device.”

The claimant followed up with Dr. Murrell on June 20, 2007:

She is now approximately 3 months from undergoing her L5-S1 decompression and fusion. She states that overall she is doing better. She states that she has good days and bad days, and that the sharp pain that she had down her left leg has resolved. She states that when she was released to restricted duties, that she was terminated by her employer....

PLAN: I have told her, at this point, she is making good progress. I do think that we could advance her to light-duty with no lifting more than 20 lb. Unfortunately, I think that she will most likely always have restrictions given the nature of her symptoms and injury. I have told her that I think she is essentially reaching maximum medical improvement and a (20%) impairment rating is assigned based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth

Edition....She is given a renewal on her prescription for Soma and Vicodin.

The parties have stipulated that the claimant reached maximum medical improvement and the end of her healing period on June 20, 2007.

The record includes a "Work Comp" form from Dr. Murrell's office, signed by the claimant, indicating that the claimant could return to work on January 21, 2008, with the limitations, "Sedentary Work: Lifting 10 pounds maximum and occasionally walk, stand, lift and/or carry light tools and files. Although a sedentary job is defined as one which involves sitting, jobs are sedentary if occasional walking and standing are required and all other sedentary work criteria are met."

The record indicates that Dr. James Franks began treating the claimant on April 1, 2008 and assessed "1) Chronic back pain. 2) Anxiety. 3) Narcotic side effects. 4) HTN."

The parties deposed Dr. Murrell on June 16, 2008. The claimant's attorney questioned Dr. Murrell:

Q. At the time you last saw Ms. Milton, what kind of physical limitations would you have placed on her as far as lifting and bending?

A. I think it's difficult to put an absolute weight limit. She certainly complained of pain with activity. I think out of fairness

to her, I would probably defer to some sort of functional capacity evaluation.

Counsel for Respondent No. 2 questioned Dr.

Murrell:

Q. In terms of the questions Mr. McNeely asked you, have you placed any type of restrictions on her in terms of what she can or cannot do as far as employment?

A. (Consulting Records) The last work status form that was completed appears to have been on January 21, 2008. At that point, she was placed on sedentary restrictions; and I don't think we have another - I'm not sure she's been back in the office after that.

Q. So you don't know her current condition in terms of what she can and cannot do. As you said, you would defer to an FCE for that?

A. Correct. I think that would be the most appropriate.

Q. But as of January the 21st of 2008, she was restricted to sedentary. Would you expect that to improve over time?

A. I think it would be - it probably would be good to proceed with an FCE to give a more objective basis of her physiologic parameters as she participates in activities.

Q. You wouldn't sit here today, for instance, and say that she can't work doing a lifting job if it was a light-duty type position?

A. Right. Sedentary work is essentially lifting 10 pounds maximum occasionally and walking, standing and lifting or carrying light tools. It even goes on to say, "...although a sedentary job is defined as one which involves sitting jobs, if

occasional walking and standing are required and all other sedentary criteria are met."

Dr. Franks saw the claimant on June 17, 2008 and noted, "Pt is a 47 yr old obese WF who presents to discuss her durogestic patches. Pt states that she has been spending a lot of time in the sun. Has been having a lot of lightheadedness, dizziness, indigestion, etc. States she has passed out once or twice...." Dr. Franks assessed "1) Chronic pain. 2) GERD. 3) Depression. 4) HTN. 5) Hyperlipidemia. 6) Obesity."

Dr. Franks reported on July 16, 2008:

Pt is a 47 yr old WF who presents with diffuse body pain. Pt involved in MVA on July 12th. Was seen in the White County ER on July 13th. States she had X-rays from her neck to her butt. States they also x-rayed her right knee. States that she is having diffuse muscle aches and right knee pain. Has the knee wrapped. Is taking her durogestic patches and using soma. States that she had been a belted driver in the accident.

Dr. Franks assessed "1) Diffuse muscle pain/strain. 2) chronic pain. 3) anxiety."

A hearing was held before an administrative law judge on October 31, 2008. The claimant testified that she had not returned to work for the respondents or any other employer. The claimant testified that she was physically unable to perform activities such as washing

dishes, vacuuming, and making her bed. The claimant testified regarding her medication, "They have me on a Fentanyl patch, a pain patch. They've got me on Cymbalta for depression. They've got me on Xanax for my nerves and blood pressure medicine because my blood pressure is just off the charts....they stopped the Lortabs and put me on what they would call for chronic pain and that is the Fentanyl which is a hundred times more powerful than morphine. They just - you know, I just put a patch on, and it releases the medicine through the day."

An administrative law judge filed an opinion on January 23, 2009. The administrative law judge found, among other things, that the claimant had sustained permanent anatomical impairment in the amount of 20%. The Full Commission affirmed and adopted the administrative law judge's decision as modified. The Full Commission found that the claimant proved she sustained permanent anatomical impairment in the amount of 12%. The parties have stipulated that the claimant sustained permanent anatomical impairment in the amount of 12%.

The claimant followed up with Dr. Franks on June 5, 2009: "Pt is a 48 yr old WF who presents for checkup and

med refills. Pt states she wants samples of diovan. Her copay went up. Also wants Rx for prilosec. States the copay for her prevacid went up. States the durosagic patches are working well, but she is having some break through pain. States she is trying to be active during the summer. States she doesn't want to go up higher on the durosagic patches because she gets lightheaded and has side effects. Wants refill on her other medications."

Dr. Franks' assessment on June 5, 2009 was "1) GERD. 2) Chronic pain. 3) HTN. 4) Obesity."

The claimant followed up with Dr. Franks on October 27, 2009:

Pt is a 48 yr old WF who presents with left shoulder pain. Pt states she fell the other day. States it hurts. States it hurts to the touch. Needs refills on medications. States that her mcr with (sic) not pay for cymbalta or diovan. Discussed switching her to a different ARB that it will cover or going to an ACE inhibitor....Left arm has tenderness in the biceps tendon.

Dr. Franks assessed "1) Left bicep tendonitis. 2) HTN. 3) Depression. 4) Chronic pain. 5) Anxiety."

The parties deposed the claimant on January 21, 2010. Counsel for Respondent No. 1 questioned the claimant:

Q. Are you currently under the influence of any medication that would affect your ability to understand and answer my questions today?

A. No.

Q. What medications are you currently taking?

A. I have Xanax, Diovan, Fentanyl, Cymbalta, Soma, Percocet. That's it.

Q. Have you had all those today?

A. Yes.

Q. I just want to make sure I understand. Even though you've taken those, your ability to understand my questions and answer them truthfully will not be affected?

A. No, it won't be affected....

Q. What's your understanding of what all those medications are for?

A. For the back pain and to keep me comfortable and -

Q. Let's take them one by one and just tell me your understanding of what each of those medications is for.

A. The Diovan is for my blood pressure. The Xanax is for my nerves. The Fentanyl pain patches are for the chronic pain in my lower back. The Percocet is for breakthrough pain. The Cymbalta is for the depression. The Soma helps with the muscle spasms that I have in my back and my leg.

Q. Is that all you're taking right now?

A. Yes....

Q. What's your understanding of your current restrictions, if any, and which doctor gave them to you?

A. My surgeon, Dr. Murrell, told me I couldn't lift over 20 pounds....

Q. Tell me what you do on a day-to-day basis now. Give me a typical day.

A. I get up and take my medicine, try to walk a few blocks, go back and try to relax the leg a little bit. I might go to the store or spread a rug out in my doorway and sit there and pick weeds around the edge of my walkway, stuff like that. I'll go visit my mom and my grandbabies. That's about it....

Q. Is there anything else you do on a day-to-day basis?

A. Watch TV, go lay down. You know, I have to lay flat of my back. I have a problem sitting for periods of time. I don't know why. I'll lay flat of my back and put pillows under my feet and bring my legs up, and that helps. The physical therapist told me to do that.

Dr. Franks reported on February 22, 2010:

Ms. Milton is a patient in my medical practice. She suffers from chronic lumbar disc disease, anxiety and other medical problems. She is presently on disability because of her lumbar disc disease and previous surgeries. She has asked me to write this letter because of the effects her medications have on her. She presently is on durogesic patches, soma, xanax and percocet. She states that these medications cause her to be sedated with blurred vision. Ms. Milton states she is unsteady on her feet and trips quite easily. They also make her forgetful. States

she cannot remember things at times. She states that because of this she is unable to hold any type of employment.

The claimant followed up with Dr. Franks on April 28, 2010:

Pt is a 49 yr old WF who presents with bilateral shoulder pain, left greater than right. Pt fell 5 days ago. Was seen in the ER earlier today. Had Xrays done. Films not available. She was told she had muscle strain. Was sent home. She f/u now stating she thinks it is more than muscle strain. States that it hurts to raise her arms, move her arms and turn her head. Has been taking medications at home. Has also been using heat.

Dr. Franks' diagnosis was "1) bilateral trapezius strain. 2) HTN. 3) Obesity."

The claimant saw Dr. Franks on June 9, 2010:

Pt is a 49 yr old WF who presents with diffuse pelvic, hip and back pain status post MVA. Pt states that the pain is worse than her normal pain. States her pain pills are not working. Was involved in MVA about 10 days ago. Wants me to review the Xrays, etc from the ER. The reports are in my chart. I reviewed them with her. They revealed diffuse degenerative disc disease throughout her back and neck. Pelvic Xrays are negative.

Dr. Franks diagnosed "1) Pelvic, hip, back pain. 2) DDD in back and neck. 3) HTN."

A pre-hearing order was filed on August 23, 2010. The claimant contended, among other things, that "because of her compensable injury she is permanently

and totally disabled or entitled to wage loss. Claimant alternatively argues that claimant had a preexisting back condition that has combined with this last injury to bring about her disability."

Respondent No. 1 contended, among other things, that the claimant was "not permanently and totally disabled and raises Second Injury Fund liability as to any wage loss."

Respondent No. 2, Second Injury Fund, contended that "the last injury is the cause of the claimant's condition and there is no combination."

A hearing was held on October 8, 2010. The claimant testified that she suffered from constant back pain and that she had difficulty standing and walking: "If I'm up on my feet very long, my legs give away, and even though in my mind they're stepping like I'm stepping, they're not. My left foot will tip and then I'll fall over." The claimant testified, "I'm in the bed flat on my back all day long until I get up and get something to eat....if I'm not laying flat on my back on the couch, I'm laying flat on my back on the bed. And that's seven hours a day." The claimant described side effects caused by the pain medication: "Loss of memory, dizziness. I can't concentrate. Nausea, you know, some

days are better than others." The claimant testified that she was drawing Social Security Disability benefits in the amount of \$592 monthly.

An administrative law judge filed an opinion on January 5, 2011. The administrative law judge found, among other things, that the claimant proved she was permanently totally disabled. The administrative law judge found that Respondent No. 2, Second Injury Fund, was not liable for the claimant's permanent total disability. Respondent No. 1 appeals to the Full Commission.

II. ADJUDICATION

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 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) (Repl. 2002).

An administrative law judge found in the present matter, "the evidence preponderates that the claimant has been rendered permanently and totally disabled within the purview of the Arkansas Workers' Compensation Act." The Full Commission does not affirm this finding.

Ark. Code Ann. §11-9-519(e) (Repl. 2002) provides:

- (1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.
- (2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

In the present matter, the Full Commission finds that the claimant did not prove she was permanently totally disabled because of her compensable injury. The claimant is middle-aged, age 50, and has a GED certificate. She testified that she was able to read, write, and perform simple math. The claimant worked at a shoe factory for over 20 years. She has also performed clerical and cashier work for other employers as well as retail sales. The claimant testified that she sustained a work-related injury to her back during her employment with Wal-Mart in 2004. The claimant underwent surgery at L5-S1 and testified that this surgery "fixed my back....it was instant relief." The

claimant testified that she did not suffer from continued back problems following the 2004 injury and surgery.

The claimant became employed with the respondent-employer in February 2006. The claimant testified that she felt a "twist" in her back at work for the respondents on May 5, 2006, and the parties have stipulated that the claimant sustained a compensable injury on that date. Dr. Murrell reported on June 20, 2007 that the claimant's physical condition had improved and that the claimant's left leg pain had resolved. Dr. Murrell stated, "I do think that we could advance her to light-duty with no lifting more than 20 lb. Unfortunately, I think that she will most likely always have restrictions given the nature of her symptoms and injury." Dr. Murrell assigned a permanent anatomical impairment rating and renewed the claimant's prescription "for Soma and Vicodin." The parties have stipulated that the claimant sustained permanent anatomical impairment in the amount of 12%. The claimant signed a form on January 21, 2008 indicating that she could return to work that date with the following limitations: "Sedentary Work: Lifting 10 pounds maximum and occasionally walk, stand, lift and/or

carry light tools and files. Although a sedentary job is defined as one which involves sitting, jobs are sedentary if occasional walking and standing are required and all other sedentary work criteria are met."

At a deposition taken June 16, 2008, Dr. Murrell testified that he found it "difficult to put an absolute weight limit" on the claimant's ability to perform restricted work. Dr. Murrell testified that the claimant had been placed on "sedentary restrictions," which he defined as "essentially lifting 10 pounds maximum occasionally and walking, standing and lifting or carrying light tools." Dr. Murrell did not opine that the claimant was physically unable to perform any work within her restrictions or that the claimant was otherwise permanently totally disabled. Dr. Murrell did not subsequently revise his expert opinion that the claimant was able to perform restricted work duties.

Dr. Franks saw the claimant the next day, June 17, 2008. Dr. Franks did not state that the claimant was bed-ridden but instead noted that the claimant "has been spending a lot of time in the sun." The claimant testified on October 31, 2008 that she had been prescribed Fentanyl, Cymbalta, and Xanax. The claimant was deposed on January 21, 2010 and testified that she

was taking Diovan for high blood pressure, Xanax for her nerves, Fentanyl for chronic lower back pain, Percocet for breakthrough pain, Cymbalta for depression, and Soma for muscle spasms. The Full Commission notes that only one of these medications, Soma, had been prescribed by the claimant's treating surgeon at the time of maximum medical improvement. The claimant was also lucid during her deposition and testified that none of these medications had affected her ability to think clearly. The claimant testified at hearing that she was experiencing loss of memory, dizziness, and an inability to concentrate. The claimant testified that she was "flat on my back ... seven hours a day" on her couch or in bed. There is no probative evidence of record corroborating the claimant's testimony that she is physically required to remain supine for extended periods up to seven hours daily.

The claimant did not prove that she was unable because of her compensable injury to earn any meaningful wages in the same or other employment. The claimant therefore did not prove she was permanently totally disabled. Nor did the claimant prove that her reliance on prescription narcotic medication had rendered her permanently totally disabled. The Full Commission

recognizes Dr. Franks' correspondence on February 22, 2010 in which he stated in part, "She is presently on disability because of her lumbar disc disease and previous surgeries....She has asked me to write this letter because of the effects her medications have on her....She states that because of this she is unable to hold any type of employment." The Commission has the duty of weighing medical evidence and, if the evidence is conflicting, its resolution is a question of fact for the Commission. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999). In the present matter, the Full Commission assigns minimal weight to Dr. Franks' February 22, 2010 letter, based on the claimant's statement to him, that the claimant is unable to hold any type of employment. We attach more significant evidentiary weight to the opinion of Dr. Murrell that the claimant is able to perform restricted work duties.

The Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 25% in addition to the claimant's 12% permanent anatomical impairment. The record indicates that light duty with the respondents was not available following Dr. Murrell's release on June 20, 2007. Because of her

compensable injury, surgeries, and resulting anatomical impairment, the claimant is limited to restricted or sedentary work. We note the claimant's testimony that she applied for several jobs following her release by Dr. Murrell. The claimant admitted at hearing, however, that she had not sought employment for over 18 months. The record in the present matter indicates that the claimant is not motivated to find appropriate gainful employment within her permanent physical restrictions. A claimant's lack of interest in returning to work is an impediment to the Commission's full assessment of the claimant's wage-loss disability, and it is a factor we can consider in determining that the claimant's loss is not as great as she states it to be. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Based on our *de novo* review of the entire record and in accordance with Ark. Code Ann. §11-9-522(b)(1)(Repl. 2002), the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained wage-loss disability in the amount of 25%. We reverse the administrative law judge's finding that the claimant proved she was permanently totally disabled. The claimant proved that the May 5, 2006

compensable injury was the major cause of her 25% wage-loss disability. The Full Commission finds that Respondent No. 2, Second Injury Fund, is not liable for any portion of the claimant's wage-loss disability. Even if the claimant had a prior disability or impairment before the May 5, 2006 compensable injury, the evidence does not demonstrate that the disability or impairment 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). We therefore affirm the administrative law judge's finding that Respondent No. 2 is not liable for benefits.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). Respondent No. 1 contended at hearing that the claimant did not sustain any wage-loss disability. For prevailing in part on Respondent No. 1's appeal of the administrative law judge's award, 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). Respondent No. 1 shall be solely liable for fees for legal services.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant is entitled to permanent total disability benefits.

Ark. Code Ann. §11-9-519(e) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

Here, the claimant completed the seventh grade and later obtained her GED. The claimant has no additional training or education. The claimant's work history has

consisted of manual labor and factory-type jobs. All of the claimant's former employment entailed physical labor, whether working as a cashier at an Exxon Convenience Store, which involved unloading trucks and stocking supplies on the shelves, or working at Wal-Mart Stores and Dollar General Stores, both of which involved bending, lifting, and unloading trucks. The claimant worked in a factory setting for over 20 years at Addison Shoes.

The evidence reflects that the claimant has undergone at least three operative procedures in connection with the May 5, 2006 compensable injury. The claimant is prescribed narcotic medications which result in side effects, to include being sedated, uncoordinated, and unbalanced. Additional side effects of the claimant's prescription medications include a lack of alertness and forgetfulness. The claimant's ability to drive is severely limited due to back pain and muscle spasms. The claimant is unable to sit for more than two hours at a time, to walk in excess of several blocks, and to lift in excess of 10 pounds on a regular basis or 20 pounds on an occasional basis. The claimant is limited in the amount of time she can stand. The claimant's efforts to achieve comfort and functionality revolve around sitting, standing, and laying down during the course of a day.

Based on the evidence presented, particularly the claimant's use of narcotic pain medication, I find that the claimant is unable to earn any meaningful wages in the same or other employment and is entitled to permanent total disability benefits. See Whitlatch v. Southland Land & Development, 84 Ark. App. 399, 141 S.W. 3d 916 (2004).

PHILIP A. HOOD, Commissioner