

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E609015

CATHY L. WRIGHT

CLAIMANT

MCMILLAN, TURNER, MCCORKLE & CURRY

RESPONDENT EMPLOYER

EMPLOYERS MUTUAL CASUALTY CO.

RESPONDENT CARRIER NO. 1

**DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 1

ORDER AND OPINION FILED JUNE 28, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

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

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on April 26, 2006. A prehearing conference was held on February 22, 2006 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and introduced into evidence without objection.

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

1. There was a May 8, 1996, compensable injury.
2. The compensation rates are \$189/154.
3. Respondent No. 1 accepted a 10% permanent impairment rating.
4. Claimant's healing period ended on February 21, 2002.

The claimant contends she is permanently and totally disabled as a result of her

compensable injury. Alternatively, the claimant contends she is entitled to wage loss disability over and above her 10% permanent impairment rating. Benefits beyond the impairment rating have been controverted and attorney's fees are requested. All other issues are specifically reserved.

Respondents No. 1 contend the claimant is not permanently and totally disabled and based on her age, education and work experience, there are jobs within her restrictions, which are available to her. Respondents further contend the claimant is not entitled to any wage loss disability. Respondents contend the claimant has not returned to work because she does not want to return to work.

Respondent No. 2 contends that it defers to the outcome of litigation on the extent of the disability issue.

ISSUES TO BE LITIGATED

1. Permanent and total disability/wage loss.
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, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, 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. There was a May 8, 1996, compensable injury.

2. The compensation rates are \$189/154.
3. Respondents No. 1 accepted a 10% permanent impairment rating.
4. Claimant's healing period ended on February 21, 2002.
5. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled but has shown by a preponderance of the evidence that she has sustained a 20% diminished wage loss disability above the 10% anatomical rating.
6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

DISCUSSION

The claimant, 53 years of age, worked for the respondent employer as a personal secretary. The claimant described her job duties as answering the phone, preparing documents, filing and lifting a lot of heavy boxes. The claimant lifted the storage boxes of file material in helping prepare for court. The claimant described her injury sustained on May 8, 1996, when she was retrieving a file from the storage boxes as feeling as though someone shot her in the back. The claimant testified that she continues to have sharp and intense pain in her back and left leg and now pain also in her right leg.

The claimant takes quinine for leg spasms as well as other medications listed in Respondent No. 1's Exhibit No. 2, page 3. According to the claimant, after she takes

some of her medicines, she must lay down as she is not steady on her feet and also has experienced memory loss. Dr. Anthony Russell performed a hemilaminectomy on May 22, 2000. The claimant underwent some trigger point and joint injections by Dr. Robert Valentine, treated with Dr. William Ackerman and now is under the care of Dr. Butchaiah Garlapati.

According to the claimant, she has about two good days per week. She testified that she could not promise a prospective employer that she would be at work every day. The claimant returned to work for her employer and worked until September 18, 1996. The claimant testified that she was scheduled for an epidural on the 19th and she had a bad reaction that caused her to be hospitalized for several days and she never returned to work.

Under cross examination, the claimant verified that she did not think she could possibly return to work, as she could not promise her employer she could be at work every day. She verified that she has not sought employment nor tried to work since leaving the respondent employer. The claimant testified that if she got her pain under control, she would like to attempt real estate or tax preparation part time. She testified that her pain level on a good day was 7 out of a 1 to 10 scale and she has constant pain. She takes pain medication every day.

The claimant contends that she is permanently and totally disabled or, alternatively, has sustained wage loss disability. At the time of the hearing, claimant was 53 years old, with an eleventh grade education and about 20 college hours in business/secretarial classes and has worked primarily in secretarial/sedentary type work for most of her working life. She sustained an injury to a portion of her body that

is not scheduled under workers' compensation laws. Therefore, claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522 (Repl. 2005), 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 disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). 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 present case, the claimant has failed to prove by a preponderance of the

evidence that she is permanently and totally disabled, but I further find the claimant has sustained a 20% diminished wage earning capacity. The claimant sustained an admittedly compensable back injury on May 8, 1996, underwent a hemilaminectomy by Dr. Anthony Russell on May 22, 2000, participated in physical therapy, pain medication, trigger point injections and facet joint blocks. Dr. Jim Moore assigned a 10% permanent physical impairment rating on August 5, 1999, and that rating was not changed following the claimant's surgery. Respondents accepted the impairment rating and have denied additional permanency. The claimant has continued pain management and on February 21, 2002, Dr. William Ackerman opined the claimant had reached maximum medical improvement. Dr. Ackerman acknowledged the claimant still experienced pain in her lumbar spine and continued with pain medication. Additional surgery has not been recommended, although Dr. Russell on June 14, 2003, recommended follow-up pain management treatment. The claimant continues pain management treatment currently with Dr. Galpati.

The claimant admitted she has not attempted work since leaving the respondent employer and she admitted she did not think she could work regularly with the pain and with the pain medication she currently takes. The claimant was evaluated by a vocational specialist, Heather Naylor, on March 31, 2006, and she determined that the claimant's experience and her medical records indicated that the claimant could return to sedentary work or clerical jobs. Ms. Naylor testified that the claimant advised her that she did not think she could work now and that she had not attempted work since leaving the respondent employer. Ms. Naylor submitted a listing of jobs that she felt the claimant was qualified and these were classified as sedentary. This listing was not

presented to the claimant until the hearing; therefore, the claimant had no opportunity to pursue any of these before the hearing. At the hearing, the claimant did not articulate any particular interest in pursuing employment when she considered her pain level and pain medication. I found the claimant credible in her description of her pain and other problems she identified and the effects of the pain medicine; however, I also found the claimant's lack of motivation in pursuing any suitable work substantially impedes her future earning capacity.

After considering the claimant's age, education, work experience, anatomical impairment rating of 10% to the body as a whole, her current back and leg problems, her lack of motivation to return to work and considering that she has been released at maximum medical improvement with no restrictions identified, I find the claimant has shown by a preponderance of the evidence that she has suffered a 20% diminished wage loss disability.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled but has shown by a preponderance of the evidence that she has sustained a 20% diminished wage loss disability above the 10% anatomical rating.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**