

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108839

TANYA G. GOFF, EMPLOYEE

CLAIMANT

CONAGRA POULTRY CO.,
SELF-INSURED, EMPLOYER

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED FEBRUARY 8, 2007

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on November 14, 2006, at El Dorado, Union County, Arkansas.

Claimant was represented by HON. ROBERT L. DEPPER, Attorney at Law, El Dorado, Arkansas.

Respondent No. 1 was represented by HON. NORWOOD PHILLIPS, Attorney at Law, El Dorado, Arkansas.

Respondent No. 2 was represented by HON. JUDY RUDD, Attorney at Law, Little Rock, Arkansas, and having deferred to the outcome of litigation did not appear at the full hearing.

STATEMENT OF THE CASE

On November 14, 2006, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on August 9, 2006, and a Prehearing Order was entered on August 11, 2006. A copy of the August 11, 2006, Prehearing Order was marked as Commission Exhibit No. 1 and made a part of the record without objection, subject to any modifications made at the full hearing.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employer/employee/carrier relationship existed at all relevant times, including August 8, 2001; the claimant's applicable compensation rates

are \$190.00 and \$154.00 for temporary total disability and permanent partial disability, respectively; that claimant sustained a compensable back injury on August 8, 2001; that claimant was assigned a permanent impairment rating of fifteen percent (15%) to the body as a whole, which rating Respondent No. 1 accepted; and that all issues not addressed herein are to be reserved.

The parties agreed at the full hearing to litigate the following issues:

1) Whether the claimant has reached maximum medical improvement with regard to her August 8, 2001 compensable injury; and if claimant has not reached maximum medical improvement, whether claimant is entitled to additional TTD benefits from December 11, 2003 to a date yet to be determined.

2) Alternatively, if it is found the claimant has reached maximum medical improvement, it must be determined whether claimant is now permanently and totally disabled and entitled to attorney's fees.

The claimant contended at the full hearing that she has not reached maximum medical impairment, and is entitled to additional TTD benefits from December 11, 2003, through a date yet to be determined, plus attorney's fees. In the alternative, claimant contended that she is at MMI, and is now permanently and totally disabled.

Respondent No. 1 contended at the full hearing that they had paid to the claimant temporary total disability benefits through December 11, 2003, and permanent partial disability benefits calculated at a rate of 15% to the whole body and that claimant is entitled to no additional benefits.

Respondent No. 2 contended at the prehearing conference that it would defer to the outcome of litigation in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3) The claimant reached maximum medical improvement with regard to her August 8, 2001, compensable injury, no later than December 11, 2003.

4) The claimant has failed to prove by a preponderance of the evidence that she is entitled to any temporary total disability benefits after December 11, 2003.

5) The claimant has failed to prove by a preponderance of the evidence that she is unable, because of the compensable injury, to earn any meaningful wages in the same or other employment.

6) The claimant has, therefore, failed to prove by a preponderance of the evidence that she is permanently totally disabled.

7) Upon consideration of all relevant wage-loss factors, I find claimant established a decrease in her wage earning capacity equal to 15% to the whole body, and is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that her compensable injury is the major cause of her decrease in earning capacity. Respondents No. 1 are liable for wage-loss disability

benefits in the amount of 15% to the body as a whole, over and above the 15% anatomical rating they have already accepted.

8) Claimant's attorney is entitled to the maximum attorney's fee under A.C.A. 11-9-715(a)(2)(A).

DISCUSSION

I. HISTORY

The claimant sustained a compensable injury to her back on August 8, 2001, while working "on the line" for the respondent-employer. The claimant testified as follows regarding her injury of August 8, 2001:

A. Okay. I was working on the line, and a bunch of chicken came down at one time, and Kip yelled at me for us to grab the chicken, and when I did, it twisted me. It twisted my whole body is what happened.

Following the accident of August 8, 2001, claimant attempted conservative treatment for her admitted compensable injury, but with no benefit. Ultimately, the claimant was referred to Dr. Anthony Russell who performed a cervical fusion on the claimant in March of 2003. Following her cervical fusion, the claimant continued to complain of various pains associated with her compensable injury.

After the claimant's fusion surgery, she continued to treat conservatively due to her complaints of severe pain. On October 15, 2003, Dr. Russell issued a report that stated "there was little more to offer her from a treatment standpoint as follow-up studies

have failed to show any further surgical problems." (RX-1, pg 19) In the same October 14, 2003 report, Dr. Russell, (who performed the cervical fusion), found the claimant at maximum medical improvement, issued a 15% whole body impairment rating, and did not schedule a routine follow-up visit.

Still with pain complaints after Dr. Russell issued the 15% whole body impairment, the claimant underwent an independent medical evaluation from Dr. Jim Moore on November 6, 2003. (CI X-1, pg. 77) Dr. Moore recommended against a pain pump and found the claimant to have a 9% whole body impairment. Dr. Moore also recommended the claimant "get into some sort of physical activity gradually and progressively." Against the advice of Dr. Moore and Dr. Baskin, the claimant went ahead and had a pain pump implanted under her skin. Respondents No. 1 denied payment for the pain pump. (T. pg. 50, lines 23-25)

The claimant testified that she could not walk before the pain pump was implanted, but then testified that none of the doctors have improved her condition. (T. pg. 52, lines 7-9) The claimant underwent two functional capacity evaluations, both of which indicated the claimant did not put forth maximum effort. Based on claimant's sub-maximum effort, both reports recommended the claimant for sedentary work.

The claimant testified at the full hearing on November 14, 2006, that her upper and lower back hurts all the time. (T. pg. 14, lines 18-22) The claimant testified that both of her arms go dead or numb when she holds anything. (T. pg. 19, lines 7-24) The claimant testified that she now lives with her grandmother and is able to do very little housework. Claimant testified she could paint some figurines for about 30 to 60 minutes. Other than getting her pain pump filled periodically, the claimant testified she was not

seeing any other doctors for her back or neck problems at the time of the full hearing. The claimant testified that if it were not for her neck and back pain, she would be able to work.

II. ADJUDICATION

A. Maximum Medical Improvement and Temporary Total Disability Benefits.

The claimant contends she has not reached maximum medical improvement from her 2001 compensable injury, and is entitled to additional temporary total disability benefits from December 11, 2003, to a date yet to be determined. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W. 3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *Id.* The healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W. 3d 878 (2002). The determination of when the healing period has ended is a factual determination for the Commission.

Respondents contended the claimant's healing period ended no later than December 11, 2003, and therefore claimant would not be entitled to TTD benefits after December 11, 2003. I agree, and find the claimant reached maximum medical

improvement from her 2001 compensable injury no later than December 11, 2003.

The evidence shows the claimant's only treatment for her compensable injury for some time has basically been her pain pump. Pain management does not necessarily extend over the healing period. In fact, Dr. Russell, in his October 15, 2003 report, found the claimant at maximum medical improvement and indicated no future treatment was recommended. Additionally, Dr. Barry Baskin found the claimant at maximum medical improvement in his December 16, 2003, evaluation . It should be noted that Dr. Baskin also recommended against a pain/morphine pump for the claimant. Based on the medical evidence contained in the record, I find the claimant reached maximum medical improvement for her compensable injury no later than December 11, 2003, and therefore would not be entitled to any temporary total disability benefits after December 11, 2003.

B. Permanent benefits.

The claimant alternatively contended that she is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." (A.C.A. 11-9-519(e)). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. A.C.A. 11-9-102(4)(F)(ii)(a). I find the claimant has failed to prove by a preponderance of the evidence that she is unable to earn any meaningful wages.

The only real evidence that the claimant is unable to work is her own testimony or doctor's reports that base their opinion on the claimant's constant reports of pain.

Several factors weigh against the claimant's claim of permanent and total

disability. Dr. Baskin, in his December 11, 2003 report, stated "The patient has exaggerated pain behavior." (Cl X-1, pg. 26) Even before the two functional capacity evaluations were conducted, Dr. Baskin stated, "I would like to get the functional capacity evaluation to see how consistent she is with her testing on current functional abilities. I suspect she will be unbelievable." (Cl X, pg. 25) Emphasis added. Dr. Baskin's prediction proved true, because both of the claimant's functional capacity evaluations showed sub-maximal effort even though they were conducted about a year apart.

Even though the claimant showed unreliable effort on the functional capacity evaluations, both FCE's still indicated she was capable of at least sedentary work. Before the first FCE, Dr. Baskin opined that the claimant could return in probably a light to medium duty category. After the first FCE, Dr. Baskin stated, "I think that she can return to work at her previous job level working in probably a medium duty category." (Cl X-1, pg. 27). As stated earlier, Dr. Moore found the claimant to only have a 9% impairment to the body as a whole and recommended the claimant start doing more physical activity. Dr. Moore's recommendations closely mirror those of Dr. Baskin and in no way indicate the claimant is permanently and totally disabled. I do recognize the claimant's pain management doctors and Dr. Russell opined that the claimant cannot work; however, those physicians primarily base their opinions on the claimant's complaints of pain. Dr. Russell states "it is doubtful that she will be able to resume any type of gainful employment based on the degree of pain that she is experiencing." (RX-1, pg. 19) I find that the credible evidence shows the claimant's complaints of pain are exaggerated and inconsistent. I find Dr. Baskin's and Dr. Moore's reports should be given greater weight when addressing permanent and total disability benefits, and therefore find the claimant

has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

When addressing permanent and total disability, it is necessary to look into the possibility of wage-loss disability benefits. 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.

The wage-loss factor is the extent to which a compensable injury has effected 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).

The claimant is only 39 years old and is a high school graduate. The claimant testified she received her certification as a dental assistant after graduating from high

school. The claimant testified she has worked in the past as a bartender, cashier, and assembly line worker. It is undisputed among the parties that the claimant sustained a 15% whole body anatomical impairment while employed by Respondents No. 1 in 2001.

I have no doubt the claimant's ability to earn wages has been negatively impacted by her compensable injury. The claimant's failure to adequately perform her functional capacity evaluations shows a lack of motivation to return to the work force, and impedes the analysis of her possible wage loss disability benefits. Still, the very most any medical report suggest is that the claimant could return to medium duty work. Regardless of the claimant's motivation to work, it is incumbent to award some percentage of permanent partial wage loss.

Subjectively, the claimant believes she cannot work at all; however, this subjective belief is not supported by the functional capacity evaluations and is not substantially supported by medical evidence.

When taking into account the claimant's 15% permanent anatomical impairment, her young age, her education and dental assistant certification, and work experience; I find tht the claimant sustained wage-loss disability in the amount of 15% over and above her anatomical impairment. Further, I find that claimant did prove by a preponderance of the evidence that her compensable injury is the major cause of her decrease in earning capacity. Claimant could perform her job prior to the admittedly compensable injury and cannot now perform the physical labor she could beforehand. Claimant's compensable injuries are therefore the major cause for her decrease in earning capacity.

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AWARD

Respondents No. 1 are directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

All sums herein awarded 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.

S. DALE DOUTHIT
Administrative Law Judge

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