

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F100206

LINDA F. ANDREWS, EMPLOYEE **CLAIMANT**

**INTERNATIONAL PAPER CO.,
SELF-INSURED EMPLOYER** **RESPONDENT**

SEDGWICK CLAIMS MGMT. SVS., INC., TPA **RESPONDENT**

OPINION FILED FEBRUARY 2, 2004

Hearing before Administrative Law Judge J. Mark White on December 18, 2003, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Robert L. Depper, Jr., Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Michael Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

On December 18, 2003, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on September 16, 2003, and a Prehearing Conference Order was entered on September 17, 2003. A copy of the September 17, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/self-insured relationship existed between the parties on July 27, 2000, when the claimant sustained a compensable injury to her back; and that the claimant earned \$14.70 per hour at the time of her injury.

The parties agreed that the issues to be presented were whether the claimant is permanently and totally disabled, or whether she is entitled to wage-loss disability over and above her anatomical impairment rating. At the hearing, the parties agreed to reserve the previously identified issue of outstanding medical bills.

The claimant contends that she has reached maximum medical improvement and that her compensable injury has rendered her permanently and totally disabled; that there are certain medical expenses that respondents have yet to pay, and that, therefore, the respondents should be ordered to pay outstanding medical expenses; and that she is entitled to an attorney's fee as permitted by law.

Respondents contend that the claimant is not entitled to any additional benefits; that the claimant has received no permanent impairment nor is she totally and permanently disabled; and that the claimant has received unauthorized medical treatment for which respondents are not liable.

For the benefit of reviewing authorities, it should be noted that the index

preceding Claimant's Exhibit No. 1 is incomplete. Claimant's Exhibit No. 1 actually contains 101 pages of medical records, rather than the 69 pages recorded by the index.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
4. The claimant has failed to prove by a preponderance of the evidence that she has sustained any permanent impairment as a result of her compensable injury.

5. The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss disability benefits over and above any anatomical impairment.

DISCUSSION

The claimant contends that she is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519 (e). The claimant bears the burden of proving that she is unable to earn meaningful wages in any employment. *Id.*

The claimant is 49 years of age with a high school education. This claim has previously been the subject of a hearing before the Commission. By an Administrative Law Judge Opinion filed October 17, 2001, the Commission found that the claimant sustained a compensable injury to her back in a forklift accident on July 27, 2000. She has received conservative treatment for her low back from several doctors, though none have ever recommended surgery. At the hearing in this claim, the claimant testified that she still has pain in her lower back, radiating to her shoulders and right leg. She also testified that in the October after her compensable injury, she began having pain in her neck which she says continues to

bother her. She testified that she is unable to lift more than five or ten pounds without pain. She uses a TENS unit for her pain, as well as heating pads. At one point she testified that she takes prescription medication for her pain, but she later testified that she now takes only over-the-counter medications.

Despite her injury, the claimant continued to work light duty for the respondent-employer until January 12, 2001, when the plant where she was working shut down. She collected unemployment benefits and looked for work as required by law. Once her unemployment benefits expired she stopped looking for work, and she has not sought work since that time. She has likewise not sought any job training or other form of rehabilitation, suggesting that she has little motivation to return to work.

An MRI performed November 15, 2000, shows that she has bulging discs at L4-5 and L5-S1. Her primary physician, Dr. D'Orsay Bryant, released her from his care on January 16, 2003. He made no mention of any anatomical impairment rating, and there is no evidence in the record that any doctor has ever assigned the claimant an impairment rating for this injury. However, Dr. Bryant did opine in his report that the claimant: "is not a suitable candidate to return to work at this time because she would have difficulty in any occupation that would involve prolong [sic] sitting, standing, walking, bending, squatting, pushing or pulling activities. She is certainly

not able to return to her former job which involved manual labor and driving a forklift.”

Dr. John Lytle examined the claimant on August 27, 2003, and at his request a functional capacity evaluation was performed on September 16. The claimant passed only 39% of the evaluation’s validity criteria, suggesting “very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment or disability.” The evaluation report noted that symptom and disability exaggeration was observed. The report quotes the claimant as saying that she can “never” bend, reach, squat, kneel or crawl. At the hearing, the claimant denied making these statements to the evaluators. Based on his examination, the FCE results, the claimant’s medical records, and the surveillance videotapes provided by the respondents, Dr. Lytle concluded that the claimant should be “released to full active-duty with no restrictions in her work.” Dr. Lytle also concluded that based on the *AMA Guides*, the claimant has no permanent impairment.

The respondents arranged for surveillance video of the claimant on three separate occasions. At the hearing, the claimant stipulated to the authenticity of the videotape. A portion of the videotape dated February 26, 2002, shows the claimant hanging clothes on a clothesline outside her house. She is able to bend over, pick up and lift wet clothes to place them on the line with no apparent difficulty.

The most significant footage on the videotape is dated June 6, 2003. The tape initially shows the claimant bending over into her car and lifting a 5-foot tall artificial tree out of the car with only one hand and carrying it into the house. Again, the claimant was able to lift the tree, bend and stoop, and walk up steps with no apparent difficulty.

According to the timer imprinted on the video image, the claimant spent the next two-and-a-half hours performing strenuous yardwork, with most of that time spent operating a push lawn mower. Notably, this work was done in the middle of June at noontime. The claimant is seen pushing and pulling the lawn mower back and forth, frequently with only one hand. She is seen bending over and stooping to pick up limbs and other debris. She is shown kneeling on the ground. She is shown dragging across the yard with one hand a four-foot long wooden bench, later returning the bench to its original spot. She is shown pruning bushes and trees, working with a large pair of shears above her head. She is shown raking and bagging grass clipping. Throughout this two-and-a-half hours, the claimant was able to stand, sit, squat, kneel, stoop, bend, push, pull and lift with no apparent difficulty. Only once was she seen grasping her back as if in pain, and then only momentarily.

The claimant testified that doing such yardwork puts her in unbearable pain,

but that she has no choice but to mow her lawn because if she failed to do so the city would mow it and then bill her for the expense. She testified that she could not afford to pay such a bill. Her testimony is belied by the fact that her lawn as shown on the videotape was not overgrown. In fact, the grass prior to mowing was so short that the bottom of her shoe was clearly visible on the videotape. If she were mowing while in significant pain only to avoid a city code violation, it is not plausible that she would mow a lawn that was not overgrown. Likewise, if she were mowing while in significant pain it seems unlikely she would be mowing in the hottest part of the day in the middle of June. Moreover, her explanation does not explain why she was also raking, pruning trees and doing other yardwork. Because of the implausibility of the claimant's testimony, because of the contradictions noted above between her testimony and the medical records, and because of her evasiveness on cross-examination, I do not find her to be a credible witness.

The surveillance videotape utterly contradicts Dr. Bryant's opinion that the claimant has difficulty with "sitting, standing, walking, bending, squatting, pushing or pulling." Because of the contradiction between Dr. Bryant's opinion and the claimant's work capabilities as demonstrated by the surveillance videotape, I find that Dr. Bryant's opinion is entitled to little weight.

Therefore, considering Dr. Lytle's opinion, the claimant's submaximal effort

and symptom magnification as noted by the functional capacity evaluation, the claimant's relatively mild medical findings, her lack of motivation to return to work, her ability to continue working for the respondent-employer from the time of her injury until the closing of the plant, and the surveillance videotape, I find that the claimant has failed to prove by a preponderance of the evidence that she is unable to earn any meaningful wages in any employment. I therefore find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

The claimant has contended in the alternative that she is entitled to wage-loss disability benefits. In considering permanent disability benefits in excess of a claimant's anatomical impairment, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The mere lack of a formal impairment rating is not a bar to wage-loss

disability benefits. *See, e.g., Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In such a case, the Commission is empowered to translate the medical evidence into a finding of permanent impairment using the *AMA Guides*. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001); *Johnson v. General Dynamics, supra*. Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969); *Fox v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.*

No doctor has opined that the claimant has any permanent impairment as a result of her compensable injury, save the discredited opinion of Dr. Bryant. Dr. Lytle has specifically opined that the claimant has no permanent impairment. My own review of the claimant’s medical records and testimony, compared with the criteria of the *AMA Guides*, fails to reveal any permanent impairment. Therefore, considering the evidence noted above, Dr. Lytle’s opinion in particular, I find that the claimant has failed to prove by a preponderance of the evidence that she has sustained any permanent impairment as a result of her compensable injury.

The claimant is relatively young, with a high school degree. As noted above,

she appears to have little motivation to work. Because the claimant has no permanent impairment, and because the other wage-loss factors do not favor her, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss disability benefits over and above any anatomical impairment. Any wage loss which the claimant has sustained is due to the closing of the respondent-employer's plant, not to the claimant's compensable injury. To put it another way, the claimant cannot have sustained a compensable wage loss where there is no permanent impairment to cause any such wage loss or otherwise affect her ability to earn a livelihood.

AWARD

The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled or that she is entitled to wage-loss benefits over and above any anatomical impairment. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge