

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F302639

KIM PIKE OSBORNE, EMPLOYEE **CLAIMANT**

**DEWITT HOSPITAL & NURSING HOME,
EMPLOYER** **RESPONDENT**

**COMMERCE & INDUSTRY INSURANCE CO.,
(AIG CLAIMS SERVICES, TPA)
INSURANCE CARRIER** **RESPONDENT**

OPINION FILED FEBRUARY 10, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on November 12, 2004, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. R. Scott Morgan, Attorney at Law, Pine Bluff, Arkansas.

A hearing was held on November 12, 2004, to determine claimant's entitlement to wage-loss disability benefits over and above the impairment ratings previously provided, as well as controverted attorney's fees.

The parties stipulated to a compensable injury on March 8, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$414.00 for temporary total disability, based on an average weekly wage of \$620.00. The parties also stipulated to certain impairment ratings that have been given to the claimant.

Claimant contends that she sustained admittedly compensable injuries to multiple body parts as a result of a job-related vehicle accident on March 8, 2003. Several impairment ratings have been issued. Claimant contends that she is entitled to a determination with respect to the wage-loss disability she has experienced over and above impairment ratings previously provided.

Respondents contend that the claimant has not suffered a wage-loss disability.

STATEMENT OF THE CASE

Claimant is a forty-year-old female who was working as a registered nurse for respondent-employer on March 8, 2003. On that date, she was working as the nurse in the back of an ambulance that went to pick up a patient. They were on their way back to the hospital when one of the tires on the ambulance blew out, causing the ambulance to wreck, rolling three times. Claimant sustained multiple injuries from the accident. She suffered a punctured lung, a rib fracture, a dislocated right shoulder, a fractured left shoulder, a fractured pelvis, a fractured hip, a kneecap fracture and torn cartilage, a T-12 compression fracture in her thoracic spine, and a concussion.

Claimant testified, and medical records reflect, that as a result of these injuries, she received extensive medical treatment, including several surgeries. For her shoulder conditions, she saw Dr. Scott Bowen, who performed surgery on her left shoulder. He placed two screws in her shoulder and then performed a rotator cuff

repair. She testified that there was nothing that could be done for her right shoulder, although surgery may be a possibility in the future.

For her pelvic fracture, her hip fracture, and her knee injury, she was seen by Dr. Jimmy Tucker. He performed cartilage repair on her left knee, placed two metal plates in her pelvis, and screws in her left hip. Claimant further had vertebroplasty done by Dr. Steven Dunnagan on the T-12 compression fracture.

Certain impairment ratings were issued by claimant's doctors, for which claimant testified some have been paid, and some have not yet been paid. However, respondents have stipulated to the impairment ratings, which are: 3 percent to the body as a whole for her right shoulder and 3 percent to the body as a whole for the left shoulder, issued by Dr. Scott Bowen on December 12, 2003; 5 percent in connection with the T-12 fracture, issued by Dr. Scott Schlesinger on July 12, 2003; and, 25 percent for the lower extremity, issued by Dr. Jimmy Tucker on January 23, 2004.

Claimant underwent a Functional Capacity Evaluation (FCE) on December 30, 2003, which demonstrated that claimant has certain limitations. The FCE noted claimant's limitations as follows:

Ms. Pike did not demonstrate the ability to material handle over 21 lbs or carry over 16 lbs as well as perform any repetitive Stooping or Crouching. Ms. Pike is limited in her ability to stand to 30 minutes continuously. She is also limited in her ability to climb stairs, kneel, and reach overhead with her left arm. Ms. Pike also requires frequent positional changes.

The FCE went on to conclude that claimant demonstrated the ability to perform work in the “light” physical demand classification.

Claimant testified that when she was working for respondent-employer, she was earning \$36,624.02 per year as a registered nurse, which amounted to approximately \$15.50 per hour. She testified that her job there involved a lot of walking, lifting heavy patients, running, pulling, and tugging. She testified that she worked twelve-hour shifts and that the entire shift required her to be very physically active. Prior to working for respondent-employer, claimant had worked for a nursing home, where her duties were much the same as those for respondent-employer, such as the lifting and turning of patients.

Claimant testified that her date of injury, March 8, 2003, was the last date she worked for respondent-employer. Since then, claimant was employed from May of 2004 through August of 2004 with the Arkansas Department of Health in Marianna, doing supervisory work for in-home care, which requires no lifting on her part. She testified that she would go into a patient’s home and make sure the aide there was doing his or her job. She testified that she made \$16.00 per hour, working twenty-four hours per week.

She also did some independent-contracting type of work for Exam One, doing in-home physical exams for insurance companies. She testified that she was paid \$20.00 per physical, and she averaged ten to twelve physicals per month.

Claimant testified that she and her husband then moved to Lonoke from DeWitt. In Lonoke, her services are no longer needed by Exam One. However, she is now presently employed with Intrepid U.S.A., which is a home healthcare services operation. She does supervisory visits for Intrepid, much like she did for the Health Department. She testified that she is not required to do any lifting in this job. She testified that she makes \$16.35 per hour and works fourteen hours per week.

Claimant testified that she was offered no opportunity to return to work for respondent-employer. She further testified that she was offered no rehabilitation into another line of work. She testified that she is making one-third of the income she was making prior to this injury and that she is still having problems today.

She testified that she still has pain with both shoulders. She stated that there is a gap in between the bones in her right shoulder, which causes pain that runs down to her elbow and wrist. She stated that it is a dull pain that is not constant but comes and goes. She stated that she has this pain in her shoulders daily, with aching arthritic pain in her left shoulder most of the time.

Claimant testified that she still has occasional pain in her pelvis and hip if she has to walk or sit for very long. She also stated, "And I can't really do stairs." She stated that her knee hurts when the weather changes and that her back hurts constantly. She testified that standing causes a sharp, constant pain in one particular spot, the T-12, where the fracture was.

She testified that although she has been released from all of her physicians at this time, she still takes medication prescribed by her family physician, Dr. Stan Burleson in DeWitt. She takes Bextra, which is an anti-inflammatory, and Ultracet for pain. Claimant testified that even though she is able to physically do her present job, she could not work forty hours per week because she still has to bend and stoop over some, and there is a lot of driving to and from each home, as well as walking. She testified that she is having difficulty just working the fourteen hours per week that she is presently working.

Claimant testified that she has maintained her Associate R.N. license by taking on-line continuing education classes. Further, she testified that she has “applied for everything everywhere,” in an attempt to find work that she could do within her limitations. She has applied for utilization review jobs with hospitals, including respondent-employer. She has also applied for school nurse positions, which pay \$60 per day. She has not been offered any of those jobs. She testified that she is required to and does list her limitations on employment applications. Claimant testified that she would not be able to work in a medical clinic with her limitations, because of the amount of walking and sitting that would be required.

Claimant testified that prior to being injured, she was active and did yard work and gardening at her house, as well as cooking and cleaning. She testified that her husband has to do those things now. She stated that she has not really found any

physical activities she can participate in, other than swimming. She further stated that her sleep is affected by her problems, in that she wakes up with pain in her back, and that she has not slept the entire night through since the accident.

FINDINGS OF FACT

1. The stipulations agreed to by the parties are hereby accepted as fact.
2. Claimant has suffered a 30 percent diminished earning capacity over and above the physical impairment ratings stipulated to by the parties.
3. Respondents have controverted any permanent disability benefits in excess of the physical impairment ratings, which they have accepted and are currently paying or have paid.

DISCUSSION

Claimant'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 a bright, well-spoken, forty-year-old, with an Associate R.N. degree, who appears eager to work. She has been able to find some employment in her field of expertise following the accident, wherein she makes about the same amount of money per hour that she was making prior to the accident of March 8, 2003. However, despite her relative youth, skills, and ability to actually find some employment, her limitations combined with the injuries she sustained conspire to deny her the ability to work the same amount of hours per week that she was able

to work prior to her compensable injuries of March 8, 2003. As such, it is this examiner's opinion that the claimant's compensable injuries of March 8, 2003, have substantially affected her ability to earn wages, resulting in a 30 percent diminished earning capacity over and above the stipulated impairment ratings she has been issued.

AWARD

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

Respondents are directed to pay the claimant's attorney, Mr. Gary Davis, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge