

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. H003818**

<b>CHERYL L. COOK, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SODEXO, INC. , EMPLOYER</b>	<b>RESPONDENT</b>
<b>GALLAGHER BASSETT SERVICES, INC., INURANCE CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION AND ORDER FILED FEBRUARY 9, 2021**

Hearing conducted before the Arkansas Workers' Compensation Commission, Administrative Law Judge (ALJ) Mike Pickens, on November 17, 2020.

The claimant was represented by the Honorable Gary Davis, Gary Davis Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Jarrod Parrish, Worley, Wood & Parrish, P.A., Little Rock, Pulaski County, Arkansas.

**INTRODUCTION**

In the Prehearing Order filed September 16, 2020, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including November 28, 2018, when the claimant sustained a lower back injury, which the respondents accepted as compensable and paid medical and indemnity benefits.
3. The claimant's average weekly wage (AWW) is \$843.41, entitling her to weekly compensation rates of \$562.00 for temporary total disability (TTD), and \$422.00 for permanent partial disability (PPD) benefits.
4. The claimant's treating orthopedic surgeon, Dr. Baskin, opined she reach maximum medical improvement on December 9, 2019, and he assigned her a 12% to the body-as-a-whole (BAW) impairment rating, which the respondents are paying at this time.

5. The parties specifically reserve any and all other issues for future determination or hearing.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 3-4). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether and to what extent, if any, the claimant has sustained wage loss disability as a result of her November 28, 2018, compensable lower back injury.
2. Whether the claimant's attorney is entitled to a controverted fee on these facts.
3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; Id.).

The claimant contends she sustained an admitted compensable injury to her lower back on November 28, 2018. Her treating physician, Dr. Barry Baskin, assigned her a 12% BAW permanent anatomical impairment rating which the respondents accepted and are paying. The claimant contends that since she returned to work in January 2020, her wages have been decreased. The claimant contends she is entitled to wage loss disability in excess of her 12% BAW impairment rating; and further, that the respondents have controverted her claim for wage loss disability and owe her attorney a controverted fee. (Comms'n Ex. 1 at 2).

The respondents contend the claimant cannot meet her burden of proof in demonstrating she has sustained any wage loss disability in excess of her 12% impairment rating that is related to her compensable lower back injury. (Comms'n Ex. 1 at 2-3).

The record consists of the hearing transcript and any and all exhibits contained therein and

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attached thereto, as well as a blue-backed copy of the claimant's attorney's post-hearing email to the ALJ; a copy of the Full Commission opinion in *Carrie R. Henderson v. Sodexo, Inc.*, AWCC No. G402688 (Full Commission Opinion filed June 8, 2016, NOT DESIGNATED FOR PUBLICATION), the claimant's attorney referenced in his email, as well as the respondents' attorney's emailed response to the claimant's attorney's email and the opinion he referenced in it.

### **STATEMENT OF THE CASE**

The claimant, Ms. Cheryl L. Cook (the claimant), was 56 years-old at the time of the hearing. She was 54 years-old on November 28, 2018, when she was working as the chief chef for catering for Solodex, Inc. (Solodex), a vendor who provides the food services for the University of Arkansas at Little Rock (UALR). On that date she was performing her job duties when she fell backwards and landed on her buttocks, injuring her lower back. After initially treating at Concentra, the claimant came under the care of Dr. Edward Saer, an orthopedic surgeon associated with Arkansas Specialty Orthopaedics in Little Rock. In his initial evaluation report dated December 18, 2018, Dr. Saer noted the claimant told him "...she has had back problems in the past, and actually had an injection in her back by Dr. Miedema earlier this year." At the time Dr. Miedema gave her the lumbar spine injection the claimant was only having lower back pain, and had not experienced any radicular pain in either of her extremities. However, after her work-related fall she began having "...pain going down the leg as well as numbness and tingling." Dr. Saer assessed the claimant's pain as "...likely related to a contusion or sprain." (Claimant's Exhibit 1 at 4, 7; 4-8; T. 6-20).

After having ordered his own x-rays, Dr. Saer reviewed the MRI the claimant had undergone

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on December 10, 2018 at Chenal MRI. The MRI revealed "...mild degenerative change at L2-3, L3-4, L4-5, with disc bulging." He found no "...frank disc herniation", but noted the claimant "...does have some stenosis at L4-5 with a large left-sided facet cyst" that appeared "...to be causing significant lateral recess narrowing." (CX1 at 8). The claimant told Dr. Saer she had only been back to work for two (2) days "...since the holidays" and that, "The only thing that really bothers her is sitting for a long time." (CX1 at 9). Dr. Saer assessed the claimant's lower back pain and radicular symptoms as follows: "Back and leg pain with degenerative changes in the lumbar spine and a left-sided facet cyst that may be causing nerve root irritation." (Id.). Dr. Saer "had a long visit" with the claimant about the source of her pain. He asked her to stop taking the Tramadol and muscle relaxers she had been taking, and recommended she try Gabepentin. Dr. Saer concluded his January 8, 2019, office visit note as follows:

After her last visit [on December 18, 2018] we gave her a note to return to work at regular duty. She does not think she can do regular duty now. She says that she was not actually on regular duty, but was working with restrictions that Concentra provided, such as working only 8 hours per day, limited bending and lifting, etc. She may continue to work with those restrictions.

(CX1 at 10) (Bracketed material added).

Thereafter, when she continued to have pain and radiculopathy the claimant began treating with Dr. Wayne Bruffett, another Little Rock orthopedic surgeon who is associated with OrthoArkansas. On May 9, 2019, Dr. Bruffett performed a lumbar laminectomy and complete facetomy in order to remove the claimant's facet cyst at the L4-5 level of her lumbar spine. In his operative report dated May 9, 2019, Dr. Bruffett explained that when he operated on the claimant he found "...a huge facet cyst at L4-L5 on the left in the spinal canal causing marked thecal sac

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compression.” (CX1 at 13; 13-15).

After the surgery the claimant no longer had leg pain, but she continued to complain of lower back pain. A post-surgical MRI showed the decompression surgery was successful. Dr. Bruffett had released her to “sedentary duty” but Sodexo had no light or sedentary duty for her. (CX1 at 18). After having obtained an updated MRI scan, the claimant returned to see Dr. Bruffett on September 9, 2019. Other than the post-surgical MRI changes, the MRI did not reflect any new problems or concerns. Dr. Bruffett recommended the claimant continue with her physical therapy. Dr. Bruffett concludes his clinic note for this visit by stating, “When I see her back in 6 weeks she will need to decide whether she can go back to work or not.” (CX1 at 21; 19-21).

On November 15, 2019, the claimant underwent a functional capacity evaluation (FCE) administered by Rick Byrd and Stuart Jones of Functional Testing Centers, Inc. (Respondents’ Exhibit 1 at 1-17). The FCE’s conclusions are set forth on page 2 of the FCE report, which indicate the claimant “...demonstrated the ability to perform work in at least the **SEDENTARY** classification of work as defined by the US Dept. of Labor’s guidelines over the course of a normal workday... .” (RX1 at 3; 2-3). Under the “**FUNCTIONAL LIMITATIONS**” section of the FCE report. Mr. Byrd and Mr. Jones stated:

Although Ms. Cook reported and/or demonstrated numerous functional limitations during her evaluation, she also exhibited numerous inconsistencies which invalidated her entire evaluation. Therefore, her current functional status remains unknown at this time due to her failure to produce sufficient objective data to substantiate her reported and/or demonstrated limitations.

(RX1 at 2).

The claimant returned to see Dr. Bruffett on December 18, 2019, at which time he opined

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she had reached maximum medical improvement (MMI), and assigned her a 12% BAW permanent anatomical impairment rating, which the parties stipulated the respondents had accepted and were paying. Dr. Bruffett released the claimant to return to work “without restrictions,” noting that “...we will [sic] just unable to measure that [her functional limitations or restrictions] because she apparently put forth inconsistent effort with the [FCE] test.” (RX1 at 24) (Bracketed material added). The claimant underwent a CT scan on July 2, 2020. Like her previous post-surgical MRI, this scan showed her fusion and preexisting degenerative disc disease but did not reveal any new problems or concerns. (CX1 at 25-26).

The claimant returned to work for Sodexo at UALR on January 14, 2020, and she worked up through March 27, 2020, when Sodexo stopped production in the kitchen due to the COVID-19 pandemic. (T. 22). She testified that before her injury she was working two (2) jobs. In addition to her job with Sodexo at UALR, she worked events at Simmons Bank Arena (and she had worked events at the Alltel Arena and Verizon Arena, as well, before the arena’s latest name change) as a ticket-taker and usher. She testified she would put in 20 to 30 hours over a two (2)-week period working at the arena. (T. 14-15). Since the COVID-19 pandemic hit the claimant has not worked any arena events since all the events were cancelled. (T. 13-16; 31-45). After having drawn unemployment benefits from early April 4, 2020 through August 16, 2020, the claimant returned to work for Sodexo in the UALR kitchen. When she returned to work in August 2020, she made the same amount of money per hour, \$17.80, as she had before her November 2018 lower back injury; however, she did not make as much money in a two (2)-week period because she was not working as many hours as she had worked at the time of her injury. She eventually conceded this

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was because there was less catering work because of the COVID-19 pandemic. (T. 38-55).

The claimant testified the surgery relieved her leg pain, but not the pain in her lower back. She said the pain affects everything she does, "...even getting in and out of the car." She said the lower back pain affects her ability to lift and to stand, among other things. (T. 17-20). The claimant testified she had not been released without restrictions, but that there "was a piece of paper" that she believed had listed some work restrictions. (T. 35-45). The claimant said if Sodexo had offered her more hours she believed she could work them, although her lower back pain "varies from day-to-day." (T. 48). She testified that while it is "not easy," she was able to perform the job she was working at Sodexo when she returned to work in January 2020 (T. 40-41).

Mr. Robert Brian Caudle was the claimant's supervisor at Sodexo. He was and is the executive chef at UALR who was responsible for scheduling employees' work and assigning duties in the kitchen and cafeteria. He worked with the claimant at the time of her November 2018 compensable injury and after she returned to work in January 2020. He testified that when the claimant returned to work in January 2020, her back injury did not affect either the claimant's work hours or her job assignments. He said that the claimant was the UALR catering chef from the time she returned to work in January 2020 through the date the kitchen and cafeteria shut down due to the COVID-19 pandemic. (T. 57-76). Mr Caudle confirmed that when the UALR kitchen and cafeteria reopened in August 2020, Sodexo hired the claimant back at the same hourly wage rate but as a floater in the kitchen area, not as the head catering chef. The reason for this was because the COVID-19 pandemic had resulted in less catering, so the claimant would not have been able to work a full 40-hour week if she had remained in the head catering chef position. (T.

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58-59). Mr. Caudle said the claimant had a full duty work release when she reported back to work in 2020. Mr. Caudle said he did not remember her making any significant complaints about lower back pain after she returned to work in 2020, and he did not recall her ever having to leave work because of back pain. (T. 59; 75-76; 56-76).

The claimant's post-injury wage records reveal, as she testified, that after she returned to work in January 2020 she was making the same hourly rate of \$17.80 per hour and working 40 hours per week; but she is working less hours over a two (2)-week period now than she was before her compensable injury. (RX2 at 1-2; T. 19-20). The record reveals further the claimant applied for and drew unemployment benefits from April 4, 2020, through August 16, 2020, when she returned to work for Sodexo at UALR. (RX2 at 3-15). On her application for unemployment benefits the claimant checked boxes indicating she was able to return to full time work immediately, and that she did not have any disabilities that would limit her ability to perform her normal job duties. (RX2 at 11). Her application for unemployment benefits also reveals the claimant represented to the Arkansas Division of Workforce Services that she was not working because the "SCHOOL CLOSED DOWN DUE TO COVID 19"; that her last day of work was "3/15/2020", and she would return to work on "6/1/2020" performing "Clerical/Nonprofessional" work. (RX2 at 12) (Emphasis in original). The "**NOTICE TO LAST EMPLOYER**" form in the unemployment records reflects the claimant was "LAID OFF" because of "LACK OF WORK." (RX2 at 13).



## **DISCUSSION**

### **The Burden of Proof**

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2020 Lexis Replacement). There is no presumption that a claim is compensable, that an injury is job-related, or that a claimant is entitled to benefits. *Crouch Funeral Home v. Crouch*, 262, Ark. 417, 557 S.W.2d 392 (1977); *Okay Processing, Inc. v. Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979). The claimant has the burden of proving by a preponderance of the evidence that she is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In determining whether the claimant has met her burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987). The ALJ, the Commission, and the courts shall strictly construe the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers' Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Correc. v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility

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of the witnesses and the weight to give their testimony. *Whaley v. Hardee's*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); and *Farmers' Coop.*, *supra*. The Commission has the duty to weigh the medical evidence just as it does any other evidence, and to resolve conflicting medical opinions; and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999).

### **Wage Loss Disability, Generally**

The Act specifically sets forth the requirements for wage loss disability findings. For unscheduled injuries, *Ark. Code Ann.* § 11-9-522 (2020 Lexis Supplement) controls an injured worker's entitlement to permanent disability benefits for loss of wage-earning capacity. The payment of compensation for permanent disability compensation is appropriate where the permanent effects of a work-related injury incapacitate the worker from earning the wages she was receiving at the time of the injury.

The Commission is charged with the duty of determining a claimant's wage loss disability, if any, based upon consideration of the medical evidence and other matters affecting wage loss. *Lee v. Alcoa Extrusion*, 89 Ark. App. 228, 201 S.W.2d 449 (Ark. App. 2005). When making a determination of the degree of disability an injured worker has sustained as the result of an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's physical anatomical impairment adversely affects her earning capacity, as well as

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other factors such as the worker's age, education, work experience, and other variables which may reasonably be expected to affect her future earning ability. Such other matters may include, but are not limited to: motivation, post-injury income, credibility, and demeanor. *Ark. Methodist Hospital v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (Ark. App. 1993); *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 (Ark. App. 1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (Ark. App. 1990).

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the relevant evidence to determine whether a claimant is entitled to wage loss disability. *Henson v. General Electric*, 99 Ark. App. 257, 257 S.W.3d 908 (Ark. App. 2007). A claimant's lack of interest in pursuing employment with his employer, and negative attitude in looking for work are impediments to the Commission's ability to assess wage loss disability. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (Ark. App. 2005). A claimant is not entitled to wage loss disability benefits for a scheduled injury. *Ark. Code Ann.* § 11-9-521; *Moser v. Ark. Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (Ark. App. 1993).

**The claimant has met her burden of proof in demonstrating she has sustained wage loss disability in the amount of six percent (6%) as a result of her November 2018 compensable lower back injury.**

Based on the applicable law as applied to the specific facts of this case, I find the claimant has met her burden of proof in demonstrating she has sustained 6% wage loss disability as a result of her November 2018 compensable lower back injury. This finding is based on the following facts.

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First, consistent with the law as set forth in *Lee v. Alcoa Extrusion, supra*, it must be noted the claimant's treating orthopedic surgeon, Dr. Baskin, assigned her a 12% BAW impairment rating as a result of her compensable injury and surgery. A 12% BAW impairment rating supported by objective medical evidence is not an insignificant rating, though it is only one (1) factor to be considered in determining the extent of the claimant's wage loss disability, if any. The pre-surgery MRIs revealed the claimant had and has congenital as well as degenerative changes in her lumbar spine. After the work incident both Drs. Saer and Baskin diagnosed the claimant with a large (in Dr. Bruffett's words, "huge") facet cyst at the L4-L5 level on the left that was actually inside the spinal canal and was "...causing marked thecal sac compression." (CX1 at 13). Facet cysts, also known as spinal or synovial cysts, are more common in people over the age of 50, and are generally caused by degenerative conditions of the spine, such as arthritis and degenerative disc disease. However, a spinal cyst may also form as the result of either a single trauma, or a series of microtraumas over a period of time. Spinal cysts may be treated surgically, but they also may spontaneously resolve themselves over time, much like the body absorbs the fluid in a large blister. See, JohnsHopkinsMedicine.org, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/spinal-cysts?amp=true>; and *The American Journal of Neuroradiology*, "Spontaneous Resolution of an Intraspinal Synovial Cyst," <http://www.ajnr.org/content/24/6/1261> (Swartz and Murtagh, June 2003).

Dr. Saer noted the claimant was having lower back pain even before the date of her work-related fall in November 2018, and that Dr. Miedema had treated her with an injection in her back before the work incident. (CX1 at 4, 7; 4-8). Both Drs. Saer and Bruffett diagnosed the spinal cyst,

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and were of the opinion the cyst was the cause of the claimant's lower back pain and radiculopathy. (Id.; CX1 at 8-9; 13-15). Although they certainly could have done so, the respondents did not question whether the cyst was related to the November 2018 work incident. Indeed, the parties stipulated to the fact the claimant sustained a compensable injury and she has sustained 12% BAW permanent anatomical impairment as a result of the injury and surgery. Consequently, the respondents accepted the claimant's condition as the aggravation of a preexisting condition.

The post-surgery MRIs and the July 2020 CT scan conclusively reveal the claimant had and has objective medical evidence that supports her subjective complaints of pain. Although her FCE results were unreliable and this is the reason Dr. Bruffett released the claimant to return to work with "no restrictions" (CX1 at 21; RX1 at 21), it must be noted that Dr. Bruffett himself stated in his clinic note of December 18, 2019:

*I explained to her that this does not mean that I do not think she has any limitations. I know she has ongoing complaints of back pain and I am sure she is quite limited. We will [sic] just unable to measure that because she apparently put forth inconsistent effort with the test.*

(CX1 at 20) (Bracketed material and emphasis added). Consequently, while the claimant's lack of effort and the resulting "unreliable" FCE findings make it difficult to assess the extent of her wage loss disability, Dr. Bruffett makes it abundantly clear that, in his opinion – and despite the fact he had released her to return to work "without restrictions" – the claimant does have some physical limitations and restrictions he could not accurately quantify or state because of her unreliable FCE results. Therefore, the medical evidence supports a finding the claimant has more probably than not sustained some degree of wage loss disability.

Second, the preponderance of the evidence reveals the primary reason the claimant has not been working as much as she was before the November 2018 work incident and when she initially returned to work in January 2020 was and is because of the decrease in the catering business due to the ongoing COVID-19 pandemic, and *not* because of any physical limitations or restrictions related to her November 2018 compensable injury. (T. 58-59). The claimant herself, if somewhat begrudgingly, acknowledged this fact at the hearing. (T. 38-55). The fact the claimant is making the same amount of money per hour now (\$17.80) and is working 40 hours per week indicates she has sustained minimal wage loss disability. On the other hand, because she is now working as a kitchen floater and not as the chief chef for catering because of the decrease in the catering business resulting from the COVID-19 pandemic also makes it difficult to, at this time, assess whether she can perform the same work duties for the same amount of time (i.e., 40-plus hours per week) she was working before the November 2018 work injury.

The claimant was working as the chief catering chef, and apparently was working roughly the same number of hours she was working pre-injury, when she returned to work post-injury in January 2020, although she said this was “not easy.” (T. 40-41). Again, the decrease in available work – both at UALR/Sodexo and the Simmons Bank Arena – resulting from the COVID-19 pandemic makes it difficult to determine whether the claimant can perform the chief catering chef job for the same number of hours – and work at a second job - as she was working before the November 2018 compensable injury. In addition, the extra hours the claimant worked at Simmons Arena were as a ticket-taker and usher, neither of which is a strenuous job. So, when the arena reopens the appears to be no reason the claimant could not continue working her arena job. Again,

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the record reveals the decrease in the number of hours she has worked since the March 2020 layoff is not primarily due to any physical or functional limitations, but is in fact due to the decrease in available work hours which has occurred due to the COVID-19 pandemic.

Third, the claimant was able to perform her job duties for almost two (2) months when she returned to work in January 2020 before the COVID-19 pandemic layoff; and since August 2020 she has been working as a kitchen floater for 40 hours per week making exactly the same hourly wage, \$17.80, as she was making at the time of her 2018 compensable injury. Moreover, the claimant herself represented under oath and penalty of fraud to the Arkansas Division of Workforce Services that from April through August 2020 she was available to work full time immediately, and she did not have any disabilities that would limit her ability to perform her normal job duties. (RX2 at 11). These facts mitigate against a finding she has sustained significant wage loss disability. Consequently, a wage loss finding of 6% on these facts is based on the medical and other relevant evidence of record; is reasonable; and is fair on these facts.

Therefore, for all the aforementioned reasons, I hereby make the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Commission has jurisdiction of this claim
2. The stipulations contained in the Prehearing Order filed September 16, 2020, hereby are accepted as facts.
3. The preponderance of the evidence reveals the claimant has met her burden of proof in demonstrating she has sustained 6% wage loss disability as a result of her November 2020 compensable lower back injury.
4. When the claimant returned to work after her injury in January 2020, and when she returned to work after the UALR COVID-19 pandemic

layoff, she was making exactly the same hourly wage, \$17.80 per hour, as she was at the time of her November 28, 2018, compensable lower back injury; however, she was making less total salary on a bi-weekly basis because she was working only 40 hours and not 40-plus hours per week, nor is she working at Simmons Arena at this time. The evidence reveals the primary reason for the decrease in the number of her available work hours, and the concomitant decrease her bi-weekly salary was and is *not* the result of any physical limitations or restrictions related to her compensable injury, but was and remains due to the decrease in the number of available work hours because of the COVID-19 pandemic.

5. The claimant's treating orthopedic surgeon, Dr. Baskin, assigned her a 12% BAW impairment rating, which is not insignificant. Although the claimant's FCE results were unreliable due to her demonstrated lack of effort during the examination, based on the objective medical condition of her lumbar spine as revealed by the post-surgery MRIs and July 2020 CT scan, there exists an objective basis for the claimant's continued reported complaints of pain which she testified are physically limiting.
6. While Dr. Baskin released the claimant with no work restrictions, he himself stated he believes she *does* in fact have some physical limitations and restrictions as a result of her November 2018 compensable injury and related surgery, although her unreliable FCE results make it difficult to quantify them. Likewise, the unreliable FCE results make it difficult to accurately determine the extent of the claimant's wage loss disability.
7. The fact the claimant's work hours have decreased since she has returned to work after her compensable injury and surgery; and the fact she is now working as a kitchen floater and not as the chief catering chef make it difficult to determine the extent of her wage loss disability attributable to the November 2018 work incident. Consequently, the preponderance of the evidence of record does not support a wage loss disability award of more than 6% on these facts.
8. The claimant's attorney is entitled to a controverted fee on the 6% award of wage loss disability benefits.



**AWARD**

The respondents are hereby directed to pay the claimant benefits in accordance with the “Findings of Fact and Conclusions of Law” set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to *Ark. Code Ann.* Section 11-9-809 (2020 Lexis Supp.), and *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett*, 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

If they have not already done so, the respondents shall pay the court reporter’s invoice within ten (10) days of their receipt of this opinion and order.

**IT IS SO ORDERED.**

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Mike Pickens  
Administrative Law Judge

MP/mp