

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E902952

JUDY A. (SMITH) BANEY

CLAIMANT

MID-SOUTH MANUFACTURING

RESPONDENT EMPLOYER

CNA INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED OCTOBER 13, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KEITH BLACKMAN, Attorney at Law,
Jonesboro, Arkansas.

Respondents represented by the HONORABLE LEE J. MULDROW, Attorney at Law,
Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on August 6, 2003. A prehearing conference was held and a prehearing order was filed on May 12, 2003. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. It was agreed that there was a June 16, 1997, compensable injury.
2. The compensation rates are \$254/191.

The claimant contends she is entitled to a 15% permanent impairment rating assigned by Dr. Edward Cooper on July 10, 2002. The claimant further contends that she is permanently and totally disabled or, alternatively, entitled to wage loss benefits and attorney's fees on all benefits since June 6, 2001.

The respondents contend the claimant has been assigned a 15% permanent impairment rating and acknowledge benefits have not been paid on that rating but are owed. The respondents contend that the claimant has not sustained significant wage loss disability. The respondents further contend that arrangements were made in December 2002 and January 2003 for a rehabilitation evaluation and job placement assistance; however, the claimant has failed to cooperate. The respondents contend that no medical benefits have been controverted.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. It was agreed that there was a June 16, 1997, compensable injury.
2. The compensation rates are \$254/191.
3. The claimant has proven by a preponderance of the evidence that she has sustained a 15% permanent impairment rating as assigned by Dr. Edward Cooper.
4. The respondents are responsible for permanent partial disability benefits associated with the 15% permanent impairment rating.

5. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled or entitled to wage loss benefits in excess of the permanent impairment rating.

DISCUSSION

The claimant, 54 years old, began her employment with the respondent on August 24, 2000, where she worked in assembly. The claimant worked on water pump assembly with the product unassembled weighing 20 to 25 pounds and after boxing two together, the weight was 40 to 50 pounds. The claimant also worked on fuel pumps and 12 were boxed together, weighing 16 to 18 pounds. The boxes were placed on skids with the boxes placed eight high. According to the claimant, there was a great deal of stooping, bending and twisting with lifting up to 50 pounds.

According to the claimant, when she last worked for the respondent employer, she had to have assistance with someone bringing her parts and placing her boxes on skids.

The claimant described her injury where she was hit with a forklift full of boxes. She was struck on her right side, lower back, in June 1997. The claimant treated with a nurse practitioner for a period of time and about March 1998, she was referred to Dr. Cooper. The claimant had her first surgery on February 16, 1999, and was placed in a top complete body brace for four months. According to the claimant, she returned to work after 12 weeks in bag assembly. According to the claimant, she was miserable and could hardly walk in and out of work but she continued to work until August 24, 2000, when she was permanently laid off. The claimant was given the option of bumping back on the floor where she would work on the pumps again, which required

stooping, bending, twisting and lifting and she testified she was simply unable to perform those tasks. The claimant drew unemployment benefits for a while and around April 2001, she learned she would have to have a second surgery so she notified the Employment Security Division she was unable to work and benefits ceased.

According to the claimant, she underwent a second surgery on June 21, 2001, with another fusion and a bone stimulator in her back. The claimant has not returned to work. She testified that if she walks much, her legs hurt and she might have an hour in the mornings without a lot of pain, then things go downhill. Relief comes by laying down. The claimant testified that she can walk a block without severe pain, standing hurts and she cannot sit long. The claimant testified since her second surgery, she does not have good days. The claimant is under the care of pain management doctors, Dr. Moacir Schnapp and Dr. Kit Mays in Memphis. The claimant is unable to perform housekeeping chores, she relies on family members.

The claimant testified that she participated in a functional capacity evaluation at the suggestion of Dale Thomas. The claimant testified that she only slept two or three hours the night after the evaluation and was extremely stiff, sore and hurting. The claimant described her pain level on a daily basis as starting around level eight and ending up at level ten after lunch.

Under cross examination, the claimant verified that she was asked to try to identify any job out in the plant that she thought she might be able to perform and she could not find such job. The claimant confirmed other people were laid off at the respondent employer the same time she was. The claimant acknowledged that she did

not contact Mr. Thomas about any of the job leads he provided with the functional capacity evaluation.

The claimant confirmed that she took a six-week computer Microsoft Word course and completed the course with a certificate. The claimant testified that she had planned to take another course but did not do so. The claimant verified that she has not attempted to find any type employment but is currently drawing social security disability benefits.

The claimant first contends she is entitled to the 15% permanent impairment rating assigned by Dr. Edward Cooper. The respondents acknowledge the rating has been assigned and is owed. The respondents are responsible for benefits associated with the 15% anatomical rating.

The claimant next contends that she is permanently and totally disabled or, alternatively, entitled to wage loss benefits. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which she was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair her earning capacity, as well as other factors such as the worker's age, education, work experience and other matters, which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *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). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, she is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Mfg. Co.*, 135 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 304, 635 S.W.2d 276 (1982).

The claimant in the present case is a 54-year old woman who has been employed with the respondent employer for approximately 21 years. The claimant sustained a compensable work injury where she was hit by a moving forklift and underwent two fusion surgeries and was assigned a 15% permanent impairment rating by Dr. Edward Cooper. On August 13, 2001, Dr. Cooper released the claimant to return to light-duty work with no lifting, bending, twisting, prolonged sitting or standing and suggested something like answering the telephone. The claimant did return to work for the respondent employer after her first surgery and was permanently laid off on August 24, 2000. The claimant did not return to work after the second surgery.

Robert Lamb, vocational rehabilitation counselor with the Division of Services for the Blind, testified that he performed an evaluation of the claimant in December 2002.

Mr. Lamb testified that he did not believe the claimant could be reasonably placed in a job in the economy in northeast Arkansas. Mr. Lamb testified that he reviewed the claimant's medical records and interviewed the claimant in coming to his assessment.

Mr. Dale Thomas, vocational consultant, testified he was employed to perform a vocational evaluation and vocational assistance. Mr. Thomas interviewed the claimant, reviewed the medical records and considered her vocational background and her prior work background. Mr. Thomas recommended a functional capacity evaluation and reviewed the results of that evaluation in determining the types of work the claimant could perform. Mr. Thomas testified that such things as age, education, transferable skills and residual physical abilities are all things considered in placement. Mr. Thomas testified that after his interview with the claimant, he asked for her opinion about returning to work and she discussed her pain level and her need for pain management. Mr. Thomas testified that he asked the claimant if she would cooperate with a job search consistent with the limitations outlined in the FCE and the claimant stated she would not cooperate with a job search, as she considered her pain level too high and that she did not want to return to work. Mr. Thomas next conducted a market research of jobs available for a three-week period and he relied on the FCE results. Mr. Thomas also helped make arrangements for the claimant to see Dr. Schnapp, pain management specialist in Memphis, and he helped arrange transportation. Mr. Thomas mailed his job leads to the claimant's attorney and he asked to meet with the claimant again to help with the job seeking skills but was not authorized to do so. Mr. Thomas testified that he believed the claimant was employable; however, because of the claimant's perception of pain, he did not believe she was placeable. Mr. Thomas further testified

that a person who does not want to find work generally will not find work. Mr. Thomas testified that he did his labor market study within a 50-mile radius of where the claimant lived.

The claimant's March 14, 2003, Functional Capacity Evaluation indicated that the claimant demonstrated the ability to perform sedentary work over an eight-hour day. Dale Thomas, vocational consultant, interviewed the claimant and reviewed her medical evidence, work background, FCE and other pertinent information to assist him in attempting to find suitable jobs the claimant could pursue. Mr. Thomas testified he did a market labor search of sedentary positions within a 50-mile radius of the claimant's home and found a number of openings she could pursue. The claimant advised Mr. Thomas that she would not cooperate with a job search as she felt her pain level was too high and she indicated she did not intend to return to work. The claimant was already drawing social security disability benefits at that time. At the hearing, the claimant testified that she did not pursue any of the job openings presented to her by Mr. Thomas.

After considering all the credible evidence to include the claimant's age, work history and educational background, the permanent physical impairment arising out of her work-related injury and all other relevant facts, I find she has failed to prove by a preponderance of the evidence that she is permanently and totally disabled or entitled to wage loss benefits in excess of the permanent impairment rating. The claimant has demonstrated that she has no motivation to return to work or to even attempt any work situation. The claimant has been provided job search assistance and pain

management assistance and she has failed to make any attempt to return to work or to cooperate with a job search.

The claimant's surgeon released the claimant to sedentary work and a functional capacity evaluation revealed that she could perform sedentary type work for eight hours per day. The claimant presented testimony from Robert Lamb, a rehabilitation consultant, who indicated the claimant was not employable; however, he relied extensively on the claimant's account of her pain level and did not consider a functional capacity evaluation nor did he actually perform a labor market analysis. I gave Mr. Lamb's evaluation and testimony marginal credit. I found Dale Thomas' testimony and his efforts to get the claimant in pain management treatment, his referral of the claimant for a functional capacity evaluation and his labor market survey of actual openings to be very interactive and unbiased.

ORDER

The claimant has proven by a preponderance of the evidence that she has sustained a 15% permanent impairment rating as assigned by Dr. Edward Cooper. The respondents are responsible for permanent partial disability benefits associated with the 15% permanent impairment rating. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled or entitled to wage loss benefits in excess of the permanent impairment rating.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday*

Inn, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE