

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E502382, E709020 & F003389

SANDRA J. HAWKINS, EMPLOYEE

CLAIMANT

**JEFFERSON REGIONAL MEDICAL
CENTER, SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED AUGUST 19, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on May 21, 2004 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM SHANE M. BRIDGFORTH, Attorney at Law, Pine Bluff, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to permanent partial disability benefits and attorney's fees.

At issue is whether or not the claimant has sustained wage loss disability as defined by Ark. Code Ann. §11-9-522. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship with Jefferson Regional Medical Center (JRMC) on November 17, 1994, December 24, 1995, and May 4, 1999 at which time the claimant sustained compensable injuries at a compensation rate of \$138.00/\$138.00. Medical expenses, temporary total disability benefits, and a 4% rating have been paid.

This claim has been the subject of two previous hearings with orders entered March 19, 1998 by Judge Blood, July 13, 2001 by Judge Hogan, July 31, 2002 and August 12, 2003 by the Full Commission and June 4, 2003 by the Court of Appeals. The Commission found the claimant to be a credible witness and ruled that Dr. Martin's care was reasonable and necessary. The Court held that JRMC was liable for a 1999 injury when a box fell on the claimant's shoulder constituting a recurrence of the compensable 1994 injury.

The claimant contends she is entitled to wage loss disability benefits in excess of her anatomical impairment rating of 4% to her left shoulder. The claimant is willing to participate in rehabilitation if the respondents will pay for an evaluation.

The respondent contends all appropriate benefits have been paid.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the claimant's two depositions taken February 27, 2001 and January 19, 2004 incorporated by reference. Also, the previous hearing transcripts, taken December 17, 1997 with Judge Blood, and April 18, 2001 with Judge Hogan and exhibits (lodged with the Court of Appeals), are designated as evidence of record.

The claimant was the only witness to testify at the hearing.

The claimant, age 46 (D.O.B. April 9, 1958) has a G.E.D. and work experience as a nurse's aide. The claimant has had some training in fashion merchandising (1986), but has never been employed in that field. Her husband receives Social Security Disability and her son receives benefits as his dependent.

The claimant's health history includes hypertension, thyroid disease, gastrointestinal problems, and vision impairment. The claimant has not had a driver's license since about 2000, either because she cannot afford new eyeglasses, (January, 2004 Depo. p. 15), or because she failed the driver's vision test (Hearing Tr. p. 36).

The claimant began work for the respondent-employer in 1987, lifting patients, attending to their needs and cleaning their rooms.

Her injuries include:

	1992	left ankle, low back	
			MVA
November	1994	shoulder	lifting a patient
August	1995	back	sweeping porch
December	1995	left shoulder	MVA, driving patient truck
July	1996		catching patient stumbled
September	1996		catching patient
January	1997		lifting patient
November	1997		pulling cart
May	1999	shoulder	box fell on her

	1999		Sodexo became her employer although she continued working at JRMC
November	2000	both shoulders and low back	MVA telephone poll

Her medical treatment includes:

February	1995	Dr. John Lytle	left shoulder
October	1999	Dr. Ken Martin	left shoulder surgery

After her last shoulder injury, the claimant worked from May, 1999 to October 1999 when Dr. Ken Martin released her. It was the claimant’s understanding that her work restrictions involved no overhead lifting, no repetitive activities, and no lifting over 25 pounds. She spoke with her supervisor Bruce Carlett, but was informed no job was available so she drew unemployment benefits until October, 2000.

The claimant was required to look for work while drawing Employment Security Division benefits but her efforts to find work as a secretary or fast food cook were unsuccessful. The claimant returned to the respondent-employer and filled out a card for a job as a receptionist at JRMC but she was told there were no openings. The claimant continued to look for work within her restrictions even after her unemployment benefits ran out, however, she remains unemployed. She has not looked for work since applying for Social Security in March 2001.

The claimant applied for Social Security Disability based on her hypertension, vision (astigmatism), hip, arms, neck, back and her left shoulder problems. She saw Drs. Parker, Chakales and Armstrong for Social Security reports. The claimant remains symptomatic with pain in her left arm and takes medication prescribed by her general practitioner, Dr. Armstrong.

The claimant has consulted Dr. Armstrong for a myriad of symptoms – hands, face, head, neck, jaw, tongue, joints, abdomen, pelvic area. The claimant relates many of these problems to her 1994 shoulder injury despite the fact that Dr. Armstrong’s records show normal x-rays of her left shoulder and Dr. Martin found no problem with her left shoulder in September 2001. Dr. Martin

attributed her symptoms to a cervical spine problem.

Attorney Bridgforth expressed concern over discrepancies in the claimant's testimony between her answers at the May 2004 hearing, the January 2004 deposition and the February 27, 2001 deposition. In my opinion, the discrepancies are either minor or adequately explained by the claimant.

The claimant testified she last worked for Sodexho on October 1, 1999. Dr. Martin then performed surgery on October 6, 1999. The claimant drew short-term disability benefits from October 1999 to April 2000. Dr. Martin released her in April, 2000. The claimant had either been told by her supervisor or received a letter to the effect that Sodexho did not have a job for her unless she could come back at full duty. It was the claimant's understanding that Dr. Martin issued permanent work restrictions including no overhead or repetitive lifting and no lifting over 25 pounds, (see his reports of April 4, 2000 and May 10, 2000)(Hearing Tr. p. 15-16/January 2004 Depo. p. 20-21/February 2001 Depo p. 22-48, 49).

At page 22 of the February 2, 2001 deposition, the claimant explained that Sodexho would not take her back without a full release, but at pages 48 and 49, she testified she had not applied for work at Sodexho based on the letter she received from her supervisor, relieving her of her duties and indicating she would not be rehired without a full release. She denied applying for work at "the hospital" but testified at the hearing that she misunderstood the question and did not distinguish Sodexho from JRMC. However, this misunderstanding was corrected at the January 2004 deposition at p. 10 when she indicated she had returned to JRMC.

The claimant then drew unemployment benefits for six months from April to October, 2000 at \$245.00 (February 2001 Depo. p. 22/42). During this period of time, she looked for work at restaurants (McDonald's and Wendy's), a temp service in Pine Bluff, the Department of Human Services, Molex in Little Rock (February 2001 Depo. p. 22/43 and applied for a job as a receptionist with JRMC (January 2004 Depo. p. 6-7/10). She also worked for Excel in 2002, however her rate of pay and length of employment are unclear (January 2004 Depo. p. 27-28).

At the hearing, the claimant testified she applied for Social Security on March 5, 2001 (Hearing Tr. p. 46) but her deposition testimony indicates she applied for benefits in November 2000, one month after her ESD benefits expired (Hearing Tr. p. 34, January 2004 Depo. p. 11/18). However, she also told Mr. Bridgforth she was unsure of the date and would have to check her paperwork. At the previous hearing, the claimant testified she applied in February 2001. She was evaluated by Dr. Parker for her eyes and Dr. Chakales for her shoulders for the Social Security Administration. Dr. Armstrong's report of May 27, 2003 indicates the claimant is receiving disability.

Attorney Bridgforth also inquired about the claimant's back and hip problems. She stated that her symptoms sometimes prevented her from walking or bending. However, she also testified that when she applied for jobs the only limitation she reported was Dr. Martin's work restrictions regarding her shoulder. She also testified she has experienced problems with her right shoulder since 1995. She has also complained of problems with her tongue, face and jaw popping in her chest, and numbness and tingling in her hands.

No weight has been given to the Social Security medical records as the evaluation is based on subjective testing and Social Security standards differ from workers' compensation. It should also be noted that the claimant has never been rated or assessed work restrictions for the motor vehicle injuries.

MEDICAL EVIDENCE

The claimant's lengthy medical history has been summarized in the previous opinions and will not be repeated here.

Since the last hearing in July 2001, the claimant has been evaluated by her treating physician and orthopedic surgeon, Dr. Ken Martin for continuing complaints of neck and shoulder pain with numbness in her hand. Dr. Martin assessed possible nerve root impingement of the cervical spine and referred her to Dr. Baskin in a report dated September 13, 2001.

In 2002, the claimant was treated by general practitioner, Dr. Armstrong for “chronic arthritic changes of the shoulder.”

In 2003, the claimant was evaluated by neurologist, Dr. Verma with an EMG/NCV study showing, “no electrodiagnostic evidence of carpal tunnel syndrome or entrapment neuropathy in any upper extremity” (see report of May 16, 2003). A second report shows signs of “periarticular tendonitis of both shoulders and tenosynovitis of both wrists associated with neck pain and mild cervical radicular symptoms”, (see report of May 27, 2003).

FINDINGS AND CONCLUSIONS

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). 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 workers’ future earning power such as motivation, post-injury income, bone 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), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In summary, the evidence shows a 46 year old female with a G.E.D. and work experience as a nurse’s aide, with a 4% permanent impairment rating to the left shoulder and work restrictions (no overhead or repetitive lifting over 25 pounds) assessed by her treating physician, Dr. Martin. In their opinion filed August 12, 2003, the Commissioners found the claimant to be a credible witness. After her release from Dr. Martin, the claimant applied for work with the respondent-employer JRMC but was not hired. The carrier has not offered rehabilitation. Accordingly, I find the claimant is entitled to wage loss in excess of the impairment rating.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of

employer-employee-carrier existed among the parties on November 17, 1994, December 24, 1995 and May 4, 1999 at which time the claimant sustained compensable injuries at a compensation rate of \$138.00/\$138.00. Medical expenses, temporary total disability benefits and a 4% rating have been paid.

2. The claimant has proven by a preponderance of the evidence of record that she is entitled to wage loss in the amount of 8% in addition to the 4% rating for a total of 12% for injuries to her left shoulder, based on her age, education and work experience. The compensable injury is the major cause of her disability.
3. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge