

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009896 & F312841

MELANIE RUHL,  
EMPLOYEE

CLAIMANT

UNIVERSITY OF ARKANSAS  
FOR MEDICAL SCIENCES,  
EMPLOYER

RESPONDENT #1

PUBLIC EMPLOYEE CLAIMS,  
INSURANCE CARRIER

RESPONDENT #1

SECOND INJURY FUND

RESPONDENT #2

DEATH AND PERMANENT TOTAL  
DISABILITY TRUST FUND

RESPONDENT #3

OPINION FILED NOVEMBER 15, 2011

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

Claimant represented by the HONORABLE GARY DAVIS,  
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE RICHARD  
SMITH, Attorney at Law, Little Rock, Arkansas.

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

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

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondent No. 2 appeals and Claimant appeal an  
opinion and order of the Administrative Law Judge filed  
June 2, 2011. In said order, the Administrative Law

Judge made the following findings of fact and conclusions of law:

1. There were two compensable injuries, July 19, 2000 and October 23, 2003.
2. The compensation rates are \$440/330.
3. Respondent #1 accepted a 12% permanent impairment rating which was a 9% rating for the July 19, 2000, injury and 3% for the October 23, 2003, injury.
4. Respondent #2 accepted on March 22, 2011, 20% wage loss based on the combination of injuries.
5. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled and that she has suffered wage loss because of her compensable injuries over the 20% wage loss that Respondent #2 has accepted and is paying.
6. The preponderance of the evidence supports that June 22, 2010, is the end of the healing period.
7. Respondent #2 is entitled to a credit for group disability benefits paid to the claimant pursuant to Ark. Code Ann. §11-9-411.
8. Claimant's attorney is entitled to attorney's fees on the 20% wage loss benefits that claimant received and Respondent #2 is ordered to pay the attorney's fees pursuant to Ark. Code Ann. §11-9-715.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the June 2, 2011 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

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CONCURRING DISSENTING OPINION

I concur in the finding that the claimant sustained a 20% wage loss disability, however, I must dissent in part from finding that the Second Injury Fund controverted this liability. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that the Second Injury Fund, at any time, controverted the claimant's entitlement to wage loss disability.

As claimant is the party contending controversion, claimant bears the burden of proving by a preponderance of the evidence that the Second Injury Fund controverted claimant's entitlement to benefits over and above her physical impairment rating. The burden of proof rests upon the claimant to prove the

compensability of his claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related, that a claimant is entitled to benefits, or that a claim has been controverted. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Claimant has failed to present any evidence that the Second Injury Fund controverted wage loss disability. The claimant's only argument at the hearing for controversion was the mere fact that Respondent No. 1 had controverted the initial claim, therefore, controversion should be imputed to the Second Injury Fund. Claimant asserts in her brief that because

Respondent No. 1 controverted the claim in its entirety, the wage loss portion of the claim is therefore controverted. This argument was shot down by the Arkansas Court of Appeals in Buckner v. Sparks & SIF, 32 Ark. App. 5, 794 S.W.2d 623 (1990), when it held that merely because the carrier controverted the claim, controversion cannot be found against the Second Injury Fund when the Fund never denied liability. Without addressing this case, the Administrative Law Judge did not accept claimant's theory of controversion, but found that the time it took the Second Injury Fund to accept the 20% wage loss was enough to find controversion. This is simply inappropriate and contrary to the evidence of record. Controversion is a question of fact to be determined from the circumstances of each particular case. New Hampshire Ins. Co. v. Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984). The mere failure to pay compensation benefits, in itself, does not necessarily amount to controversion. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d 477 (1983). However, assuming a position which requires an injured employee to retain an attorney so that the employee's rights are protected may constitute

controversion. Turner v. Tradewinds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980).

In Camp v. Green County Tech., Full Commission Opinion filed May 4, 2009, (F610239) this Commission found that the Second Injury Fund did not controvert a claim for wage loss benefits when it accepted wage loss liability after having time to investigate a claim. Likewise, in Bain v. Hughes School District, Full Commission Opinion filed July 9, 2009 (F103351), the Full Commission found that when the Second Injury Fund acknowledged that it was responsible for some wage loss and that it had delayed in taking a position of the extent of its responsibility while attempting to negotiate a comprehensive settlement of the claim that the Second Injury Fund had not controverted the claim.

In the present claim, it is clear from the Second Injury Fund's response to the Prehearing Questionnaire which was filed on October 20, 2010, that discovery was not complete and that it was not provided with the appropriate medical records by the parties to assess the claimant's wage loss status at that time. However, the Second Injury Fund affirmatively stated: "The Second Injury Fund has not controverted this case." (Emphasis in original.) Thus, any delay in

assessing the full extent of its liability from the filing of the Prehearing Questionnaire responses cannot be held against the Second Injury Fund as it was not provided with the appropriate information to make a meaningful assessment. Likewise, a finding of controversion cannot be made from the Prehearing Order as the Prehearing was held without the benefit of counsel from the Second Injury Fund. Moreover, from a reading of the Prehearing Order it appears that counsel for the Second Injury Fund was excused from the prehearing and was allowed seven days within which to state the Fund's contentions. There is no evidence in the record that the Second Injury Fund failed to comply with this order. In fact, counsel for the Second Injury Fund advised at the hearing that the Fund had accepted liability at that time and was attempting to negotiate a joint petition settlement. Counsel for claimant stated at the hearing that he never participated in any negotiations directly with counsel for the Second Injury Fund, however, he did acknowledge that settlement negotiations were taking place at that time.

The facts in this claim are identical to the facts in Bain v. Hughes School District, supra. The Second Injury Fund was brought into the claim late,

discovery was not complete, upon receipt of the necessary medical records the Fund acknowledged responsibility for wage loss and initiated settlement negotiations, negotiations fell through, the Fund advised the parties in advance of the hearing as to the amount of liability the Fund accepted. Just as in Bain, there is no evidence that these facts amount to controversion. While the claimant may have required an attorney at the first hearing on this claim to prove that she sustained a second injury, the evidence of record reveals that once the Second Injury Fund was brought into this claim and provided with the appropriate medical records the Fund acknowledged its responsibility for wage loss disability. As evidenced by counsel for claimant, claimant did not even require the assistance of an attorney for the respondents to initiate settlement negotiations. Once it was evident that a settlement could not be reached due to Medicare issues, the Second Injury Fund accepted a 20% wage loss and advised claimant's attorney of that fact. No hearing on the extent of claimant's wage loss up to 20% was required and as such no controversion of that amount of wage loss can be found. Therefore, I find that the claimant has failed to prove by a preponderance of the

evidence that the Second Injury Fund controverted this claim.

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KAREN H. MCKINNEY, Commissioner

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

**CONCURRING AND DISSENTING OPINION**

After a de novo review of the record, I must respectfully concur, in part, and dissent, in part, from the majority opinion. I specifically concur in the finding that the Second Injury Fund controverted the 20% wage-loss disability awarded by the majority. However, as I would award the claimant 50% wage-loss disability, I must respectfully dissent from the majority's limited award of 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).

The determination of wage-loss disability is fact intensive. The claimant is 52 years old and has a high school diploma. She also has multiple sclerosis. Despite the multiple sclerosis, the claimant worked as a registered nurse at Jefferson Regional Medical Center and the University of Arkansas for Medical Sciences from 1996 until she was terminated August 28, 2004. She sustained a neck injury July 19, 2000, requiring a fusion surgery performed by Dr. Richard McCarthy August 18, 2000. Claimant returned to work three months later, but was injured again on October 23, 2003. Neck pain, arm pain, and numbness resulted in another fusion

surgery in April 2006. However, following the second surgery, the symptoms produced by the second injury did not subside.

Subsequent to her first fusion surgery, the claimant returned to work taking care of patients and their babies and performing all tasks related to their care. This work required her to be on her feet, lifting, pushing and pulling and doing computer work. Only one of the tasks described as necessary to the job, "being on her feet", would be negatively influenced by the diagnosis of multiple sclerosis and her corresponding lower extremity symptoms.

Alone, the upper extremity and neck symptoms would prohibit the claimant from returning to work at a job she had performed since 1996 at which she earned \$25 per hour. The claimant last worked November 10, 2003, a couple of weeks following her last injury on October 23, 2003. Considering the claimant's age, education, and work experience which can't be transferred into another job paying \$25 an hour, I find the majority's award of 20% wage-loss disability to be too low. I would award the claimant 50% wage-loss disability.

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

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PHILIP A. HOOD, Commissioner