

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F406472

MARTHA TAGGART, EMPLOYEE

CLAIMANT

MID-AMERICA PACKAGING, EMPLOYER

RESPONDENT

**CONTINENTAL CASUALTY COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 8, 2007

Hearing before Administrative Law Judge Barbara Webb on May 10, 2007, in Pine Bluff, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on May 10, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on February 27, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including December 31, 2003.
3. The claimant sustained a compensable injury to her back and right knee on December 31, 2003.
4. The claimant is entitled to the maximum compensation rate of \$440.00 for TTD and \$330.00 for PPD, if allowed.
5. The claimant has been paid some temporary total disability benefits and permanent partial disability benefits in connection with her impairment ratings of 7% to her back and 2% to her knee.
6. The claimant was paid the sum of \$37,256.48 in long term disability payments by Jefferson Pilot after the healing period ended.
7. The claimant's last day of employment was May 2, 2004.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Claimant's entitlement to additional temporary total disability benefits from April 25, 2005 through July 25, 2005.
2. Claimant's entitlement to wage loss benefits.

The record consists of a one volume transcript of the May 10, 2007, hearing, consisting of the testimony of Martha Taggart and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Joint Exhibit No. 1 (medical records); Joint Exhibit No. 2 (abstract of medical records); Claimant's Exhibit No. 1 (Earnings Record Prior to Injury); Claimant's Exhibit No. 2 (Termination Letter and Arbitration); Respondents' Exhibit No. 1 (Jefferson Pilot Financial Letter of 4-02-07)

CONTENTIONS

In the instant hearing, the claimant contends she is entitled to additional temporary total disability benefits from April 25, 2005 through July 25, 2005, and wage loss benefits.

Respondents contend that the claimant is not entitled to additional temporary total disability benefits because her healing period ended on April 25, 2005, and that any amounts paid between April 25, 2005, and July 25, 2005, should have been characterized and paid as permanent partial disability benefits as opposed to temporary total disability benefits. Respondents claim an appropriate credit under Ark. Code Ann. § 11-9-411 for any long-term disability benefits paid claimant by Jefferson Pilot; and respondents claim an appropriate set-off or credit for any unemployment benefits paid to the claimant for the period of time during which she also received workers' compensation benefits. Respondents contend that claimant

has failed to seek available employment within her restrictions and is therefore not entitled to wage loss benefits.

FACTUAL BACKGROUND

Taggart is 53 years old (DOB: 12-22-53). She completed high school. After her injury, Taggart began attending Southeast Arkansas College in the Fall of 2006 and has completed twenty four hours of higher education with a 4.0 grade average. She plans to attend the University of Arkansas at Pine Bluff to complete a degree in Social Work. She currently receives financial assistance from Arkansas Rehabilitation Services and works in a Federal Student Work Services program with the Literacy Council at W.T. Chaney Elementary School. She is currently paid \$5.15 per hour and works twenty hours a week while attending classes.

Taggart began working at Gaylord Container, which later became known as Delta Natural Kraft, in February of 1977. She worked various jobs, beginning as a utility aide and working up to a boiler fireman and ultimately to a boiler operator. She sustained a compensable work-related injury to her low back and right knee on December 31, 2003. At the time of her work-related injury, she was employed as senior boiler operator, making \$67,721.07 from 6/06/03 until 6/11/04. She explained that she was injured when she tripped over a drain cover and fell while "making a round". "Making a round" consists of checking all the pumps, motor, belts and equipment to verify that it is working properly. She typically would ride the elevator to the seventh floor and descends the stairs downwards and walks each floor to

check each individual item. There were times when the elevator was out and she would walk the seven flights of stairs. After the fall at work, she continued to work until early May of 2004. She sought medical treatment and ultimately was treated by Dr. Gullet for her knee and Dr. Moore for her back. She underwent conservative treatment and was ultimately diagnosed with spinal enthesopathy and a lumbar HNP L3/4 by Dr. Moore. She was diagnosed with a contusion to the right knee with a medial meniscus tear. She was treated conservatively with physical therapy, prescription medication, cortisone shots for the knee and a TENS unit for her back. She underwent a functional capacity evaluation on January 27, 2005. The evaluation was concluded with "unreliable results" and determined that the claimant was capable of light duty work on an eight hour day, but that she did not meet the functional requirements to return to her work position as a Recovery Boiler Operator. She continued physical therapy. She was released to return to light work on March 14, 2005, by Dr. Gullet, but was not released to work by Dr. Moore due to continuing concerns with her low back. She was released by Dr. Moore to full duty work on April 16, 2005. She was not permitted to return to work by her employer due to restrictions. She underwent a second functional capacity evaluation on June 20, 2005. At that time, the study concluded that the claimant put forth "inconsistent effort and demonstrates inconsistencies illness responses". It was noted that Taggart demonstrated the ability to perform work at least at the light duty classification for an 8 hour day and that her abilities were less than her previous FCE

on 1/27/05. She was terminated from her employment on August 1, 2005, due to the lack of available work within her restrictions. The Union filed a grievance on behalf of Taggart which was ultimately arbitrated. The arbitrator concluded that based on the claimant's medical record, the company had just cause to terminate Taggart since she did not meet the "minimum qualifications of experience and/or health or fitness for any job covered hereby". Taggart received long term disability payments in the total amount of \$37,256.48, from October 30, 2004 through October 30, 2006, under a disability policy with Jefferson Pilot Financial which was purchased and paid for by Taggart. In their review of her claim, Jefferson Pilot concluded that the claimant was capable of performing several sedentary occupations as a maintenance scheduler (\$32,590.00), eyeglass frame inspector (\$ 34,620.00), Expeditor (\$34,620.00), Service Clerk (\$34,270.00), Batch Records Clerk (\$32,090.00), and Sorter (\$34,620.00). It was noted that the jobs existed within her area. The claimant testified that she had applied for approximately six or seven jobs with the Department of Human Services and with Wal-mart. She explained that after completion of her Master's degree as a social worker in four years, she believed she could earn between twenty-eight and thirty-five thousand (\$28,000.00 - 35,000.00) dollars annually. The claimant testified that she had exhausted all the funds that she had in her savings and 401(k) and had applied and received unemployment benefits from August - December of 2005 in the approximate amount of \$5,000.00. She testified that she would return to work for Delta Natural Kraft if asked and that

she believed she could perform the duties of her job notwithstanding the results of her FCE's and the continuing pain in her back and problems with her knee.

In August of 2005, Dr. Moore assigned the claimant a total of 7% permanent partial impairment to the body as a whole for her lumbar spine. On April 7, 2005, she received a 2% impairment rating of the lower right extremity from Dr. Mulhollan.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including December 31, 2003.
3. The claimant sustained a compensable injury to her back and right knee on December 31, 2003.
4. The claimant is entitled to the maximum compensation rate of \$440.00 for TTD and \$330.00 for PPD.
5. The claimant has been paid some temporary total disability benefits and permanent partial disability benefits in connection with her impairment ratings of 7% to her back and 2% to her knee.
6. The claimant was paid the sum of \$37,256.48 in long term disability payments by Jefferson Pilot after the healing period ended.
7. The claimant's last day of employment was May 2, 2004.

8. Claimant reached the end of her healing period on April 25, 2005, and all disability payments made between April 25, 2005 and July 25, 2005, should be properly characterized as permanent partial disability benefits as opposed to temporary total disability benefits.
9. Claimant has proven by a preponderance of the evidence that she is entitled to 20% wage loss benefits sustained as a result of her compensable low back injury.
10. Based on the preponderance of the evidence, respondents are not entitled to a credit under Ark. Code Ann. § 11-9-411 for long term disability benefits paid since the claimant paid all premiums for the policy or unemployment benefits paid after the end of claimant's healing period.
11. Respondents have controverted the claimant's entitlement to wage loss disability benefits. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.
12. This award is subject to the attorney's lien filed by Philip Wilson on October 6, 2005. If the parties cannot reach an agreement as to payment of the lien, a separate hearing to address the lien will be set upon request of either party or Mr. Wilson.

DISCUSSION**End of Healing Period**

The first issue in this case is a determination of when Taggart's healing period ended. Stated differently, the determination of when Taggart reached maximum medical improvement.

The Arkansas Workers' Compensation Act does not define maximum medical improvement. However, Ark. Code Ann. § 11-9-102(12) states that "healing period" means that period for healing of an injury resulting from an accident. The healing period ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. Clairday vs. The Lilly Company, Inc., No. CA05-696, (April 19, 2006). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982); Arkansas Highway & Transportation Department v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

In the instant case, there is overwhelming evidence that Taggart's healing period as to her compensable back and right knee injury ended in April of 2005. Both Dr. Moore and Dr. Gullet have issued opinions that Taggart has reached maximum medical improvement as to her back and knee injuries and released to return to light-duty work. The results of both FCE's in January and June of 2006 indicated that Taggart was able to work at a light physical demand for an 8 hour day with some accommodations.

In the instant case, based on the preponderance of the evidence in the case, I find that the claimant reached the end of her healing period for her back on April 16, 2005, and the end of her healing period for her knee injury on April 25, 2005, when she was released to return to work. Moreover, the medical evidence in the case demonstrates that all subsequent treatment has been directed at relieving pain symptoms and not intended to be a cure for the claimant's condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124 , 628 S.W.2d 582 (1982).

Wage Loss

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). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell,

340 Ark. 475, 10 S.W.3d 727 (2000). 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. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. 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).

However, so long as an employee, subsequent to her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. § 11-9-522(b)(2)(Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than her average weekly wage at the time of the accident.

Ark. Code Ann. § 11-9-522(c)(1). In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, supra. The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(Repl. 2002). Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms “permanent benefits” and “disability” are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In the instant case, the preponderance of the evidence demonstrates that claimant sustained wage-loss disability in the amount of 20%. The claimant is only age 54 and has taken a number of college-level studies. She has completed 24 or more hours towards her degree in Social Work and intends to pursue a Master’s Degree. While her work history primarily involves industrial work, the preponderance of the evidence demonstrates that the claimant has reached maximum medical improvement and is capable of performing at least light duty work and should be able to secure steady employment. However, the evidence demonstrates that she will not be able to return to her prior work as a boiler operator or similar work due to the limitations and restrictions that have been placed on her due to her back injury by her treating physician. While the claimant is currently attending a full schedule of classes and working a part-time job, the evidence demonstrates that she will have difficulty in replacing her wages at the level before her injury. Therefore, after considering the claimant’s age, education, work experience, medical evidence, as well as her motivations to return to full time work

and her post-injury income, I find that the claimant is entitled to 20% wage loss disability benefits as a result of her compensable low back injury over and above her physical permanent impairment.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein. 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 Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995). This award is subject to the attorney's lien filed by Philip Wilson on October 6, 2005. If the parties cannot reach an agreement as to payment of the lien, a separate hearing to address the lien will be set upon request of either party or Mr. Wilson.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge