

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106802

LONETTE OVERBEY PRESLEY	CLAIMANT
RHEEM MANUFACTURING CO.	RESPONDENT
EMPLOYERS MUTUAL INS. OF WAUSAU INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 12, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by JASON BROWNING, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 24, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on July 21, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. On March 22, 2000, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her back on March 22, 2000.

4. The claimant earned wages sufficient to entitle her to a weekly compensation rate of \$363.00 for temporary total disability and \$272.00 for permanent partial disability.

5. The claimant's healing period ended on October 19, 2000.

6. The claimant has a 15% permanent impairment rating as a result of her compensable injury and the respondent accepts liability for and is paying benefits in regard to that rating.

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

1. Wage loss over the 15% rating.
2. Attorney's fee.

All other issues are reserved.

In regard to the foregoing issues the claimant contends that she is entitled to wage loss disability over the 15% impairment rating and attorney's fees.

In regard to the foregoing issues the respondents contend that have paid all benefits to which the claimant is entitled.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and Claimant's Exhibit No. 2, the claimant also submitted a report from Dr. Parmet marked Claimant's Exhibit No. 3 and the pre-hearing order of September 6, 2001, which is marked Claimant's Exhibit No. 4. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

At the request of the claimant, a briefing schedule was set out for the parties.

#### DISCUSSION

The claimant testified that she was 33 years old at the time of the hearing and is currently enrolled in Carl Albert pursuing a course of study in elementary education. The claimant testified that this program will take her approximately four years to complete depending on how her health allows her to participate and continue in this study program.

It has been stipulated and the claimant testified that she sustained a compensable injury while working for the respondent and as a result of this low back injury has undergone surgery. The claimant testified that she returned to work on October 10, 2000, for the respondent after her surgery under medical restrictions. The claimant testified that her restrictions were that she could not work more than six to eight hours per day, could not lift over ten pounds, no climbing and could only push or pull at a sitting position. The claimant testified that she returned to the same line she had been working on but at a different job. The claimant testified that the job which she was assigned was called subassembly and she was allowed to do this job for ninety days. The claimant testified that at the end of 90 days her supervisor called her in and asked her to be seen by Dr. Carson to see if her medical restrictions could be lifted. The claimant testified that Dr. Carson did not lift or remove her working restrictions, therefore, it was company policy as well as union policy that after

a ninety-day period, if medical restrictions are not lifted, the employee will be terminated. The claimant testified that it was her opinion that the respondent had worked which she could do within her restrictions but that none had been provided for her since January 2001. The claimant testified that she has not found employment anywhere else since she last worked for the respondent but she has visited with a vocational rehabilitation specialist and this professional person has not been able to place her in employment either.

The claimant agreed that she has continued to receive medical treatment since January 2001. The claimant testified that her medical treatment has been with several physicians and that primarily it has been to address her pain. The claimant testified that she has been assessed with a 15 percent whole body impairment rating which has been accepted and paid by the respondents. The claimant testified that she has a burning sensation across her back and into her left hip. The claimant stated that she gets a knot that swells up from the nerve ending damage that she had to have removed and she has pain shots about every four to six months to help with the ongoing discomfort. The claimant testified that she also has shooting pain down her left leg that goes to her toes and a burning tingling, prickly feeling in her foot as well as muscle spasms. The claimant testified that at one point Dr. Short prescribed for her an ankle/foot orthotic brace but after some treatment by Dr. Swicegood she was able to go without this brace. The claimant testified that she does utilize a motorized scooter or

wheelchair so that she can get around because her walking is limited and when she has to do a lot of walking it causes the pain in her hip to increase. The claimant testified that the respondents have paid for her orthotic brace as well as her motorized wheelchair. The claimant agreed that she was sitting sideways in her chair explaining that she cannot put any pressure on her hip because of the pain. The claimant testified that she can sit in a chair about two to three minutes before she has to start fidgeting or wiggling around. This witness testified that she has become so accustomed to fidgeting that she is not even aware now that she is doing it. The claimant agreed that Dr. Carson listed her restrictions as: sitting or standing at will, no bending or twisting at the waist, no leaning at waist, ten pound lifting limit and no use of her upper extremities with her elbows away from her body. The claimant stated again that the respondent did provide her work within these restrictions and she would be able to continue to work for the respondent if they would allow.

The claimant testified that she had worked six years for the respondent before her accident and at the time she got hurt, she was earning \$26,000.00 approximately. The claimant agreed that under the respondent's collective bargaining agreement, she would have been provided with periodic raises but was unaware of what her salary would have been to date if she had been allowed to continue working. The claimant testified that she has worked for Dixie Cup in production work stating that this work was much more physically demanding than the work she had done for the respondent prior to

her injury. The claimant testified that she has worked for Safeway as a cashier which required her to stand and lift in excess of ten pounds. The claimant testified that she has worked for Taco Mayo and again that the requirements of this job required her to stand, twist and bend all in excess of her limitations. The claimant testified that she also has worked for Payless Cash Ways and this work was even heavier and more demanding than her work at Safeway since there was more stocking involved.

The claimant testified that once the respondent would not allow her to return to work and the vocational expert could not find work for her, she applied for social security disability and has been approved and is receiving these benefits. The claimant testified that she also receives long term disability through the respondent. The claimant testified that she is currently enrolled at Carl Albert College and her instructors are aware of her back problems and accommodate her restrictions. The claimant agreed that once before she had entered a retraining program at Kiamichi Vocational Center in the EKG technician program but due to the lifting and pushing she could not complete this program. The claimant testified that currently she is enrolled in an elementary education program and she is aware of the physical duties required of a school teacher. The claimant testified that her schooling is interrupted occasionally by her need to undergo physical therapy and get injections for her discomfort.

The claimant testified that she takes eight different medications, listing them as Skelaxin for muscle spasms, Neurotin

for pain, Trimadol for pain, Lexapro for depression, Bextra which is an anti-inflammatory, Clonazepan which helps her sleep, Phenergran for her stomach because all of these medications make her nauseous and Synevac because she has lost bladder control. The claimant testified that she has one child but after her surgery she did get pregnant and lost that child due to the stress from the back surgery. The claimant testified that her doctors recommended that she have no other children because of her back problems and she has had a tubal. The claimant testified that she has a noticeable limp when she walks.

On cross examination, the claimant agreed that the work which the respondent provided for her after her surgery, she was able to perform. The claimant agreed that, considering her restrictions, there were other jobs at the respondent's business that she could have performed, such as the fresh air booth and literature. The claimant also agreed that it was the union's bargaining agreement that forbid the respondent from placing her back at work. The claimant testified that she currently is taking thirteen hours in school and takes these classes on two evenings a week. The claimant testified that she takes her classes in the evening because there is less traffic and it is easier for her to get around. When asked, the claimant agreed that she had not affirmatively pursued any other employment after she left the respondent. The claimant testified that she does do home exercises and on the days she is able to get her exercises in, it does help relieve some of her discomfort. The claimant testified that even

with her exercises and medication as well as occasionally having injections, her pain level is never less than a five.

On redirect examination, the claimant testified that there are periods of time when her pain level has gone up to a ten and when this happens she has to go to the hospital to get a shot of Demoral. The claimant testified that she realized that if she completes her degree and begins teaching school, her social security disability benefits as well as her long term disability benefits will stop.

The medical records set forth information consistent with the claimant's testimony in that she has been seen by several medical providers and provided various medical treatments including surgery and physical therapy. These medical records also set forth and list her medications which she is currently taking as well as medications which she had previously been prescribed. Dr. Allen Parmet writes on October 31, 2001, concerning the claimant and sets forth a rather detailed review of the claimant's medical history as it relates to her back injury. Dr. Parmet writes that the claimant was assessed with a fifteen percent impairment rating by Dr. Short on August 14, 2001. Dr. Parmet writes that Dr. Short felt that the claimant had failed back syndrome with radiculopathy as well as depression and a foot drop. This same report from Dr. Parmet sets forth that the claimant underwent a functional capacity evaluation on October 16, 2001, and writes that the claimant was unable to lift any weight from floor to waist and reported that she was unable to tie her own shoes. This report continues to set forth

that the claimant could lift three pounds from waist to eye level and she was able to push thirty pounds. It is noted that the claimant's grip strength is forty-two pounds on the right and thirty-two pounds on the left and she was able to carry ten pounds, walk one half mile, stand eight minutes and sit thirty minutes.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that she is entitled to wage loss in the amount of 15 percent over and above her 15 percent impairment rating. This additional assessment is based on the claimant's age, education, transferrable job skills, physical limitations and the medications which she is prescribed for her compensable injury. It is noted that the claimant is seeking an elementary education teachers degree but at this time it is still uncertain whether she will be able to physically complete this program.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 22, 2000, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to her back on March 22, 2000.
4. The claimant earned wages sufficient to entitle her to a weekly compensation rate of \$363.00 for temporary total disability and \$272.00 for permanent partial disability.
5. The claimant's healing period ended on October 19, 2000.

6. The claimant has a 15% permanent impairment rating as a result of her compensable injury and the respondent accepts liability for and is paying benefits in regard to that rating.

7. The claimant has proven by a preponderance of the evidence that she is entitled to an additional 15 percent wage loss over and above her 15 percent impairment rating. This will give this claimant a disability rating to the body as a whole of 30 percent. See discussion above.

8. The respondents have controverted this claimant's entitlement to wage loss over her 15 percent.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that she is entitled to 15 percent wage loss over and above her 15 percent whole body impairment rating. This will entitle the claimant to a disability rating of 30 percent to the body as a whole. The respondents should pay to this claimant an additional 15 percent as wage loss resulting from her compensable injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional 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.

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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE