

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E902952

JUDY A. (SMITH) BANEY, EMPLOYEE	CLAIMANT
MID-SOUTH MANUFACTURING, EMPLOYER	RESPONDENT
CNA INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 19, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE KEITH BLACKMAN, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE LEE J. MULDROW, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed October 13, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. It was agreed that there was a June 16, 1997, compensable injury.
2. The compensation rates are \$254/191.
3. The claimant has proven by a preponderance of the evidence that she has sustained a 15%

permanent impairment rating as assigned by Dr. Edward Cooper.

4. The respondents are responsible for permanent partial disability benefits associated with the 15% permanent impairment rating.
5. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled or entitled to wage loss benefits in excess of the permanent impairment rating.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I dissent from the majority opinion denying claimant wage-loss disability benefits and permanent and total disability benefits. On appeal, Claimant argues that she is entitled to permanent and total disability benefits or, alternatively, wage-loss disability benefits in addition to the 15% permanent physical impairment rating she received as a result of her compensable back injury and subsequent surgeries.

Claimant, age 54, worked for Respondent in various assembly positions from February 1979 until she was laid off in August 2000. During those 21 years of service, Claimant worked at several different assembly stations, which

required her to routinely lift parts weighing between 16 to 50 pounds. Prior to working for Respondent, Claimant worked briefly in a restaurant and in a garment factory.

Claimant incurred an admittedly compensable injury to her back on June 16, 1997, when she was struck in the back by a forklift. After conservative treatment failed, Claimant received treatment from Dr. Edward Cooper and underwent a bilateral spinal fusion at L5-S1 on February 16, 1999. She was in a body brace for four months and returned to work in a light duty position 12 weeks after the surgery. Claimant worked in the light duty position until she was laid off in August 2000. Claimant testified that she felt intense pain and was miserable while working this light duty job.

Claimant testified that, following the lay off, she received a call from John Brooks, the personnel manager, informing her that, due to her seniority status, she could bump into a job on the water pump assembly line. Claimant testified that she could not do that job because it required bending and twisting and was not within her physical limitations. She also testified that Mr. Brooks told her that if a position within her limitations became

available, he would let her know, but Claimant has not been so informed.

Claimant underwent a second back operation after Dr. Cooper determined that the first fusion failed. This second surgery consisted of a spinal fusion at L4-L5 and L5-S1 with pedicle screw internal fixation and iliac crest bone grafting in June 2001. Claimant also testified that she has a battery operated bone stimulator attached to her back. She testified that she did not get any relief from that procedure and that she feels like it made her pain worse.

On August 13, 2001, Dr. Cooper opined that Claimant could return to light duty work with restrictions including no lifting, bending, twisting, prolonged sitting or standing. Claimant has not worked since being laid off by Respondent. On June 10, 2002, Dr. Cooper, assigned Claimant a 15% impairment rating to the body as a whole and Respondents have agreed to compensate Claimant for that rating.

As for her current physical condition, Claimant testified that she becomes very sore while sitting, such as while driving, and cannot sit for more than 20 minutes. She testified that she was very physically active prior to her

surgery and enjoyed such activities as hunting, fishing, working in her yard, going to work, and maintaining her home. Since the back injury and subsequent surgeries, however, Claimant states that she cannot stand or sit for longer than 20 minutes, spends most of a typical day laying down, and can not do house work as she did previously.

Claimant testified that she is currently taking pain medication and wears a medicated patch prescribed by Drs. Schapp and Mays, pain management specialists. Though these medicines have helped lessen the pain she feels while walking, she still has significant stiffness, soreness, and numbness. These medications also have negative side effects that cause Claimant to become confused and disorientated when doing routine tasks, such as driving to a post office four blocks from her home.

Claimant earned a GED in 1985 while working for Respondent. Since her layoff from employment with Respondent in 2000, Claimant has taken a six week computer course in Microsoft Word. However, Claimant testified that she uses the two finger "hunt and peck" method of typing and is only able to use a computer to play games, search the Internet, or do minimal typing. Prior to the second surgery, Claimant

intended to register for another computer course, but has not been able to due to pain and confusion she experiences as a side effect of pain medications.

Robert Lamb, a vocational rehabilitation counselor, testified that Claimant does not have transferable job skills and that she is not capable of returning to work in Northeast Arkansas. Though his findings were based on Claimant's representations alone, he opined that Claimant's decision making and concentration abilities are limited as a result of the medication that she takes.

Dale Thomas, a vocational rehabilitation counselor, testified that based on his interview of Claimant that he did not think that she had transferable job skills: "It was my opinion that she did not have skills which would transfer. Most of her work was done, well, almost all of her work, really, essentially, was done at Mid-South in that limited work environment." Thereafter, Thomas ordered a Functional Capacity Evaluation, which Claimant underwent on March 14, 2003. The FCE results state that Claimant is able to work in a sedentary position: "Ms. Judith Baney demonstrates the ability to work at least the Sedentary work category over the course of an 8 hour work-day. Ms. Baney

benefits from a work position that allows for occasional change in postural position." Claimant, however, testified that she was "extremely stiff and sore and hurting" on the day after the FCE. Thomas testified that Claimant told him that she could not return to work due to pain and that Claimant did not respond to his attempts to contact her about potential employment positions within her limitations. He opined that Claimant was employable but not placeable because of her perception of pain.

Notably, the FCE did not take into account the pain medications that Claimant was taking or their side effects, such as confusion and disorientation, as described above. Thomas acknowledged that some of the positions that he recommended for Claimant, such as a receptionist position, required phone, typing, and computer skills that Claimant does not have. Thomas also acknowledged that the problems that Claimant has with her memory and disorientation would be detrimental to potential employment.

Based on the foregoing, I find that Claimant is entitled to permanent and total disability benefits, or, alternatively, that she is entitled to substantial wage-loss disability benefits in excess of her impairment rating. In

determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b) (1) (Repl. 2002); Glass v. Edens, 233 Ark. 786, 346 S.W.2d 682 (1961); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

I find that the factors favoring a wage-loss disability award are satisfied here. Claimant is an older worker with very limited work experience, transferable skills, and minimal education. Claimant's job experience consists entirely of manual, unskilled labor. Her current physical condition, however, limits her ability to sit, stand, sit, twist, bend and lift and disqualifies her from obtaining similar employment in the future. While Claimant testified that she feels worse after the second surgery than she did before and does not think she is able to work, her motivation to return to work in the past is exemplified by

her return to work in a sedentary, light duty position for Respondents following her first surgery despite the ongoing pain she felt at that time. After the lay off, Claimant could not return to a position with the Respondent-Employer, despite the fact that her seniority would have permitted her to bump into another position, because there was not a position available within her limitations. It is evident that Claimant's physical condition inhibits her ability to attain employment within her limited skills and educational background.

According to the FCE results, Claimant can work in sedentary positions. However, the FCE did not consider that Claimant suffers from confusion and disorientation when doing simple tasks as a result of the prescription pain medication. Further, both of the vocational rehabilitation counselors, Lamb and Thomas, acknowledged that such confusion and memory problems would be detrimental to her ability to work. Additionally, as an unskilled laborer, Claimant is not qualified for most sedentary positions because they require proficient typing, phone and computer skills, which she does not have.

Thus, considering claimant's age, education, work experience, physical impairment, limited education, and job skills, I find that Claimant is entitled to at least wage-loss disability benefits of at least 45-65% and am open for discussion of such an award. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner