

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F006282

BRENDA VOYLES, EMPLOYEE	CLAIMANT
RONNIE DOWDY, INC., A SELF-INSURED EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 4, 2004

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

Claimant represented by HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE BILL WALMSLEY, Attorney at Law, Batesville, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Second Injury Fund appeals a decision of the Administrative Law Judge filed on August 11, 2003, awarding the claimant an additional 15% in wage-loss disability benefits over and above the 15% the Second Injury Fund accepted. Based upon our de novo of the record, we hereby reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury on May 18, 2000. The claimant sustained an injury to her back at L4-L5 when her truck hit a dip in the road in Kentucky causing the seat to bottom out. The claimant

continued to drive and reported low back pain to her dispatcher. She did not see a doctor until she completed the run and returned to Little Rock. The claimant ultimately came under the care of Dr. Anthony Russell who performed an L4-L5 decompressive laminectomy, foraminotomy and posterior lumbar fusion on August 8, 2000.

The evidence demonstrates that the claimant previously sustained a herniated nucleus pulposus at L4-L5 in 1996, and the claimant had a partial hemilaminectomy and discectomy on October 29, 1996. The claimant was able to return to her employment without any obvious problems after the October 1996 surgery. Thus, the Second Injury Fund was brought in to the case as a party.

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). 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 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.

However, so long as an employee, subsequent to his 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, 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. 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 his 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).

Under the Arkansas Workers' Compensation Law that existed prior to the passage of Act 796, an injured worker could also be classified as permanently and totally disabled under the "odd lot" doctrine even though the injured worker was not altogether incapacitated from work. An injured worker was said to fall into the "odd lot" category where the obvious severity of his injury combined with other factors such that the services he could perform were so limited in quality, dependability, or quantity that a reasonably stable market did not exist for those services even though the claimant was not completely incapacitated from work. See, Lewis v. Camelot, 35 Ark. App. 212, 816 S.W.2d 632 (1991). However, Act 796 eliminated the "odd-lot" doctrine as a consideration in a claim for permanent disability benefits under the Arkansas Workers' Compensation Commission. See, Ark. Code Ann. § 11-9-522(e) (Repl. 2002).

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.

The evidence demonstrates that the claimant was 46 years old at the time of the hearing. She graduated from high school and has completed certification to be an emergency medical technician and a licensed practical nurse. She has also completed the training necessary to obtain a commercial driver's license.

Doctor Russell stated in his report that the claimant's healing period ended in February of 2001 and he assigned a 15% permanent partial impairment. This 15% was accepted by the respondents and paid accordingly. Doctor Russell stated that most people could return to their pre-injury activities after a lumbar fusion and that the claimant's resumption to truck driving was strictly up to her. The claimant ultimately had to have surgery at L4-5 toward the T12-L1 level on January 22, 2002.

The evidence demonstrates that the claimant is not a credible witness. The claimant admitted that she lied about her log book. First of all, the claimant stated that she drove only for an hour after she sustained her injury. However, the log book demonstrates that the claimant

indicated that she drove the entire way to Arkansas. The claimant, in her brief, states that falsification of her log book was proof positive that she was really a credible person. Admission of fraudulent conduct does not rise to the level of being a credible witness. The argument was made by the claimant that "every truck driver does it." In addition, the claimant's attorney's brief states that the falsification of the log book is "essentially the blue collar equivalent of the ultimate lie, known in the legal profession as the 'billable hour'". However, it is of note that the claimant's husband had to drive her approximately 20 hours and that this was in violation of Department of Transportation regulations.

The claimant's attorney's characterization of the falsification of the log book as being the same as a falsification of the billable hour for the legal profession is troubling at best.

Furthermore, it is apparent that the claimant is not motivated to return to work. The claimant has applied for social security disability and her weekly compensation for workers' compensation and her current social security disability benefits amounts to approximately \$80.00 less per week than what she was making working full time and driving approximately 70 hours a week. Simply put, we cannot find

that the claimant is entitled the additional 15% in wage loss disability benefits. Accordingly, the decision of the Administrative Law Judge is hereby reversed.

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 dissent from the majority opinion reversing the Administrative Law Judge's award of 30% wage-loss disability to Claimant. I find that the award should be affirmed and adopted and that the majority's decision fails to adequately compensate Claimant.

Claimant, age 46, sustained an admittedly compensable injury to her back in May, 2000 when the truck she was driving hit a dip in the road. Claimant underwent surgery on her lumbar spine in August 2000. Claimant's educational and work experience includes certification as an EMT and LPN and commercial truck driving. Claimant testified that she continues to experience constant hip,

leg, and lower back pain that restricts her ability to sit, stand or walk for long periods and she cannot commercially drive due to side effects from pain medication.

While Dr. Anthony Russell did assign Claimant a 15% permanent impairment rating, he opined in May, 2002, that Claimant is "functionally unable to resume the activities that she did prior to surgery, and in fact if she did resume those activities, the risk to her would be significant" and restricted her physical activity as follows:

In the past I have been reluctant to recommend anything other than a return to a normal and active lifestyle in patients who have undergone lumbar spine surgery. However, in reviewing this particular case, I am concerned that Ms. Voyles' spine is such that if she continues in the activities that she has done in the past, she may ultimately require further surgery and as the number of operative procedures increases, the complexity as well as the inherent risks increase as well. I believe that although technically not "disabled", Ms. Voyles is functionally unable to resume the activities that she did prior to surgery, and in fact if she did resume those activities, the risk to her would be significant. I have encouraged her to explore other options that may be available to her. With a reasonable degree of medical certainty, I do believe that further surgical intervention is eminent if she is not able to make a drastic change in her lifestyle, and this would be something more significant than the generalized avoidance of 'lifting

greater than 25 pounds, bending, and stooping, twisting, pushing and pulling, etc.'

The wage-loss factor is the extent to which a compensable injury has effected the claimant's ability to earn a livelihood. 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) (Supp. 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).

Here, Claimant is no longer able to drive commercially and her ability to obtain patient care positions is significantly limited due to her physical limitations resulting from her compensable injury. The majority reasons that Claimant is not motivated to return to work because her current disability income is near the same amount as her pre-injury salary. However, the workers' compensation benefits that Claimant is currently receiving will be exhausted on or about October, 2004 and her

opportunity to obtain a position in her field will still be significantly limited in October, 2004 when the benefits are exhausted. In my opinion, it is evident that Claimant's education and prior experience qualify her for higher paying positions but that her opportunity to obtain such positions is significantly limited as a result of her compensable injury.

I also find that the majority's criticism of Claimant's credibility is unfounded because her testimony regarding her physical limitations resulting from her compensable injury is corroborated by the documents in the record and by Dr. Russell's written evaluation. Further, to the extent that the majority's criticism addresses Claimant's testimony regarding compensability of her injury, such criticism is irrelevant here because it is undisputed that Claimant sustained a compensable injury. In any event, the courts have clearly stated that the Commission cannot deny compensation simply because a claimant is untruthful. Instead, the lack of credibility must bear on a disputed issue to be relevant. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 224 (1984)). I, therefore, find that Claimant's testimony is supported by the record and is credible.

After considering Claimant's age, education, work experience, and physical impairment as a result of her compensable injury, I find that the 30% wage-loss disability award is abundantly fair and should be affirmed.

SHELBY W. TURNER, Commissioner