

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E901881

PAULA MCKINNEY, EMPLOYEE	CLAIMANT
PLASTICS RESEARCH & DEVELOPMENT, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 10, 2004

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE ROBERT MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant is entitled to a 60% loss in wage earning capacity. Specifically, the respondents are appealing the award of a 60% loss in wage earning capacity. The claimant is cross appealing the decision contending that she is permanently and totally disabled. Based upon our de novo review of the record, we find that the claimant has proven by a preponderance of the evidence that she is entitled to a 20% loss in wage earning capacity.

This case is before the Full Workers' Compensation Commission after it was remanded to the Administrative Law Judge for a determination of whether or not the claimant was entitled to any wage loss disability benefits in excess of her permanent

physical impairment rating. In an opinion dated November 24, 2003, the Administrative Law Judge found that the claimant was entitled to a 60% loss in wage earning capacity in addition to the claimant's 10% whole body permanent impairment.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

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*.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' 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). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

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.

Our review of the evidence indicates that the claimant sustained a 20% loss in wage earning capacity. The claimant is 39 years old, she graduated from high school, can read and write, read a newspaper, and has experience with machines like monitors and cash registers. The claimant can drive a car and take care of three kids at her home. The claimant has applied for social

security disability benefits but testified that her claim is "still pending, I believe." The claimant testified that she has not considered looking into job retraining or any schooling program in order to learn new skills. In short, the claimant shows no motivation to return to work.

The claimant contends that she is permanently and totally disabled, but the medical evidence contradicts this argument. The medical records indicate that the claimant was not using the spinal cord stimulator as she was prescribed and that she had almost full extension of her right elbow. Although claimant's scheduled elbow injury per se has not been considered when assessing claimant's wage loss disability, the medical records and observations of the claimant with regard to claimant's elbow injury demonstrate contradictions and reflect upon claimant's motivation. On March 30, 2001, Dr. Robert Fisher noted that the claimant was able to extend her right elbow and did not carry her hand in the guarded position. In February of 2002, the claimant saw Dr. Fisher again and his notes indicated that the claimant's efforts to extend her elbow were very tenuous. However, during the hearing claimant displayed a much more guarded position with regard to her elbow. Claimant's failure to display her full movement capabilities calls into question the claimant's motivation and credibility. In June of

2003, Dr. Fisher noted that the claimant was "not particularly cooperative with the physical therapy."

In short, the claimant is young and has a high school education. The claimant has shown no interest or motivation to return to work or getting any retraining. The medical records belie claimant's lack of movement as shown to the Administrative Law Judge. Simply put, after we consider the claimant's credibility, motivation, willingness to cooperate with physical therapy, together with all other factors which must be considered in rendering a wage loss determination, we find that the claimant cannot prove that she is permanently and totally disabled. However, we find that evidence supports a finding that the claimant is entitled to a 20% loss in wage earning capacity. Therefore, we affirm, as modified, the decision of the Administrative Law Judge.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For

prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must respectfully dissent from the opinion of the majority finding that claimant failed to prove by a preponderance of the evidence that she is permanently and totally disabled. The Administrative Law Judge awarded benefits for a loss in wage-earning capacity in an amount equal to 60% to the body as a whole. The majority's award of only 20% wage-loss disability is inadequate and certainly not just compensation for the permanent effects of this work-related injury.

On February 13, 1998, claimant sustained an admittedly compensable injury to her right upper extremity while using a molding machine to make fishing lures. Dr. Sherrill, an orthopedic surgeon, performed surgery. Unfortunately,

Dr. Sherrill apparently damaged the sensory nerve during the course of this surgery. Dr. Fisher subsequently diagnosed "neuropathic pain post-traumatic right antecubital fossa." This condition appears to be quite similar to reflex sympathetic dystrophy. Claimant experiences significant pain, burning, and swelling in her right upper extremity. The extremity is exquisitely sensitive to light touch. In an effort to address claimant's symptoms, Dr. Fisher, a pain management specialist, has tried various patches, a topical gel, stellate ganglion blocks, freezing the upper extremity with nitrous oxide, various prescription medications, scar revision surgery, and finally the implantation of a spinal cord stimulator. Dr. Fisher has described this condition as quite painful. The injury is to claimant's dominant extremity. Dr. Fisher has opined that claimant is restricted to one-handed jobs. The right upper extremity is essentially useless for any meaningful activities.

Claimant tried to return to work for the employer but the employer eventually determined that it had no positions within claimant's physical restrictions. Claimant even looked for work at a daycare, but this employer would not hire her because she would not be able to physically take care of the children. Claimant is almost 40 years old and has a high school education. She has no special skills or training. Her employment history includes work at Bonanza as a salad bar attendant; at Callahan

Steakhouse as a greeter; at Children's Today, a daycare center; and with the employer, a factory setting. She has never done any office work or other sedentary type work where she would not have to use both extremities. The Full Commission has determined that claimant's healing period ended on November 29, 2000. As of May 1, 2002, Dr. Fisher reported that claimant "remains off work and disabled."

Based on the above evidence, I find that claimant has proven by a preponderance of the evidence that she does not have the capacity to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). Therefore, claimant is entitled to benefits for permanent total disability and the opinion of the Administrative Law Judge should be modified accordingly.

This legitimately injured worker has not been fairly compensated for her work-related injury. Accordingly, I must respectfully dissent.

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SHELBY W. TURNER, Commissioner