

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F710101

MARSHA BROWN, EMPLOYEE CLAIMANT

DELIGHTFUL MEALS/PASS YOUR PLATE,
EMPLOYER RESPONDENT NO. 1

STATE FARM FIRE & CASUALTY COMPANY,
INSURANCE CARRIER/TPA RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND RESPONDENT NO. 2

OPINION FILED APRIL 26, 2021

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

Claimant represented by the HONORABLE AARON L. MARTIN, Attorney
at Law, Fayetteville, Arkansas.

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

Respondents 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

The claimant appeals an administrative law judge's opinion filed
September 21, 2020. The administrative law judge found:

1. The stipulations agreed to by the parties at a pre-hearing
conference conducted on March 18, 2020, and contained
in a pre-hearing order filed that same date are hereby
accepted as fact.

2. Claimant's claim is not barred by res judicata.
3. Claimant's claim is not barred by the statute of limitations.
4. Claimant has met her burden of proving by a preponderance of the evidence that as a result of change in physical condition she is entitled to additional permanent partial disability benefits in an amount equal to 3% to the body as a whole for anatomical impairment.
5. Claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled or that she is entitled to any additional wage loss benefits for a change in physical condition since the Full Commission opinion of February 12, 2013.

After reviewing the entire record *de novo*, it is our opinion that the administrative law judge's decision is supported by a preponderance of the evidence of record, 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 are therefore adopted by the Full Commission.

Therefore, we affirm and adopt the September 21, 2020 decision of the administrative law judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. The Full Commission denies the claimant's motion to strike certain portions of Respondent No. 2's brief.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite concurs and dissents.

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 concur with the majority's finding that, (1) Claimant's claim is not barred by res judicata; (2) Claimant's claim is not barred by the statute of limitations; and (3) Claimant has met her burden of proving by a preponderance of the evidence that as a result of change in physical condition she is entitled to additional permanent partial disability benefits in an amount equal to 3% to the body as a whole for anatomical impairment. However, I must dissent from the majority opinion finding that the claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled.

Pursuant to Ark. Code Ann. §11-9-519(e)(1) (Repl. 2012), "permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or

other employment." The burden of proof is on the employee to prove inability to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e)(2). Permanent total disability shall be determined in accordance with the facts. Ark. Code Ann. §11-9-519(c).

On May 18, 2007 the claimant suffered a compensable low back injury. The claimant offered the following testimony as to how the accident occurred:

Q I want to go way back to 2007. This is the original date of your injury to your lower back. Would you remind us what happened that day?

A I was managing the two Pass Your Plates; the one in Fayetteville and the one in Springdale. And they were trying to get the one in Springdale ready to open, and they sent me to Springdale to receive orders for the whole day, to get set up. And the meat company brought in a load of frozen meats, and I thought the best way to get it – of course, I knew I couldn't pick it up, but I thought the best way to get it there was to get down and push, push it over to the freezer where I could open the box then and individually put them up on the freezer. When I got down to push that box, my back popped twice, and I knew I was in trouble.

Q Why did you know you were in trouble?

A Because I could barely move.

Q Tell me what symptoms you were having.

A Pain down the left side of my hip all the way down into my ankle, sharp pain.

Q Describe the severity of that pain.

A It was about an 8. I could hardly walk on it.

After her compensable back injury, the claimant underwent a total of four related surgeries. On February 19, 2008 by Dr. Luke Knox performed a “L3-L4, L4-L5, L5-S1 bilateral decompression hemilaminotomies with takedown from old epidural scar”.

Dr. Rajesh Arakal performed the second surgery on December 3, 2015. The procedures performed during this surgery were noted as follows:

1. Use of C-arm fluoroscopy.
2. Use of an operating microscope.
3. Reexploration of previous hardware and revision of previous hardware.
4. Pedicle screw instrumentation at L3, iliac screw fixation through an S2 starting point.
5. Laminectomy of L3, revision laminectomy of L4 with Smith-Peterson osteotomy at the L3 level to get as much sagittal correction as possible through the L3-L4 segment and lumbar fusion at L3-L4 and instrumentation down to the

pelvis with revision of the previous hardware as described.

6. Application of allograft bone as well as autograft bone along the posterolateral gutters at L3-L4 for posterior fusion, open correction of spinal deformity at the L3-L4 level, again through various compression techniques as well as cantilever forces.

The third surgery was performed on December 4, 2015 to reposition a screw that was placed in the prior surgery. The claimant's fourth surgery was performed in 2016 to correct a left foot "acquired clawfoot". The claimant explained that the misplacement of the screw in her second surgery caused the toes on her left foot to curl under. This surgery was performed to correct this condition.

The claimant was assessed with an impairment rating of thirteen percent (13%) to the body as a whole following her initial surgery, and assessed with an additional 3% impairment to the body as a whole after her two subsequent surgical procedures in 2015.

The claimant underwent a functional capacity evaluation (FCE) on May 31, 2018. The results of the FCE indicated that the claimant was able to perform sedentary work. Despite the results stated in the FCE, the facts of this claim establish that the claimant is entitled to receive P&T benefits.

The claimant is 63 years old with a high school diploma and 2 years of vocational training. She has had jobs previously as a travel agent, in a saloon show, as a park tour guide, and as an owner/operator of three separate restaurants.

The claimant testified that she is not able to work. The claimant experiences high levels of pain for which she is prescribed medication. Regarding her pain level, the claimant testified that the pain in her middle back is between 5 and 8 on a scale of 1 to 10. Additionally, the claimant testified that her lower back is in constant pain. According to the claimant, the lower back pain goes into both hips and is at a level of 8 on a scale of 1 to 10. The claimant's testimony is supported by her medical records.

The claimant also testified that she has limitations that include: no lifting over ten pounds; the inability to sit for more than 20 minutes; the inability to stand for more than 10 minutes; and walking with a limp (using a cane when in public to prevent falls). The claimant testified further that she has bad days approximately once per month when she is unable to get out of bed due to her level of pain.

In addition to the claimant's testimony, there are other facts that support a determination that she is permanently totally disabled.

According to the medical evidence the claimant is taking multiple medications to control her pain. These medications are Celebrex taken two times per day; and Tramadol, as needed¹. In addition, the claimant takes Ambien at night to help with sleep. Common side effects of these drugs include tiredness, dizziness, drowsiness, and headaches. Functioning under the influence of these medications will certainly reduce the claimant's efficiency and productivity at work.

Further, in 2016 Dr. Cable, who is the claimant's treating physician, opined that the claimant is "permanently and totally disabled from gainful employment". I am not unmindful of the 2018 FCE that placed the claimant in the sedentary work classification. However, I note that despite the evaluator indicating the claimant could perform sedentary work, he also indicated the following:

Ms. Brown did not meet her reported maximum full duty job lifting requirements of 60 lbs. occ. During this evaluation. ... Deficits were noted in lumbar AROM, positional tolerances, gait (antalgic), dynamic lifting/carrying tolerance, and complaints of I.B and L hip discomfort with dynamic activity. The examinee would benefit from entry into a CPP to address the above deficits, decrease the risk of reinjury & better prepare for full duty RTW.

¹ The claimant testified that she usually takes Tramadol twice per day.

I also note that the increased activity during the FCE negatively impacted the claimant. Following the FCE, Dr. Cable noted that the claimant's pain levels increased significantly. Dr. Cable's records from the claimant June 28, 2018 indicated:

Patient had her FCE on May 31. She flared up dramatically with that and has had continued pain since then. She has been taking tramadol up to 6 a day. She has been trying to keep her Norco at less than 3 a day. She has got her current pain in the right posterior buttock like she was having before she had a rhizotomy on the left SI joint. She is also having some left lateral hip pain. She is having pain in the mid and upper lumbar region. She cannot lie in the left side difficult to sleep. She is tearful in the office today. Pain level is an 8/10.

Based on the added pain, Dr. Cable provided the claimant with a Medrol Dosepak. In the records of the claimant's July 30, 2018 visit, Dr. Cable noted that the claimant's pain was starting to abate after almost two months.

That the claimant suffered this level of flare-up after a mere four-hour evaluation, taken in conjunction with the totality of facts of this claim, it is clear that she is unable to return to the same or any other meaningful work. Therefore, for the foregoing reasons, I would find that the

claimant proved by a preponderance of the evidence that she is permanently and totally disabled.

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

M. SCOTT WILLHITE, Commissioner