

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F410550**

**MARCELLA REED**

**CLAIMANT**

**DOLLAR GENERAL STORE  
(SELF-INSURED)**

**RESPONDENT EMPLOYER**

**ORDER AND OPINION FILED MAY 30, 2006**

Opinion by Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KENNETH A. OLSEN, Attorney at Law,  
Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law,  
Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on April 6, 2006, before Administrative Law Judge Cynthia Estes Rogers. Since Judge Rogers is no longer a Commission employee, the case was reassigned for an opinion to be written on the record with no objection by the parties.

A prehearing conference was held on March 6, 2006 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. A compensable back injury occurred on September 30, 2004.
2. The compensation rates are \$335/251.
3. All medicals thus far, all temporary total disability benefits and a 10% permanent partial disability rating have been paid.

The claimant contends that she is entitled to wage loss benefits in excess of her impairment rating.

Respondents contend that all appropriate benefits to which the claimant is entitled have been paid and that work within the claimant's restrictions was made available.

### **ISSUES TO BE LITIGATED**

1. Wage loss benefits.
2. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. A compensable back injury occurred on September 30, 2004.
2. The compensation rates are \$335/251.
3. All medicals thus far, all temporary total disability benefits and a 10% permanent partial disability rating have been paid.
4. The claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss benefits in excess of her 10% permanent impairment rating.

### **DISCUSSION**

The claimant is a 40-year old woman who completed the 11<sup>th</sup> grade but received her GED. She worked at the respondent employer as the store manager where she

supervised employees, unloaded trucks, stocked shelves, mopped floors and ran the cash register. The claimant lifted up to 70 pounds and worked about 80 hours per week. She began with the employer in August 2004 and worked until September 30, 2004. The claimant lifted a 60-pound box of frozen meat on September 30, 2004 and injured her back. The claim was accepted and the claimant received medical treatment, to include back surgery in November 2004, and indemnity benefits.

The claimant testified that the surgery helped her pain; however, she continues to have a dull constant pain in her low back and left leg numbness and takes Neurontin and hydrocodone, as well as Artane for muscle spasm. The claimant continues to have muscle spasms in her back that wake her up at night about four times a week. Even though the claimant takes medication for the muscle spasms, she continues to have them and she described them as jerking her whole body and making her body sore. The claimant also had complications following her surgery, which included the incision getting infected and a cyst developed on the inside. The claimant also had one lumbar epidural, but this did not help her condition and seemed to worsen it. The epidural caused the spine to leak fluid and the claimant developed spinal headaches which continue.

According to the claimant, she has the headaches three to four times per week and they last from one hour sometimes to all day sometimes. The claimant stated that when she has the headaches she cannot think clearly or concentrate. She stated her pain level was 4 out of 10 when she was at rest and 8 out of 10 with activity. The claimant testified that she takes one of her sons with her to help her when she goes to the grocery store. The claimant further testified that she cannot pick up her 31-pound

child. When the claimant takes her hydrocodone, she usually takes a nap because it makes her drowsy. The claimant has also used lidocaine patches and uses a TENS unit. The claimant testified that she has about two days per week that are better days, which she characterized as more normal.

The claimant contends she is entitled to wage loss benefits. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co., Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss benefits over the 10% permanent impairment rating assigned by Dr. Scott Schlesinger. On February 25, 2005, Dr. Schlesinger released the claimant back to work without restrictions after the claimant completed a Functional Capacity

Evaluation with unreliable effort. The claimant has undergone surgery, physical therapy, prescribed medications, had an epidural injection, provided lidocaine patches and provided a TENS unit. Joe Vecchio, district manager for the respondent employer, gave deposition testimony that he spoke with the claimant around the end of January 2005, about returning to work in a light-duty capacity. The claimant did not return to work. Mr. Vecchio testified that he contacted her again and she stated that she did not think she was able to return to work even in a light-duty capacity. The claimant was thereafter terminated.

The claimant testified that she has made some applications for work but she did not think she would be able to handle any of the jobs with the pain and pain medications that she regularly takes.

Respondents introduced a surveillance video of the claimant's activities for part of three days. The video revealed the claimant driving, walking and shopping at a discount store. The claimant appeared able to handle these activities.

While the claimant testified that she continued to take pain medication for her compensable injury and this pain medication causes her to be drowsy at times, the claimant did not make any attempt to return to her employer after light-duty work was offered to her. The claimant did not dispute that the district manager had discussed her returning to work. It was the claimant's testimony that she did not believe she could perform the job now even though she did not attempt the job. The claimant also testified that she was not aware the employer had light-duty jobs available. Ark. Code Ann. §11-9-522(b)(2) provides that an employee shall not be entitled to permanent partial disability benefits in excess of the impairment rating, if she has a bona fide and

reasonably obtainable offer to be employed at wages equal to or greater than the average weekly wage at the time of the accident.

After considering the deposition testimony of Joe Vecchio stating that the claimant was offered a position to come back to work and the claimant refused, coupled with Dr. Schlesinger's February 25, 2005, release to return to work without restrictions, as well as considering the other wage loss factors, I find the claimant has failed to prove that she is entitled to permanent partial disability benefits in excess of the permanent impairment rating. The claimant's FCE completed on February 25, 2005, provided the claimant gave unreliable effort with only 40 of 65 consistency measures within expected limits and the FCE evaluator determined the claimant put forth inconsistent effort throughout the evaluation. While the surveillance video did not present any activities that were particularly strenuous, the video did show the claimant performing some normal daily activities without evidence of distress. I did give the testimony of Joe Vecchio considerable weight that a bona fide job offer was made and I was not persuaded that the claimant demonstrated motivation to return to the workforce. I find the claimant's lack of motivation in pursuing work impedes her future earning capacity.

### **ORDER**

The claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss benefits in excess of her permanent impairment rating. The claim for benefits is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**