

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707095

THERESA JONES, EMPLOYEE	CLAIMANT
JORDAN'S KWIK STOP, EMPLOYER	RESPONDENT
EMPLOYERS MUTUAL CASUALTY COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 28, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on July 25, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 25, 2008, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on May 21, 2008, and a Prehearing Order was filed on May 22, 2008. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed at all relevant times, including July 1, 2007; that the claimant sustained a compensable cervical injury on said date; that she earned sufficient wages to entitle her to compensation rates of \$191.00 per week for temporary total disability and \$154.00 per week for

permanent partial disability; that the claimant's healing period ended on January 14, 2008; that the claimant sustained a ten percent (10%) whole body impairment as a result of her injury which respondents had accepted and were in the process of paying; and that respondents controverted all wage-loss disability in this claim.

By agreement of the parties, the sole issue presented for determination was whether the claimant was entitled to wage-loss disability benefits.

Claimant contended, in summary, that she sustained substantial wage-loss disability in an amount to be determined by this Commission and that a controverted attorney's fee should attach to any wage-loss awarded.

The respondents contended that the claimant could not prove entitlement to wage-loss disability. Respondents further maintained that it made work available to the claimant within her limitations and restrictions, and that the claimant was not entitled to any wage-loss disability.

The claimant testified in her own behalf. Jackie McClure and Maria Fay Behrens testified for the respondents. The record is composed solely of the transcript of the July 25, 2008, hearing containing numerous exhibits.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she is entitled to wage-loss disability.

DISCUSSION

_____The relevant facts in this case are basically undisputed. The claimant, Theresa Jones, is thirty-nine (39) years old. She has a tenth grade education. The claimant's work history has consisted primarily of factory work and working for various convenience stores. Primarily, the claimant has worked in convenience stores where her job duties included stocking, cleaning, cooking, and working the cash register. The claimant began working for the employer herein on or about June, 2003. The owner of the business known as Jordan's Quick Stop actually owned two (2) other associated businesses, the Dairy Shack, and Josie's Restaurant. Prior to July 1, 2007, the claimant performed work at all three (3) businesses. At Josie's Restaurant, the claimant only cleaned the restaurant which she described as very physically demanding. The claimant primarily worked at the convenience store and the Dairy Shack which the claimant described as easier work. On July 1, 2007, the claimant sustained an admitted compensable injury to her neck when, while stocking a cooler, a stack of beer fell on her, knocking her to

the floor. The claimant promptly reported the injury and was provided medical treatment. The claimant's primary treating physician was Dr. Fereidoon Parsioon, a neurosurgeon in Memphis, Tennessee. The claimant ultimately underwent a cervical fusion performed by Dr. Parsioon. The record reflects that after the claimant was released to return to work, she worked at the Dairy Shack because the employer felt that job would be less physically demanding. The record reflects that the claimant returned to work on or about December, 2007. She worked for approximately one week, at which time she developed additional problems. She returned to Dr. Parsioon and was prescribed additional physical therapy. The claimant was ultimately released on January 14, 2008, to return to her regular work duties with no restrictions. (Resp. Ex. A, pp.1-3)

After the claimant was released for full-duty work, she again returned to work at the Dairy Shack where she worked from January 14 until on or about January 25, 2008. The claimant candidly acknowledged that when she returned to work, there was a lot of friction between her and several co-workers. The claimant also maintained that she was having physical problems doing some of the work. In any event, the claimant voluntarily quit her job on January 25, 2008, without providing any notice to upper management. Thereafter, the claimant applied for, and was denied unemployment compensation because she walked off the job without notification. (Resp. Ex. B, pp.11-14)

The claimant subsequently applied for a position at the Quick Stop and was

rehired. The claimant worked less than one day and, again, voluntarily quit her job. The record reflects that the claimant terminated her employment, in part, because of a personality conflict with a co-worker which the claimant stated, "had an attitude," and, in part, because the claimant did not believe that she could do the work. Although the claimant stated that she left work in on the first day because of neck pain, the record reflects that the manager, Maria Behrens, only required her to perform cashier's work on the one day that the claimant worked. The record further reflects that when the claimant was rehired, she was hired to work forty (40) hours per week at \$7.15 per hour which was the same wages that she earned at the time of her admitted injury. (Tr.18-21)

The record reflects that the claimant did not apply for unemployment following her second voluntary termination. The claimant next went to work at Wal-Mart where she worked until a job became available at FG Express which was another convenience store. The claimant was working for FG Express at the time of the within hearing. She has been employed since on or about May, 2008. She stated that she worked approximately thirty-two (32) to thirty-four (34) hours. In addition to running the cash register, the claimant also was required to stock and clean, work activities similar to those performed with the respondent herein. At the time of the hearing, the claimant was earning \$7.00 per hour.

WAGE-LOSS DISABILITY

Ark. Code Ann. §11-9-522 (Repl. 2002) provides, in 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.

(2) However, so long as an employee, subsequent to his or 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 or her average weekly wage at the time of the accident, he or 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.

(c)(1) The employer or his or her workers' compensation insurance carrier shall have 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 his or her average weekly wage at the time of the accident.

(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

Respondents have paid all appropriate temporary total disability to which the claimant is entitled. In addition, respondents have accepted and were in the process of paying a ten percent (10%) whole body impairment which was related to the injury and surgery. The only issue concerns claimant's entitlement to wage-loss disability, if any. 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. *Emerson Electric v. Gaston*, *supra*. To be entitled to wage-loss disability 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 the result of the injury which the claimant has established in this case. *Wal-Mart Stores, Inc., v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining, 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). Further, 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).

This claim turns almost entirely upon the claimant's credibility. A claimant's testimony is never considered uncontroverted. The testimony of an interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

Admittedly, the claimant has sustained a ten percent (10%) whole body impairment as the result of her injury which respondents have accepted. The only evidence that the claimant's disability is greater than her impairment is the claimant's own testimony. The claimant course of conduct and work history is inconsistent with a claim for wage-loss disability. Further, the only medical evidence of record from Dr. Parsioon, the claimant's primary treating physician, reflects that the claimant can return to work performing her regular duties without any physical restrictions. Despite the claimant's assertion that her injury affects her ability to perform her regular duties, the record reflects that the claimant has returned to work for a different employer performing essentially the same type of work that she performed for the employer herein. Further, the record indicates that the claimant did not return to Dr. Parsioon after January 14, 2008, with any additional complaints, indicating that she could not perform her regular work duty.

The burden of proving entitlement to additional workers' compensation benefits rests with the claimant. The claimant has simply failed to meet her burden of proof. Although a compelling argument can be made that there are inherent inconsistencies in Dr. Parsioon's assessment of permanent impairment while, at the same time, imposing no physical restrictions whatsoever, that is a medical decision outside my area of expertise. Clearly, the claimant could have returned to Dr. Parsioon and voiced additional complaints if she was unable to perform her regular job duties. Again, the claimant's course of conduct and work history are simply inconsistent with her claim for wage-loss disability. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge