

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601599

STACY L. SHELNUTT, EMPLOYEE	CLAIMANT
BAPTIST HEALTH, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 3, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on March 10, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. J. Mark White, Attorney-at-Law, Bryant, Arkansas.

Respondent represented by Ms. Gail Ponder Gaines, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 10, 2008, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on January 30, 2008, and a Prehearing Order was filed on January 31, 2008. At the hearing, the parties announced that the stipulations, issue, 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 between the parties at all relevant times, including December 6, 2005; that the claimant sustained a compensable injury to her left shoulder on said date; that she earned sufficient wages to entitle her to compensation rates of \$353.00 per week for

temporary total disability and \$265.00 per week for permanent partial disability; that the claimant's healing period ended on or about August 17, 2007; that respondents paid appropriate temporary total disability; that respondents accepted a six percent (6%) whole body impairment; and that respondents had controverted claimant's entitlement to wage-loss disability.

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

Claimant contended, in summary, that she was discharged from her previous position because of physical restrictions imposed as a result of the admitted injury and that she was entitled to wage-loss disability in an amount to be determined by this Commission. The claimant requested a controverted attorney's fee on any additional benefits awarded.

The respondent contended maintained that the claimant could not prove entitlement to wage-loss disability.

The claimant testified in her own behalf. Gwen Wetzel and Joni Schales were called as witnesses by respondent. The record is composed solely of the transcript of the March 10, 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, and set out above, are hereby accepted as fact.
3. The claimant has shown, by a preponderance of the credible evidence, that she is entitled to additional permanent disability in excess of the six percent (6%) permanent physical impairment previously accepted. A preponderance of the credible evidence reflects that her future earning capacity has been diminished as the result of her compensable injury and the resulting permanent physical impairment and/or physical restrictions.
4. A finding of an overall permanent partial disability of fifteen percent (15%) to the body as a whole fairly and accurately reflects the extent of claimant's permanent disability; specifically, the six percent (6%) impairment previously accepted, together with a nine percent (9%) wage-loss disability.
5. Respondent has controverted claimant's entitlement to any wage-loss disability.

DISCUSSION

Ark. Code Ann. §11-9-522 (Supp. 2007) provides:

(a) A permanent partial disability not scheduled in §11-9-521 shall be apportioned to the body as a whole, which shall have a value of four hundred fifty (450) weeks, and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole resulting from the injury.

(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. (Emphasis supplied)

The claimant, Stacy Shelnutt, testified in her own behalf. Claimant is forty-one (41) years old. The claimant graduated from high school in 1984 and then attended college for approximately a year and one-half. The claimant later attended

the Baptist School of Nursing for LPN where she graduated in December, 1993. The claimant has worked as a licensed practical nurse since that time. The claimant began working for the employer herein in December, 2002. The claimant worked primarily at the Baptist Rehabilitation Center in what was described as the nursing pool which permitted her to work part-time rather than full-time. The claimant stated that she preferred to work out of the nursing pool rather than full-time because it permitted her greater flexibility to work around her children and family duties. The claimant would simply notify her employer concerning which dates she was available and they, in turn, would contact her on the days that work was available. The claimant was paid an hourly rate of \$19.00 per hour, together with a percentage increase for working nights and weekends.

The claimant sustained an admitted injury to her left shoulder as the result of a lifting incident on December 6, 2005. The claimant's description of the injury, as well as her course of medical treatment, is set out below:

Q All right. If you would, just very briefly explain to the Judge how you got hurt.

A Me and my RN was getting a patient up ready for therapy, and we were using the lift. Some of our rooms, I think all of them do now, have lifts, and it was a very large stroke patient who could not walk or stand. And we lowered her into the wheelchair and – one thing about those lifts, you know, you're on a chain hanging. We got her into the wheelchair but she was crooked, which most of them do get crooked when you're lowering them. The RN said she would take the front and told me to take the back so we could straighten her to the right. And when we did, I said, "Oh, my shoulder hurts." I mean, I could feel something pull or something. Then later that day I did fill out an incident report, because my RN said to make sure you do in case,

you know, the hurt doesn't go away.

Q Now, we've introduced into evidence the medical records, so I'm not going to walk through your medical treatment. I guess we can just say that you treated with Dr. David Gilliam –

A Uh-huh.

Q – and he eventually performed surgery, is that correct?

A Yes, that's the doctor that Laura Singleton wanted me to go see.

Q All right. Let's skip forward to August 13, 2007. There has been introduced into evidence a functional capacity evaluation report on that date. Do you recall taking that evaluation?

A Yes .... (Tr.12-13)

Again, the claimant's primary treating physician was Dr. David Gilliam, an orthopedic surgeon with OrthoArkansas in Little Rock, Arkansas. The record reflects that the claimant continued working for the employer herein while receiving conservative medical treatment. It is undisputed that the claimant has received all appropriate temporary total disability. After failed conservative treatment, the claimant ultimately underwent shoulder surgery on February 9, 2007. The claimant underwent a functional capacity evaluation on August 13, 2007. The FCE reflects that the claimant gave reliable effort on all consistency measures within expected limits. The functional capacity evaluation was submitted to Dr. Gilliam. At the hearing, claimant's attorney argued that based upon his review of the FCE, he interpreted the evaluation to indicate that the evaluator may have made a mistake because he found the claimant capable of medium-duty work, whereas claimant's

counsel interpreted the report to indicate that the claimant was capable of light-duty work.

I do not agree. Based upon the functional capacity evaluation, as well as the August 17, 2007, report from Dr. Gilliam, it appears that the permanent restrictions based on the FCE results indicated that the claimant should be limited to medium work level. Dr. Gilliam released the claimant with a ten percent (10%) permanent partial impairment to the left upper extremity which was equivalent to six percent (6%) to the body as a whole. (Cl. Ex. A, pp.25-26)

The record reflects that because of the claimant's permanent restrictions, she was not permitted to work out of the nursing pool. There was conflicting testimony concerning the claimant's failure and/or refusal to follow company procedures in attempting to return to work for the employer herein. Apparently, there is no dispute that the claimant was advised that she could no longer work out of the pool because of her permanent restrictions. However, it is equally clear from the record as a whole, that the claimant failed and/or refused to follow instructions, specifically, to contact Barbara Wagner, head of the central staffing office, to help place her in various nursing positions available in the Baptist Health System. Gwen Wetzel, the manager of staffing and employee relations, specifically advised the claimant to contact the central staffing office. Ms. Wetzel also testified that the claimant was still active in the employer's system and had never been terminated. (Tr.47-50)(Cl. Ex. B, pp.1-6)

Despite the claimant's contention that she was discharged from her position because of physical restrictions, I find no credible evidence to support this contention. However, there is credible evidence that the claimant was not allowed to return to her position in the nursing pool because of physical restrictions.

Joni Schales was called as a witness by the respondent. Ms. Schales works in the HR department. She stated that she has had no communications with the claimant. Rather than conduct an exhaustive analysis of Ms. Schales' testimony, suffice it to say that her testimony supports the claimant's contention that she has sustained wage-loss disability because of her injury and permanent restrictions. In fact, the testimony of Ms. Schales indicates that the entry level wages for positions within the system for LPNs with the claimant's years of experience was \$15.25 per hour, reflecting that even if the claimant had complied with the employer's instructions, the employer herein, in all likelihood would not have been able to place the claimant in a job at wages equal to or greater than her wage at the time of the accident. Ms. Schales did indicate that there were other jobs in the private sector which might pay more, such as work in a nursing home; however, it is my belief that LPNs in nursing homes normally require lifting which would exceed the claimant's restrictions.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. 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, work experience, and other matters reasonably expected to affect the claimant's earning power. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Further, A.C.A. §11-9-522(b) only precludes a claim for wage-loss benefits as a matter of law if the claimant has returned to work, obtained other employment, or has a *bona fide* and reasonable, obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident. *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

At the time of the within hearing, the claimant had just accepted a job earning \$16.50 per hour. As reflected above, respondent's entry level position for LPNs outside the nursing pool was \$15.25 per hour. Admittedly, the Commission cannot simply apply a mathematical formula.

Based upon a review of the record as a whole, and after consideration of the claimant's age, education, and work experience, it is hereby concluded that a finding of a nine percent (9%) wage-loss disability fairly and accurately reflects the extent of the claimant's entitlement to wage-loss disability. Accordingly, I hereby make the following:

#### AWARD

Respondent, Crockett Adjustment, Inc., is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$265.00 per week beginning August 18, 2007, and continuing for 67.5 weeks, representing a six

percent (6%) permanent physical impairment and a nine percent (9%) wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount, and respondents may claim credit for any permanent impairment benefits previously paid.

Additionally, claimant's attorney, Mr. J. Mark White, is hereby awarded the maximum statutory attorney's fee on the controverted portion of this Award, one-half ( $\frac{1}{2}$ ) to be paid by the respondent and one-half ( $\frac{1}{2}$ ) to be paid by the claimant pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge