

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205956

BEULA GILMER, EMPLOYEE

CLAIMANT

**BAPTIST HEALTH, EMPLOYER
SELF-INSURED**

RESPONDENT

**CROCKETT ADJUSTMENT (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 4, 2004

Hearing before Administrative Law Judge Cynthia Estes Rogers on May 6, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Gail Ponder Gaines, Attorney at Law, Little Rock, Arkansas.

A hearing was held on May 6, 2004, to determine the claimant's entitlement to permanent disability benefits.

It was stipulated that the claimant sustained a compensable injury arising out of and during the course and scope of her employment on February 20, 2002.

It was stipulated that the claimant's weekly indemnity rates are \$299.00 for temporary total disability and \$224.00 for permanent partial disability benefits. Respondents accepted the claim as compensable and have paid temporary total disability benefits for the following periods: from May 21, 2002 through November 10, 2002; from February 17, 2003 through May 26, 2003; and from August 30, 2003 through October 7, 2003.

It was further stipulated that claimant was assigned a 15 percent impairment rating to the body as a whole for the left shoulder and 18 percent for the right shoulder, benefits for which are currently being paid by respondents, as well as medical expenses.

Claimant contends that as a result of her compensable injury of February 20, 2002, she has been rendered permanently and totally disabled. She seeks permanent total disability

benefits. In the alternative, claimant contends that she is entitled to some wage loss disability in excess of the physical impairment ratings assigned and accepted by the respondents.

Respondents controvert any permanent disability benefits in excess of the physical impairment ratings which they have accepted and are currently paying.

STATEMENT OF THE CASE

Claimant is 51 years of age and has a seventh grade education. Her reading and writing ability is at about a fifth-grade level, and her mathematical skills are very limited. Her prior work history consists of working in cotton fields, housekeeping at a nursing home, and working as a cook or in food service at various locations.

While employed with respondent employer, claimant was injured on February 20, 2002, when a cart pushed by another employee struck her and knocked her to the floor, landing on both arms outstretched. As a result of this injury, claimant sustained bilateral rotator cuff tears. Dr. David Collins treated her for both shoulders, performing cuff repair surgery on the left shoulder in May of 2002 and on the right shoulder in February of 2003. Dr. Collins released claimant as having reached maximum medical improvement on October 7, 2003, with assessed impairment ratings of 15 percent to the body as a whole for the left shoulder and 18 percent for the right shoulder.

After her doctor released her to return to work with restrictions, respondent employer assigned claimant to a number of light duty jobs, including answering the phone and taking messages for admissions, and sorting silverware in the cafeteria. The cafeteria job proved to be too physically demanding for claimant, due to her injuries. She was terminated from the admissions job due to her inability to take down messages correctly or articulately communicate, due to her limited academic skills.

Claimant testified that she would like to return to work, that she loved her previous job for respondent employer, and that she had hoped to continue working there until she

retired. She testified that she had looked for a job that would fit within her restrictions since she was released from the doctor but that she had been unsuccessful.

Claimant testified that she continues to have pain. She testified that she has trouble lifting things and dressing herself and that she cannot reach up to comb her hair. She cannot sleep on either side because of the pain in her shoulders; and, then, if she does sleep on one side, that side will be numb when she awakens. She states that she is constantly waking up in the night, unable to get a full, rested night's sleep and is, therefore, tired during the day.

She testified that she experiences frequent muscle spasms and that if she moves a certain way or picks up something, she just has to drop it or let it go because her muscles become sore and tense. She stated, "I just have to shake my arms to try to get the muscle spasm out from under my shoulder. I can't shave up under my arm. I can't put my bra on; I have to throw it across my back because I can't reach in the back." She testified that her daughter or grandson has to help her with these things.

A vocational evaluation was conducted by Heather Naylor, a vocational rehabilitation counselor, on March 8, 2004, at claimant's home. Although no vocational testing was conducted, Ms. Naylor's evaluation consisted of a personal history taken from the claimant and a review of the claimant's medical history which included the compensable injury of February 20, 2002. In the vocational summary section of Ms. Naylor's report, dated March 12, 2004, she stated:

[I]t appears that Ms. Gilmer has few transferrable skills, as she has mainly performed unskilled and semi-skilled jobs her entire life. She has a 7th grade education and she reported her reading/writing ability to be able the 5th grade level. Ms. Gilmer sustained injuries to both shoulders and both wrists. However, at this time, I am unsure as to her current physical capabilities. I do think that Ms. Gilmer will be able to return to the workforce in some capacity in and unskilled or semi-skilled occupation but at what level, I am unsure. She is scheduled to have a Functional Capacity Evaluation on 3/19/04. Once I am in receipt of this information, it will be beneficial in identifying what types of jobs she can now perform and at what physical level.

The claimant underwent a functional capacity evaluation on March 19, 2004, wherein her physical capabilities were assessed, indicating that although the claimant is not capable of performing her pre-injury job, which was a “medium physical demand level” job, she is capable of functioning in the “sedentary/light” classifications of physical work demands.

Following the functional capacity evaluation, labor market research was conducted by Heather Naylor to identify job possibilities for the claimant. Ms. Naylor found that when combining claimant’s restricted academic skills with the results of the functional capacity evaluation, all of these factors significantly restricted her job options. However, Ms. Naylor identified a few possibilities of jobs in claimant’s labor market area that met the criteria of claimant’s restrictions. These jobs were parking lot attendants, receptionist, and customer service desk assistant. Claimant testified that she had applied for most all of the jobs listed by Ms. Naylor but was unsuccessful in attaining employment.

FINDINGS OF FACT

1. Claimant is entitled to a 15 percent impairment rating to the body as a whole for the left shoulder and 18 percent to the body as a whole for the right shoulder.
2. Claimant is entitled to wage loss disability in the amount of 50 percent rated to the body as a whole.
3. Respondents have controverted any permanent disability benefits in excess of the physical impairment ratings which they have accepted and are currently paying.

DISCUSSION

Appellant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522 (Repl. 2002), which states in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation 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 his or her future earning capacity.

Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. See *Whitlatch v. Southland Land & Development*, CA 03-736 (Ark. App. 1-21-2004); *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

In the instant case, the claimant is 51 years of age, with very limited education and skills. It is my opinion that the claimant's compensable injury of February 20, 2002, has substantially diminished her capacity to earn wages. Nevertheless, it is felt that there are some sedentary jobs which she could perform, although those are admittedly few in number. Still, the claimant's age and limitations combined with the injuries she sustained conspire to deny her access to a wider array of employment possibilities that she would have had prior to her compensable injury of February 20, 2002.

AWARD

Respondents are directed to pay the claimant permanent partial disability benefits in accordance with the findings of fact above.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge