

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G807297

JANA MANKIN, Employee	CLAIMANT
FORT SMITH SCHOOL DISTRICT, Employer	RESPONDENT NO. 1
ARKANSAS SCHOOL BOARD ASSOCIATION, Insurance Carrier/TPA	RESPONDENT NO. 1
DPTD TRUST FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 8, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas; deferred to the outcome of litigation and waived appearance at the hearing.

STATEMENT OF THE CASE

On November 12, 2020, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on July 8, 2020, and a Pre-hearing Order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury on September 26, 2018 to her neck and right shoulder.

4. The claimant is entitled to a weekly compensation rate of \$673.00 for temporary total disability and \$505.00 for permanent partial disability.

5. The claimant's MMI date is June 26, 2019.

6. The claimant was assessed a 5% impairment rating to the body as a whole regarding her right shoulder.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether claimant is entitled to wage loss disability.
2. Whether claimant's attorney is entitled to an attorney's fee in the form of a lump sum.

Claimant's contentions are:

“a. The claimant contends that she is entitled to wage loss disability in an amount to be determined by the Commission because of the dramatic effect that her injury has had on her ability to earn wages. Her treating physician has opined that she is unable to return to her former job and a functional capacity evaluation indicates that her consistency measurements were 52 of 52. Her treating physician, after reviewing the FCE, has opined that the claimant should not lift greater than 5lbs with the right upper extremity nor greater than 20 pounds utilizing both upper extremities.

b. The claimant contends that her attorney is entitled to an appropriate attorney's fee and that attorney's fee should be paid in a lump sum pursuant to ACA §11-9-716.”

Respondent No. 1's contentions are:

“Claimant is not permanently or totally disabled or entitled to wage loss over and above the impairment rating. Respondents provided work within her restrictions.”

Respondent No. 2's contentions are:

- “a) See above Proposed Stipulations No. 1 (a) – (e).
- b) The Trust Fund defers to litigation on the issue of wage loss.
- c) The Trust Fund waives its appearance at the hearing.”

The claimant in this matter is a 48-year-old female who was employed by the respondent as a physical therapy assistant and worked with special needs children in the respondent's district. The

claimant sustained a compensable injury to her right shoulder and neck on September 26, 2018. The compensable injury occurred while the claimant was engaged in physical therapy with a child, and in an effort to keep that child from falling, the child placed all of his weight onto the claimant's upper right extremity. In testimony to the Commission, the claimant estimated the child to weigh about 75 pounds.

The claimant had some initial treatment with Dr. Keith Holder but was treated by Dr. Greg Jones and his PA, Layne McClain. The claimant was well known by Dr. Jones as he had previously treated the claimant and performed multiple surgeries on her person. The claimant has had right knee surgery, left shoulder surgery, a left ankle reconstruction, and three separate right shoulder surgeries in 2012, 2015, and 2016. The 2012 right shoulder surgery included a labrum repair, and the 2016 shoulder surgery included a right thumb surgery. All three of the claimant's shoulder surgeries prior to her compensable injury were performed by Dr. Jones. The claimant's prior non-work related medical history is well documented in the respondents' medical exhibit.

On December 19, 2018, the claimant was seen by Dr. Jones at Mercy Clinic River Valley.

Following is a portion of that medical record found at Claimant's Exhibit 1, Pages 4-5:

HISTORY:

Ms. Mankin is a long standing patient, 46 years of age, who I have been involved with an instability situation with her right shoulder for some time. She was in a work related injury in September when an autistic student who she was standing behind in her roll [sic] as physical therapy assistant tried to shove his head backwards. She arched her neck and back and is able to demonstrate the position. He then dropped all of his weight with which she held and caught him with her right upper extremity primarily. The left upper extremity he had tried to bite at least in this episode, or another incident and she had tried to pull away basically describing the position and demonstrating the arm alignment at the time of the incident.

She further after careful questioning confirms that this is a different sort of feeling that is not compatible with the symptoms she had prior to her shoulder being reconstructed for instability.

The magnetic resonance imaging is reviewed. It does have some change in the infraspinatus tendon. It is possible given the mechanism that she describes that the findings described as a partial thickness possible small full thickness punctate tear are indeed traumatic based on the magnetic resonance imaging reviewed by the radiologist and by myself. I think the next step in management is get electrodiagnostic of the right upper extremity, get a magnetic resonance imaging of her cervical spine. She had described these neck events in detail to Dr. Holder, the apparent first physician seeing her in the Workers' Comp setting, and at this point given he symptom complex and my evaluation I think those studies are appropriate and medically necessary with the symptoms persisting since the September injury time frame.

Again, I still hold the option of arthroscoping the shoulder not for instability, but rather for new traumatic rotator cuff injury. I think we should evaluate and detail the level of cervical spine pathology before proceeding in that direction. Twenty minutes face to face time was spent both in the examination going over the findings with her mother present, reviewing the studies specifically the magnetic resonance imaging frame by frame. No new x-rays are made today. She remains unable to return to work with her present objective findings.

On January 16, 2019, the claimant was again seen by Dr. Jones. Following is a portion of that medical record found at Claimant's Exhibit 1, Pages 6-7:

The shoulder remains tender. I don't think she has restored instability. The shoulder has been multiply [sic] operated as detailed in previous notes unrelated to the work injury so if instability were to be discovered on exam under anesthesia arthroscopic visualization, certainly an exacerbation of the previously well-functioning shoulder and would be attributable, in my opinion, to the injury. I don't think that's the case, however, but reserve that understanding for the described testing (scope eval-visualization and exam under anesthesia) above.

A note to return for off-duty strict restrictions is again provided. She is better with rest. I don't think there is any point in sending back to work and reinflaming issues, particularly as the neck is improving with the conservative. The injury was at the end of September. She worked through October and has been off since November.

On March 15, 2019, the claimant underwent surgical intervention at the hands of Dr. Jones at Mercy Orthopedic Hospital in Fort Smith. Following is a portion of that operative report found at Claimant's Exhibit 1, Page 8:

PREOPERATIVE DIAGNOSES:

1. Traumatic rotator cuff strain, possible recurrent instability and biceps tendinitis right shoulder.
2. Chronic lateral epicondylitis traumatic right elbow.
3. Subscapular bursitis.

POSTOPERATIVE DIAGNOSES:

1. No evidence of full-thickness rotator cuff tear. Moderate subacromial adhesions. Biceps superior labral from anterior to posterior tear peel back greater than 5 mm, negative instability exam on exam under anesthesia and arthroscopic evaluation /drive through attempt.
2. Chronic lateral epicondylitis with tendinosis at the extensor carpi radialis brevis insertion.
3. Subacromial or subscapular bursitis.

PROCEDURES:

1. Glenohumeral arthroscopy with biceps tenotomy.
2. Subacromial bursal adhesion release.
3. Open lateral epicondylar release right elbow.
4. Subscapular bursa injection (local anesthetic and steroid).

On May 29, 2019, the claimant is again seen by Dr. Jones. Following is a portion of that clinic note found at Claimant's Exhibit 1, Page 14:

We have been going slow with therapy letting her get better. I am ready to advance her activity to include more work and related physical stress. I made it clear to her that the nature of her injury in this instance is something that we cannot guarantee might not happen again given the unpredictability of the autistic student, for example, that was involved. She wishes to return to work, we will make a return to work evaluation of her orthopedic issues. She is still taking Tramadol at night as well as oral anti-inflammatories, icing and the stretching program are to continue with the addition of the strengthening and work return mimicry efforts at this point. Therapy orders are provided. Follow-up in 3-4 weeks to make a final assessment.

On June 26, 2019, the claimant was again seen by Dr. Jones. A portion of that clinic note follows found at Claimant's Exhibit 1, Pages 15-16:

It is my opinion after reviewing her now over three months since the surgery in mid-March with biceps release, having taken care of the shoulder, the open lateral release having improved but not eliminated all of her elbow pain with the traction injury that she still has numbness and radicular symptoms and electric "shocks", I do not have anything else to offer her. We have looked at her neck exhaustively and although it is related, I do not think this is a surgical lesion. I do not think based on my review of the work status that she can return to that work, but in this

setting, a functional capacity assessment would probably be appropriate. Melinda Campbell, her occupational nurse liaison, will work towards trying to see that that gets done both for the purpose of obtaining an appropriate rating for impairment evaluation as well as determining specifically what limitation she has so that either a return with restrictions or as I have suggested, if it is as broad and diverse as what I have read her job description to be, I do not think she can return safely. It would not be in her best interest. I am going to leave her follow up open-ended. Will get busy getting that functional capacity assessment and impairment rating and when those are completed, I will review and approve or adjust as findings dictate. No new x-rays are made today.

On July 9, 2019, the claimant underwent a functional capacity evaluation at the Functional Testing Centers in Mountain Home, Arkansas. The evaluation report in part states, “The results of this evaluation indicate that a reliable effort was put forth, with 52 of 52 consistency measures within expected limits” and placed the claimant in “LIGHT classification of work as defined by the U.S. Dept. of Labor’s guidelines over the course of a normal workday within limitations as noted above.”

On August 7, 2019, Dr. Jones authored a letter regarding the claimant’s functional capacity evaluation, maximum medical improvement and his opinion about her ability to return to work as a physical therapy assistant. The body of that letter follows found at Claimant’s Exhibit 1, Page 39:

To Whom It May Concern:

Ms. Mankin was evaluated for functional capacity on 7/9/2019 by Functional Testing Centers. The results indicated she had reliable results with consistent efforts. She is able to perform work in the light classification of work as defined by the U.S. Department of Labor’s guidelines over the course of a normal workday.

A written job description was reviewed. She did not meet the physical demand of lifting up to 50 pounds.

She is released from care at MMI as of 6/26/2019 with permanent restrictions of no lifting greater than 5 pounds with the RUE and no lifting/carrying greater than 20 pounds with both upper extremities. She is permanently restricted from forward and above shoulder reaching. It is my opinion that she is unable to return to a job as a physical therapy assistant. We will see her back on a prn basis.

The most recent medical record in evidence is a clinic note from Dr. Jones. In a portion of that note he discusses the claimant's employment as it relates to her compensable injury. That portion follows found at Claimant's Exhibit 1, Page 42:

She is back at her job duty status that is compatible with a functional capacity assessment/lengthy examination that was made. She is 11 months postoperative. I have no recommendations or changes, or advancement in that activity level and the bottom line is she has gone from a position as a physical therapy assistant to a much more sedentary job and thankfully that is available, but I do not see that she go back to the other and it represents a significant change in her employment capabilities based on this injury in my medical opinion. I am going to leave her follow up at as needed. If there are further deteriorations or worsening related to this right upper extremity, we will see her back on that account.

The claimant has asked the Commission to consider her entitlement to wage loss disability. The parties have stipulated that the claimant has a 5% anatomical impairment rating to the body as a whole regarding her right shoulder and that the claimant reached maximum medical improvement on June 26, 2019.

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with assessing wage loss on a case by case basis. Factors to be considered in assessing wage loss include the claimant's age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the worker's future earning power such as motivation, post-injury income, bona fide job offers, credibility or voluntary termination. *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); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); and *Hope School District v. Charles Wilson*, 2011 Ark. App. 219, S.W.3d (2011). The award of wage loss is not a mathematical formula, but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements, *Henson v. General*

Electric, 99 Ark. App. 129, 257 S.W.3d 908 (2008).

The claimant was 48 years old at the time of the hearing in this matter. The claimant completed high school in 1990. She went on to receive two associates degrees. Her first was an Associate of Arts and Physical Education and her second was an Associates in Physical Therapy Assistant.

The claimant's work history includes work at the Tag and Title office in Poteau for the Oklahoma Tax Commission. The claimant has worked breaking and training horses that were used for barrel horse races. The claimant also competed in barrel horse racing. The claimant worked as a physical therapy assistant in a hospital setting at Mercy Rehab for about ten years. The claimant also worked in multiple long-term rehabilitation facilities applying her trade as a physical therapy assistant.

The claimant began her employment with the respondent in the Spring of 2016 as a physical therapy assistant to special needs children in the respondent's district. At the time of her September 26, 2018 compensable injury, the claimant was earning \$44,620.00 under her contract for hire with the respondent. The claimant's current job with the respondent is as a media clerk at which she earns \$18,336.00 for the same contract period. The claimant gave direct examination testimony about changing jobs, her earnings and a step or scale process used by the respondent to determine wage levels as follows:

Q My question is did the school district make your physical therapy assistant job available to you? Did they offer you that job?

A No.

Q Okay. Are you currently working for the school district?

A Yes.

Q In what job capacity?

A Media clerk.

Q And what is that? I mean what do you do as a media clerk?

A I help in the school library and the media center in Morrison Elementary and Trusty Elementary. I help with scanning books in and out, shelving books, scanning computers that we are issuing out to

children, our different students. So I am just kind of helping with the media/library services, media clerk.

Q When you went back to the school district and told them that you had been released from the doctor and you were ready to work, did they offer you any other job other than the media clerk job?

A No.

Q How much were you earning at the time of your injury?

A Around 44- to 45,000.

Q There has been submitted into the evidence a pay scale.

A Yeah.

Q Where were you on that pay scale when you got hurt?

A At 11.

Q Step 11?

A Yes, I believe.

Q Okay.

A When I went to Fort Smith school, they didn't count the years that I have been a therapist unless it was full time, even though I did a lot of, like I said, prn work. It's like a substitute therapist, so you stay just as busy. You are just not working full time for one company. I worked for a lot of different companies.

Q And I am looking at Page 1 of Claimant's Exhibit 3 and it shows that a Step 11 is \$44,620.

A Yes.

Q Does that sound right?

A Yes.

Q And how much are you earning as a media clerk?

A 18,000. It's on the scale, also.

Q What step are you at the media clerk?

A They put me at Step 1.

Q So you went from a Step 11 as a physical therapy assistant to a Step 1 as a media clerk?

A Yes.

Q Now, tell me how those steps work. I mean what does it mean to be at a Step 1, Step 2, Step 3? How does that all work?

A Kind of like I just described as far as a physical therapy assistant, it's full-time work is what the school system considered it. As far as my understanding, it was full-time employment at that position. Like I said, I really had 22 years of physical therapy assistant, you know, experiences, job, work-related employment since I have been a graduate, but they had me at 11 for the school district. But it is based on how much you work that job, as far as I understood.

Q So once you are in a step, how long does it take you to get to another step?

A A year of full employment at the school system.

The claimant has experienced an extreme reduction in her wage earning capacity since she lost the ability to perform the job duties of a physical therapy assistant. Certainly, the claimant had numerous difficulties with her right shoulder prior to this injury including a visit to Dr. Jones on September 20, 2018 shortly before her September 26, 2018 compensable injury. That medical record is found at Respondent's Exhibit 1, Pages 47-48. However, the claimant was able to perform her job duties prior to her compensable injury. On February 5, 2020, Dr. Jones specifically addressed the changes in the claimant's employment capabilities as it relates to her September 26, 2018 compensable injury when he stated in his clinic note, "I have no recommendations or changes, or advancement in that activity level and the bottom line is she has gone from a position as a physical therapy assistant to a much more sedentary job and thankfully that is available, but I do not see that she go back to the other and it represents a significant change in her employment capabilities based on this injury in my medical opinion." Dr. Jones is in a unique position to make such a statement as it was he that performed three surgeries and provided treatment to the claimant prior to her compensable injury and then performed

surgery on the claimant and provided treatment after her compensable injury. His opinion carries a lot of weight regarding the claimant's abilities and the cause of their reduction. I should also note that throughout the testimony of the claimant, I found her to be a credible witness. She was responsive to questions and provided answers that were consistent with the documentary evidence admitted in this matter. After my review of the evidence and testimony in this matter, including the employment skills and abilities the claimant has been reduced to after her compensable injury, I find that the claimant is entitled to wage loss disability in an amount that would be equal to a 45% impairment rating to the body as a whole.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 8, 2020 and contained in a Pre-hearing Order filed that same date, are hereby accepted as fact.
2. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss disability in an amount equal to a 45% anatomical impairment rating to the body as a whole.
3. The claimant has proven that her attorney is entitled to an attorney's fee in this matter in the form of a lump sum.

ORDER

Respondents shall pay the claimant wage loss disability in an amount that would be equal to a 45% anatomical impairment rating to the body as a whole.

Respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits

pursuant to Ark. Code Ann. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**