

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: G804863

CRYSTAL GAINEY, EMPLOYEE

CLAIMANT

**GENOA CENTRAL SCHOOL DISTRICT,
EMPLOYER**

RESPONDENT NO. 1

**ARKANSAS SCHOOL BOARDS ASSOCIATION, WCT,
THIRD PARTY ADMINISTRATOR/TPA**

RESPONDENT NO. 1

**DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

OPINION FILED MARCH 1, 2024

Hearing before ADMINISTRATIVE LAW JUDGE CHANDRA L. BLACK in Texarkana, Miller County, Arkansas.

Claimant represented by the Honorable Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the Honorable Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the Honorable Christy King, Attorney at Law, Little Rock, Arkansas. Ms. King waived her appearance at the hearing.

Statement of the Case

On October 10, 2023, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing telephone conference was conducted on July 27, 2023, from which a prehearing order was filed that same day. A copy of the order and the parties' responsive filings have been marked as Commission's Exhibit 1 and made a part of the record without objection.

Stipulations

During the prehearing telephone conference, and/or at the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. That the employee-employer-insurance carrier relationship existed at all relevant times, including on July 16, 2018, when the Claimant sustained an admittedly compensable injury to her lower back.

3. The Claimant's average weekly wage on July 16 was \$319.50, which entitles her to weekly compensation rates of \$213.00 and \$160.00.

4. On September 20, 2021, the Claimant reached maximum medical improvement/MMI for her compensable back injury. Of note, although the parties did not make it a stipulation, per Respondents No.1's prehearing filing, they have accepted and paid the Claimant a 25% impairment rating for her back injury of July 2018.

5. Respondents No. 1 have controverted this claim for additional benefits.

6. All issues not litigated here are reserved under the Arkansas Workers' Compensation Act.

Issues

The parties agreed to litigate limit the issues as follows:

1. Whether the Claimant has been rendered permanently and totally disabled due to her compensable back injury of July 16, 2018, or in the alternative, whether the Claimant is entitled to wage loss disability benefits.

2. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

Contentions

The parties' respective contentions are listed below:

Claimant:

The Claimant contends that admittedly compensable injuries were sustained on July 16, 2018 to her low back. She received an impairment of 25% to the body as a whole. The Claimant contends entitlement to a wage loss determination. All benefits above the impairment are controverted for purposes of attorney's fees.

Claimant reserves the right to pursue other benefits to which Claimant may become entitled to in the future.

Claimant's attorney respectfully requests that any attorney's fees owed by the Claimant on controverted benefits paid by award or otherwise be deducted from Claimant's benefits and paid directly to Claimant's attorney by separate check, and that any Commission Order direct the Respondents to make payment of attorney's fees in this manner.

Respondents No. 1:

Respondents contend that Claimant is not entitled to wage loss, over and above permanent partial disability (PPD) rating.

Respondent No. 2:

The Death and Permanent Total Disability Trust Fund defers to the outcome of litigation on the following issues:

- 1) Whether the Claimant has been rendered permanently and totally disabled due to her compensable back injury, or in the alternative, whether the Claimant is entitled to wage loss disability benefits.
- 2) Whether the Claimant's attorney is entitled to a controverted attorney's fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on my review of the record as a whole, to include the aforementioned documentary evidence, other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witnesses and observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has authority over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.
3. The Claimant has failed to prove by a preponderance of the evidence that she was rendered permanently and totally disabled by her compensable back injury of July 16, 2018.
4. The preponderance of credible evidence does not prove that the Claimant sustained any wage loss disability over and beyond her 25% anatomical impairment, which Respondents No. 1 accepted and paid for her compensable back injury.
5. The issue of a controverted attorney's fee has been rendered moot and not discussed herein this opinion.

Summary of Evidence

At the hearing, Mattie Dianne Watkins (a friend and former employer), the Claimant, and her husband, Boyce Thomas Gainey, Jr., testified on behalf of the Claimant.

Respondents No. 1 called Debbie Huff, Superintendent of Genoa Central School District, and Ci Ci Burns, the Custodial Supervisor for the school district, as their witnesses.

The record consists of the October 10, 2023 hearing transcript, comprising of the following exhibits: Specifically, Commission's Exhibit 1 includes the Commission's Prehearing Order of July 12, 2023 and the parties' responsive filings; Claimant's Exhibit 1, which includes a

Claimant's Documentary Evidence Exhibit which consists of medical records of forty-seven (47) numbered pages; Claimant's Exhibit 2 is a one-page medical report, which was authored by Amelia A. Ray, APRN, CNP on November 19, 2019; Respondents' Exhibit 1 entails Respondents' Medical Hearing Exhibit consisting of sixteen (16) numbered pages and Respondents' Exhibit 2 comprising twenty-one (21) numbered pages is a Respondents' Non-medical Hearing Exhibit. These exhibits were admitted into evidence with no objection.

Testimony

Mattie Dianne Watkins

Ms. Watkins works as a radiology clerk. According to Ms. Watkins, she became acquainted with the Claimant through their church. They developed a close friendship and began spending a lot of time together. Ms. Watkins has known the Claimant for more than three decades. She testified that she hired the Claimant to do work for her in her home after the death of her husband. The Claimant worked for Ms. Watkins for ten years. Ms. Watkins and the Claimant have also taken trips together and spent a lot of leisure time together. Per Ms. Watkins, all these activities took place before the Claimant's work-related back injury.

The Claimant performed general household cleaning for Ms. Watkins. According to Ms. Watkins, the Claimant cleaned and scrubbed every "nick and cranny," of her home. The Claimant also helped Ms. Watkins to decorate for the holidays. Specifically, the Claimant helped Ms. Watkins to bring in the totes of decorations, climb ladders, put decorations away, and about whatever needed to be done at the time.

However, since the Claimant's injury, Ms. Watkins essentially testified that the Claimant has not been able to travel or help her with any home cleaning because she is unable to physically hold up to do the work. Ms. Watkins confirmed that she has observed the Claimant since her

injury. According to Ms. Watkins, the Claimant is feeble. Based on Ms. Watkins dealings with the Claimant, she testified that she found the Claimant to be an honest and straightforward individual. She also testified that she found the Claimant to be an extremely hardworking individual; and prior to her injury, she was extraordinarily strong and robust and could do what needed to be done. However, Ms. Watkins denied that the Claimant was able to physically continue working at her home after her work-related injury.

On cross-examination, Ms. Watkins confirmed that she has never worked for the school district. Nor did Ms. Watkins ever have any involvement with Annett Bassett or Debbie Huss. However, is familiar with Ms. Burns. She confirmed that she also found Ms. Burns to be a truthful person. They attend the same church.

Ms. Watkins confirmed that she was not involved with the job opportunities, restrictions, or limitations, and the work provided to the Claimant by the school district after her injury. She confirmed that the Claimant worked for the school district a significant period of time after her injury. Ms. Watkins confirmed that the Claimant worked for the district until February of 2020, which would have been a year and a half after her injury.

She verified that the Claimant is able to drive, and that she drove herself to Little Rock for her deposition. Ms. Watkins also verified that the Claimant is able to take care of her own personal needs. She confirmed that she was aware that the school district collaborated with the Claimant to modify her job after her injury.

Under further questioning, Ms. Watkins admitted that she was aware the Claimant's husband had undergone surgery due to a heart condition. She also was aware that the Claimant resigned her position shortly before his surgery. Ms. Watkins confirmed that based on her

conversations with the Claimant, she was resigning so that she would be able to take care of her husband.

Boyce Thomas Gainey, Jr.

Mr. Gainey is the Claimant's husband of forty-five years. He confirmed that the Claimant performed physical labor prior to her injury. He confirmed that over the years, he has had the opportunity to observe his wife's work ethic. According to Mr. Gainey, his wife always put forth her best effort into her work. Per Mr. Gainey, the Claimant's work required physical labor. Mr. Gainey also testified that his wife took care of chores around the house, including the gardening and all of the cleaning. However, he testified that since the Claimant's injury of July 2018, the Claimant is very limited in what she can do around the house. Per Mr. Gainey, the Claimant has now made a hundred-and eighty-degree turn. According to Mr. Gainey, he has to make the beds, vacuum, sweep, and do the dishes for his wife. Now, Mr. Gainey has to go with the Claimant when she goes grocery shopping because she is unable to lift grocery items. Mr. Gainey testified that he has to bring all the groceries into the house for his wife.

Mr. Gainey confirmed that he was previously employed as a supervisor of a fertilizer plant at Miller-Bowie Supply. He also previously worked for Cooper Tire for over nineteen years. As such, Mr. Gainey confirmed he is familiar with the demands of physical labor. Mr. Gainey further confirmed that prior to her injury, the Claimant was able to take care of household chores and those sorts of things around the house before she injured her back. He confirmed that before the Claimant hurt her back, they would have the grandkids over, and they did cookouts and other fun activities. Mr. Gainey testified that after the Claimant got hurt, she continued to work for the school district. However, he testified among other things, that at the end of the Claimant's workday, she would come home crying.

On cross-examination, Mr. Gainey confirmed that he has never been employed by the school district. He also confirmed the Claimant is able to drive him to his doctor's appointments. Mr. Gainey confirmed that the Claimant drove from Texarkana to Little Rock in May 2022 for her deposition. However, Mr. Gainey denied that his wife resigned her position with the school district on February 26, 2020, to take care of him following his heart pump surgery. He admitted he was not a part of the conversation with the Claimant and Annett Bassett, Debbie Huff, or Ci Burns when she resigned her position. He admitted that he does not know what the Claimant told them. According to Mr. Gainey, the Claimant resigned her position with the school district because the administration placed more strenuous job duties on her and as a result, she was physically unable to do the work because of her back condition.

Nevertheless, Mr. Gainey specifically testified that his heart condition took a dramatic turn and practically shut down, and he had to be hospitalized on March 10 to have the heart pump put in. He agreed that this occurred around the time his wife resigned her position. Mr. Gainey was shown a copy of his wife's letter of resignation. Specifically, the following exchange took place:

A I can't see it.

Q Okay. It says due to unfortunate circumstances, my husband's health, please accept my resignation from my current position as custodian effective 2/26/2020 and then it says Crystal Gainey and she signed it.

A Yes, sir.

Q That would be around the time that you're talking about, correct?

A Yes, sir.

Mr. Gainey went on to testify that his treating physician explained to them that after the LVAD surgery, he would have to have someone take care of him. This occurred around the time

of the COVID-19 pandemic. Therefore, the Claimant had to basically move into the hospital to take care of her husband.

On redirect-examination, Mr. Gainey testified that he was hospitalized for sixteen days before he was discharged from the hospital. According to Mr. Gainey, they had to stay three days at the hotel, which was next door to the hospital. After that period of time, they went home. Mr. Gainey confirmed that during this period, his wife continued to have medical treatment for her injury until recently. He confirmed that his wife has had ongoing complaints relating to her injury. According to Mr. Gainey, the Claimant has problems sitting in a chair for lengthy periods of time. She also has problems sleeping throughout the night and gets up in the middle of the night. He confirmed that the Claimant underwent fusion surgery which consisted of placing hardware in her back.

Crystal Gainey

The Claimant is 62 years old. She confirmed that she completed that 10th grade. The Claimant quit school to get married and started working. She did not obtain any additional education beyond that time except training as a nurse's aide. The Claimant worked as a certified nursing assistant at St. Michael's Hospital. According to Mrs. Gainey, she did not ever obtain her GED.

Regarding her admittedly compensable back injury of July 16, 2018, while employed with the Genoa School District. Mrs. Gainey testified that she injured her back and other bodily parts when she slipped and fell on a wet floor that they had been stripping. Her most severe injury was to her back. The Claimant promptly reported her injury. The Respondents sent the Claimant to Healthcare Express, and they performed some x-rays. Mrs. Gainey confirmed that she underwent

surgery to her back in October of 2019. The Claimant testified that she worked on light-duty from the time she got hurt until her surgery.

The Claimant testified that three weeks after her surgery, her supervisor called her and told her she had to return to work or be fired. The Claimant returned to work and worked until the latter part of February 2020. Mrs. Gainey underwent a functional capacity evaluation in April of 2020. She maintained that upon her return to work, they had her picking up trash. However, the machine the Claimant had to ride on while performing this task jerked and jarred her back. She also testified that among other employment duties, she had to do repetitive activities, such as reaching, bending, standing, cleaning windows and furniture and straightening desks. Mrs. Gainey further testified that she worked in the cafeteria for a time. Per the Claimant, this position included job activities that were hard and included heavy lifting of boxes of potatoes and various other food items. Mrs. Gainey gave an extensive overview of her overall job duties while working in the cafeteria, which included cleaning, washing, and scrubbing the floors. (T. 40) The Claimant further testified that she had to also work guard duty.

Mrs. Gainey confirmed that Dr. Samuel Clay Overley was her treating physician. She maintained that the work she was being required to perform at the school involved bending and twisting her back. The Claimant further maintained that her work involved lifting more than ten pounds. She denied that any of her care-taking activities for her husband after his heart surgery involved lifting, bending, pulling, and/or pushing. Specifically, Mrs. Gainey testified that following her husband's heart surgery, she had to check a monitoring box (which was apparently for his heart) and blood pressure, and she had to change his bandaging every so many days. The Claimant also prepared her husband's meals per his diet restrictions, but she denied being required to lift him for any reason.

She admitted that prior to leaving her employment with the school district, she had some discussions with management. According to Mrs. Gainey, she did not have enough hours to qualify for FMLA because she did not have enough accrued leave. Per the Claimant she was told to return to work or be fired. The other option was for her to resign, which would potentially allow her to be rehired by the school district.

The Claimant confirmed that she underwent a functional capacity evaluation that resulted in some permanent physical work restrictions being placed on her. She is restricted from lifting anything over ten pounds. When traveling, the Claimant must take a break every thirty to forty minutes and walk around before proceeding to drive again. The Claimant has difficulty walking on concrete because it causes her to have severe back pain. She is limited in reaching, stretching, and bending, but she can do some stooping. The Claimant has been directed not to do prolonged sitting and standing, and no twisting or turning of her body. According to the Claimant, she is not familiar with any job at the Genoa School District that would meet her physical restrictions. She testified that when she worked on light duty, they had her do heavy lifting, and challenging things, which included but not limited to lifting the copy paper, walking students back and forth to the restrooms and outside for them to catch the bus. The Claimant further testified that when the teachers had holiday parties, she had to decorate their classrooms. However, the Claimant admitted that while doing the arts and crafts, she could alternate standing and sitting, which permitted her to work within her physical limitations. She denied that the school district offered her a job of this type. The Claimant also denied that they offered a job on a permanent basis.

Following the Claimant's April 15, 2020, functional capacity evaluation, she denied having any oral and/or written communications with the school district. Prior to going to work for the school district, the Claimant worked for a daycare center for approximately five years. She denied

she could perform that job because of the lifting, bending, and twisting involved in the essential functions of taking care of the infants and toddlers. The Claimant stated that if the school district would allow her to collaborate with the teachers, she could perform those jobs because there would be no strenuous, repetitious, lifting or twisting activities involved. She could also do work that involved taking the kids to the restroom and helping the teachers with art projects and things of that nature. However, the Claimant denied that she would be able to work in the cafeteria or help with the waxing and stripping of floors.

Prior to her injury, the Claimant's employment duties included cleaning the classrooms, sweeping, dusting, mopping, wiping down the desks, sinks, and walls. According to the Claimant, she also had to vacuum, move furniture around and help the teachers to do whatever they needed done. She confirmed that her employment duties were extremely arduous work and included activities outside of the restrictions placed on her by Dr. Overley.

Mrs. Gainey confirmed that since her surgery, she has had some injections therapy to help relieve her back pain and related symptoms. The Claimant confirmed that a spinal cord stimulator has been recommended for her back. She denied being eligible for Social Security Disability benefits or having enough quarter in to qualify for these benefits.

Per the Claimant, Dr. Overley discharged her from his care after he referred her to Dr. Smith for the spinal cord stimulator.

On cross-examination, the Claimant confirmed that her husband had a pacemaker and defibrillator put in eight years ago. Then, he had heart pump placement surgery on March 10, 2020. She confirmed her husband has been placed on the heart transplant list since March of 2022.

Mrs. Gainey testified that she left her employment with the school district in part, to help care for her husband. She confirmed that she had to be off work for at least three weeks or longer

following her husband's surgery. The Claimant confirmed that she had to either show up for work or be fired because she did not qualify for FMLA. Therefore, Mrs. Gainey decided that it was in her best interest to resign her position with the school district.

The Claimant admitted that she did not re-apply for her position with the school district after her husband's surgery, nor did she contact them in any way to try and get her job back. She admitted that after her July 2018 injury, she continued to work except for the few periods of time she was receiving treatment, and until her resignation on February 26, 2020. The Claimant admitted that she did not apply for or interview for a job any place else after that time. According to the Claimant, she was not released from her doctor at that time. She admitted that after undergoing the functional capacity evaluation in April 2020, she did not apply or interview for a job at that point. Mrs. Gainey admitted that she has not called Ms. Burns, Ms. Huff, or Ms. Bassett since February 2020. She confirmed that she never filed for any teacher's aide job or anything.

She admitted that following her July 16, 2018, injury, she returned to work beginning August of 2018. The Claimant confirmed she worked modified duty until her surgery. Then she returned back to work and worked until February of 2020. Mrs. Gainey admitted that she stayed at the hospital with her husband due to the COVID-19 pandemic. His surgery was on March 10 and they returned home from Little Rock to Texarkana on March 24.

The Claimant admitted that she does not take any medication for her back. She testified that she only took medication after her surgery. Mrs. Gainey admitted that she is able to drive. According to the Claimant, she was released from medical care after she chose not to undergo implantation of the pain stimulator. The Claimant testified that she decided not to have the stimulator implanted because of long-term health and safety concerns, which would have included her inability to undergo an MRI. She confirmed that the primary injury was to her back. The

Claimant admitted that she did not injure her arm or shoulder while working at the school district. She confirmed that she was in a sling and told them that she had to have a replacement and a reversal done on her right arm. The Claimant is right-handed. She confirmed that she first started having problems when her arm hurt last year. The Claimant admitted that she has done some waitressing at a small country restaurant. There, she cooked, served food, cleaned up and waited on the customers. She also worked at a daycare for a church. She worked as a teacher's aide in addition to the custodial work that she did at the school.

Under further questioning, the Claimant admitted that she had two slipped or ruptured discs in her back some twenty years ago. She underwent some injections. According to the Claimant, it took some time for her back to heal, but she never had any more back problems until her most recent injury with the school district.

Regarding her compensable injury, the Claimant admitted that after she had surgery on her back and had significant improvement. However, the Claimant maintained that she is a long way from being well and able to do the things she used to do. The Claimant admitted that she told the person doing the functional capacity evaluation that she went back to work on light duty and worked until she resigned due to having to take care of her husband. According to the Claimant, she wanted to work and keep her job, but she had no choice but to resign or be fired. She admitted that she had the option to resign and then reapply if she wanted to return to work for the school district.

Mrs. Gainey confirmed that her supervisor, Ms. Burns, communicated to her jobs that were going to be made available. She agreed that one of the light duty jobs she worked in included a teacher's aide position, but it did not include teaching.

On redirect examination, the Claimant confirmed that the job that she actually performed when she returned to work exceeded the restrictions placed on her by Dr. Overley. Mrs. Gainey denied that she was ever offered a job that did not exceed her restrictions.

Mrs. Gainey admitted on recross examination that she did not interview or do anything proactively to go after a job with the school district.

Debbie Huff

Ms. Huff testified on behalf of the Respondents. She is the superintendent of the Genoa Central School District. She worked for the school district in July of 2018 as the Director of Federal Programs. She oversaw Title 1 and Title II federal funding that included distribution of material and resources for teachers and students.

She confirmed that she was appointed the interim superintendent in February 2020. Ms. Huff admitted to meeting with the Claimant and Ms. Burns to discuss her options surrounding her being off work with her husband due to his heart surgery. She confirmed that the Claimant did not qualify for FMLA. Ms. Huff verified that the Claimant decided to resign so she could be with her husband in hopes of trying to come back to the school district at some point. She denied that there was any discussion about the Claimant being unable to perform any of the job duties that she had been assigned to work. Ms. Huff admitted that she typed the Claimant's letter of resignation on her computer, but the Claimant read over it and signed it in her presence. She denied having any contact with the Claimant after she signed the letter of resignation on February 26, 2020.

On cross-examination, Ms. Huff confirmed that the Claimant does not have a college degree. Ms. Huff was not aware of anyone communicating to Mrs. Gainey regarding a job offer. She confirmed that back in 2018 she was a state employee administering federal money. At that time that the Claimant had discussions about taking care of her husband, Ms. Huff served as the

interim superintendent for the district. She admitted that the work activities in the cafeteria could involve bending, twisting, and lifting greater than ten pounds. Ms. Huff verified that the Claimant's work in the cafeteria would exceed the restrictions provided by her doctor.

She was not aware of a custodial job that did not involve bending, twisting, or lifting no greater than ten pounds. Ms. Huff confirmed that the school district did not ever communicate to her that they had a job available for the Claimant within her restrictions after April 15, 2020. She confirmed that the Claimant came to her because she was worried about her husband, and she wanted to protect her job if possible. Ms. Huff admitted that she gave the Claimant the option of resigning so that it would look better if she decided to return to work for the school district. She confirmed that she told the Claimant if she did not show up for work, it could lead to disciplinary actions which could lead to her termination. She admitted that the three weeks the Claimant needed to be with her husband would have exceeded the time she was allotted for taking off work to continue her employment with the school district.

On redirect examination, Ms. Huff confirmed that the Claimant worked for a year and half after her injury in July 2018. Specifically, the Claimant continued to work various modified jobs for the school district. She denied that Mrs. Gainey indicated that there was any ill-will between her and the school district. Ms. Huff confirmed that during her conversation with the Claimant in February of 2020, she never indicated to her that there was a problem with Ms. Burns or anyone else. Moreover, nor did the Claimant indicate to Ms. Huff that she was having problems performing her job responsibilities.

On recross examination, Ms. Huff admitted that she did not ever observe the Claimant performing her job duties. She confirmed that the Claimant had restrictions in 2019 that kept her from sitting or standing longer than thirty minutes.

Ci Ci Burns

Ms. Burns is the custodial supervisor at the Genoa Central School District. She has held this position for twenty-nine years and has been the custodial supervisor for ten years. According to Ms. Burns, the Claimant worked as a custodian under her. She agreed that she supervised the Claimant. Ms. Burns confirmed that Mrs. Gainey began working for the school district around April 30, 2018, which would have been the 2018-2019 school year. She admitted that the Claimant worked extra hours during the summer months. Per Ms. Burns, although the Claimant had a contract, she was not considered a salaried employee.

She testified that the Claimant had light-duty work restrictions on March 25, 2019, placed on her by Dr. Overley. Per these restrictions, the Claimant was restricted from twisting, bending, and lifting no more than fifteen pounds. She confirmed that if the Claimant's restrictions had changed, she would have made a new list of items/duties for her. Ms. Burns agreed that if she contacted the Claimant to return to work, it would have been based on a doctor indicating that she could return to work. She agreed that the Claimant was provided lighter work duties within her physical limitations and restrictions, which included wiping down desks and disinfecting the classrooms, which simply entailed spraying a can of Lysol. According to Ms. Burns, this occurred during the COVID-19 pandemic.

Under further questioning, Ms. Burns testified that during the school year 2019-2020, she prepared a list of duties for the Claimant. Said list indicated that the Claimant was responsible for monitoring the students exiting and entering the campus, cleaning windows, picking up trash, assisting in the cafeteria (which involved putting food on trays and handing trays to the students). The Claimant was required to stand in the serving line and scoop the tray up and slide it to the students. She confirmed that the Claimant did not have to lift the trays to give them to the students.

Instead, the Claimant only had to push the tray outward to the students, which was within her restrictions. Ms. Burns also testified that there were eight to ten other workers performing this same task.

According to Ms. Burns, the Claimant never indicated to her that she was unable to physically perform the job duties that she was assigned to perform at that time. She agreed that had the Claimant complained to her, she would have modified her job duties. Ms. Burns denied that she ever indicated to the Claimant she could not return to work for the school district. She specifically denied that she threatened to fire the Claimant if she did not do certain things. Ms. Burns also denied having reduced the Claimant's pay when she returned to work after July of 2018. Instead, Ms. Burns testified that the Claimant would have been eligible for a raise.

On cross-examination, Ms. Burns confirmed that she did not notify Mrs. Gainey of any available jobs after February 26, 2020. Ms. Burns testified that the Claimant was a very good worker.

Ms. Burns confirmed on redirect examination that the jobs that are posted are available to anyone who has either internet connection or social media. She agreed that this is the way that the school district goes about notifying people of jobs.

Medical Evidence

The first medical record of evidence following the Claimant's fall at work is dated July 16, 2018. The Claimant sought medical services from HealthCare Express due to a slip and fall on stripper wax on the floor at work as she came around the corner. Mrs. Gainey reported that she hit her tailbone and both her hips hard. The Claimant also complained of a headache in the back of the head after hitting it on the floor.

The Claimant sought medical treatment from HealthCare Express on August 20, 2018, for a follow-up appointment of back and head injuries. The Claimant was assessed with a contusion of the head, and a lumbar contusion. At that time, an MRI of the lumbar spine was recommended to determine if there was any nerve root impingement.

An MRI of the Claimant's lumbar spine was performed on August 24, 2018, with the following impression:

1. Severe L4-5 canal stenosis secondary to spondylolisthesis, small broad-based disc bulge and bilateral facet arthropathy.
2. Small L5-S1 central disc protrusion.

The Claimant underwent an evaluation at UAMS by Dr. Micheal D. Cassat on September 27, 2018, due to significant low back pain since a fall at work several weeks ago. Her back pain radiated bilaterally to legs and thighs. However, there was no associated sensory change or weakness. Dr. Cassat performed x-rays which showed a Grade 1 spondylolisthesis at L4-5, for which physical therapy strengthening and an epidural steroid injection at L4-5 to help with the Claimant's radicular leg pain. They also discussed medial branch blocks with possible rhizotomy for her axial back pain. As a result, the Claimant was placed on restrictions of no lifting, pushing, or pulling greater than ten pounds, and no repetitive flexion or extension.

On December 10, 2018, the Claimant returned to UAMS for a recheck of her low back pain with radiculopathy. Dr. Cassat noted that her leg pain was much better after an epidural steroid injection, but she continued to have significant low back pain. At that time, Dr. Cassat assessed the Claimant with low back pain, which was potentially associated with radiculopathy. His relevant treatment recommendations included return to Interventional Pain for medial branch blocks with rhizotomy, continued physical therapy with core strengthening only, limited extension

and rotation, with continued same work restrictions, with follow-up in six weeks, or sooner if needed.

The Claimant returned to Dr. Cassat on January 28, 2019, to discuss her low back symptoms and previous radicular leg pain. Dr. Cassat reported that unfortunately the Claimant complained of worsening pain after medial branch blocks with zero relief during lidocaine component. Her pain continued to be moderate to severe with activity, especially with standing extension and rotation. Dr. Cassat opined:

At this point she has failed conservative treatment measures including physical therapy, medial branch blocks and epidural steroid injections. Her radicular leg pain resolved after her epidural steroid injection, but she continues to have severe debilitating back pain. I would like her to see my partner to discuss further treatment options including potential operative treatment. If there is no further appropriate treatment for her work-related injury, she will need a functional capacity evaluation.

On February 8, 2019, the Claimant presented to Samuel Clay Overley's clinic for an evaluation of her severe lower back pain associated with some buttock pain and left lower extremity radiculopathy. The Claimant reported she had a fall back in July of 2018 when all her pain started. She complained of severe pain in the lower back as well as the buttocks and primarily the left lower extremity. However, after an L4-5 transforaminal injection on the left, her left lower extremity pain was better. The Claimant continued to have severe low back pain. Although the Claimant had tried epidural steroid injections, facet blocks, narcotics, physical therapy, acupuncture, membrane stabilizers, and muscle relaxers without any significant lasting relief. The Claimant was referred to Dr. Overley by his colleague, Dr. Cassat, for evaluation for potential surgical intervention.

A computed tomography report dated February 25, 2019, demonstrates that the Claimant underwent a CT of her lumbar spine, with the following IMPRESSION:

1. L4-5 level spinal stenosis and bilateral lateral recess stenosis due to prominent bulging of the annulus fibrosis, facet arthropathy and ligamentous hypertrophy. Small disc protrusion cavity excluded, and MRI of the lumbar spine is recommended for further evaluation.
2. Diffuse lumbar spondylosis as detailed above.

On March 1, 2019, the Claimant presented to Dr. Overlay in clinic for evaluation of severe low back pain associated with left greater than right buttock and left lower extremity radiculopathy. At that point, Dr. Overlay recommended that the Claimant continue physical therapy for at least another six months and if after that she was still having severe pain, he would consider offering an L4-5 instrumented fusion. In the meantime, Dr. Overlay put the Claimant on light duty work for the next six months.

The Claimant underwent a Functional Capacity Evaluation on April 19, 2020. The results of this evaluation indicate that the Claimant put forth a reliable effort, with 55 of 55 consistency measures within expected limits. The examiner stated that further analysis of the data collected during this evaluation indicates that Claimant did put forth a consistent effort and passed all criteria for a reliable effort indicating that a significant degree of effort was put forth. She was consistent with repeated trial testing, distraction-based testing for which she exhibited appropriate responses to material handling and strength testing. The examiner concluded that the Claimant completed the functional testing on this date with reliable results. Overall, the examiner opined that the Claimant demonstrated the ability to perform work in the light classification of work as defined by the U.S. Dept. of Labor's guidelines over the course of a normal eight-hour workday within limitations as noted above.

On December 9, 2020, the Claimant underwent evaluation by Amelia A. Ray, APRN, CNP, to discuss her MRI and physical therapy. The Claimant reported she was prescribed oral steroids, and they improved her back pain and leg pain a bit. Unfortunately, this lasted only about four days

and then her back pain returned. At that time, the Claimant's pain was in her low back diffusely and radiated into bilateral legs. The Claimant also reported pain in her knee and buttocks, hip, and down the back of her left leg. Per this medical report, the Claimant was ten months status post L4-L5 posterior decompression with instrumented fusion, and she did very well postoperatively until about four months ago when she started having feelings of radicular pain again as well as low back pain. Imaging was detailed as the following:

MRI lumbar spine shows no new disc bulge or protrusion or canal stenosis at any level.

Evaluation of neural foramina limited at L4-L5 and L5-S1, however without any suggestion of significant foraminal narrowing. Likely mild right foraminal narrowing L5-S1 and mild to moderate foraminal narrowing bilaterally at L4-L5.

The Claimant returned to Nurse Ray on September 15, 2021, for an MME evaluation and an impairment rating. This clinical note shows that the Claimant was one year out status post L4-5 posterior decompression and instrumented fusion, but she had done quite well following this surgery. The Claimant still had occasional pain down the left lower extremity. She also had occasional back pain. At that time, the Claimant was declared to be at maximum medical improvement for her back injury. Her impairment rating based on AMA guidelines 4th volume was 25% to the whole person based off of radiculopathy and loss of motion segment integrity. They discussed the fact that she continued with left lower extremity pain and wanted to try an epidural steroid injection.

Adjudication

Permanent and Total Disability, or alternatively, Wage-Loss Disability

The Claimant has asserted that she has been rendered permanently and totally disabled because of her compensable back injury of July 16, 2018, or in the alternative, that she sustained wage loss, because of her work-related injury.

In that regard, Ark. Code Ann. §11-9-519(e)(1) (Repl. 2002) provides: "Permanent total disability" means an inability, because of compensable injury or occupational disease, to earn a meaningful wage in the same or other employment.

Furthermore, the statute provides that the burden of proof shall be on the injured employee to prove their inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2) (Repl. 2002).

The evidence before me does not show that the Claimant has been rendered permanently and totally disabled due to her July 16, 2018, back injury.

Here, the Claimant worked as a custodial worker for the school district. She sustained a work-related fall when she slipped and fell on a floor that was being stripped and waxed by coworkers. The Claimant promptly reported her injury to management, and they provided her appropriate medical care. After the Claimant failed conservative treatment, she underwent back surgery by Dr. Overley in October 2019. Although the Claimant's testimony and the medical records mention that Dr. Overley performed a posterior spinal fusion at L4-5 with interbody, the surgical report for this surgery has not been made a part of the record. Review of the evidence leads me to conclude that the Claimant underwent back surgery in October 2019.

Following the Claimant's back surgery, on December 18, 2019, she returned to work for the school district and worked in various positions, performing light-duty work. The Claimant performed light-duty for the district work until February 26, 2020. At that point, the Claimant resigned her position with the school district so that she could care for her husband, who was scheduled for heart surgery.

On April 19, 2020, the Claimant underwent an FCE. Per the Claimant's FCE, she has permanent restrictions as noted above in the light duty category. The Claimant was declared by

Dr. Overley's clinic to be at MMI for her back injury in September 2021. At the time, the Claimant was assessed with a 25% whole body anatomical impairment for her compensable back injury. Respondents No. 1 accepted and paid the 25% impairment rating for the Claimant's back injury.

The Claimant admitted that she can drive and perform her own personal care needs. Her testimony demonstrates that after her husband's heart surgery in March 2020, she was able to able to prepare his meals and care for him. The Claimant does not take any medications for her back. Notably, the Claimant ambulates without the use of any assistive technology or adaptive devices.

Considering all of the above-mentioned reasons, particularly the fact that the Claimant successfully returned to work following her fusion surgery and was able to perform her assigned light-duty employment activities without any documented problems or difficulties performing her duties, until she resigned her position with the school district to care for her husband, and because she is able to perform work in the light duty category, I am unable to find that the Claimant has been rendered permanently and totally disabled by her compensable back injury of July 2018.

The wage-loss factor is the extent to which a compensable injury has affected the Claimant's ability to earn a livelihood. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W. 3d 916 (2004). When 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).

In considering factors that may affect an employee's future earning capacity, the appellate court considers the Claimant's motivation to return to work, since a lack of interest or a negative

attitude impedes an assessment of the Claimant's loss of earning capacity. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Here, the Claimant is 62 years of age. She is of advanced age and has a limited education. The Claimant worked for the school district as a custodial worker. In July 2018, she slipped and fell on a wet floor primarily injuring her lumbar spine. Ultimately, the Claimant underwent back surgery for her back. After her October 2019 back surgery, the Claimant returned to work for the school district and performed various jobs in the light-work duty category until her resignation. Following an FCE, the Claimant was given permanent physical restrictions in the light category of work.

The evidence shows that the Claimant resigned her position with the school district in February 2020. Although the Claimant maintained she had problems performing these light duty employment duties, she did not make any documented complaints, written or otherwise to management, concerning her alleged difficulties performing her assigned work. Both Ms. Burns and Ms. Huff credibly testified that the Claimant did not complain to either of them about any difficulties with her assigned light-duty work. More importantly, the Claimant's letter of resignation states that her sole reason for resigning her position with the school district was to take care of her ailing husband. The testimony of these two witnesses and the Claimant's letter of resignation does not establish that the Claimant resigned because she had difficulty performing her assigned light-duty work. Instead, the preponderance of the credible evidence proves the Claimant resigned from her job with the school district for the sole purpose of caring for her husband due to his upcoming heart surgery.

Furthermore, upon the Claimant's return to work after her lumbar surgery, the Claimant performed her assigned light duty work, and she made the same or more wages as she was paid

prior to her injury. Because the preponderance of the credible evidence shows that the Claimant successfully returned to work for the school district after her back surgery, and had no loss or decrease in her earning capacity, I am unable to find that the Claimant sustained any wage loss disability as a result of her compensable back injury of July 16, 2018.

The issue pertaining to a controverted attorney's fee has been rendered moot and not discussed in this opinion.

ORDER

This claim for permanent and total disability benefits and/or wage loss is hereby respectfully denied and dismissed. The issue pertaining to a controverted attorney's fee has been rendered moot and not addressed herein.

IT IS SO ORDERED.

Chandra L. Black
Administrative Law Judge