

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F101716

MARILYN HAMILTON,
EMPLOYEE

CLAIMANT

BOARS HEAD PROVISION COMPANY, INC.,
EMPLOYER

RESPONDENT

ZURICH AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MARCH 7, 2005

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE MICHAEL R. MAYTON,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on January 9, 2004.

The Administrative Law Judge entered the following
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. A preponderance of the credible evidence of record proves that the claimant has sustained wage-loss disability in excess of her eight percent (8%) permanent impairment.
4. The claimant has proven, by a preponderance of the evidence, that she is entitled to an overall permanent partial disability of twenty-five percent (25%) to the body as a whole, specifically, an eight percent (8%) permanent impairment, together with a seventeen percent (17%) wage-loss disability.
5. Respondents have controverted all permanent disability in excess of eight percent (8%) to the body as a whole.
6. Issues not addressed herein are specifically reserved.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct 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.

We therefore affirm the January 9, 2004 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. 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 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.

OLAN W. REEVES, Chairman

Commissioner Turner concurs.

CONCURRING OPINION

I concur that Claimant is entitled to wage-loss disability benefits in the amount of 17% in addition to undisputed permanent impairment that she has incurred as a result of her injury and subsequent cervical fusion and diskectomy. I write separately to address the dissenting opinion's argument that Dr. Engleberg's release and the FCE are reliable and that Claimant is not credible. I find that each of these arguments are adequately refuted by the record.

Claimant, age 45, is a high school graduate with no vocational or other specialized training. She has no office or clerical experience. Her work history is exclusively in manual labor including working at a cleaners, uniform company, and a sewing factory. Claimant incurred an admittedly compensable cervical spine injury. Dr. Engelberg, the neurosurgeon who performed the C4-5 diskectomy, allograft, fusion and plating on Claimant, assigned Claimant an 8% impairment rating as a result of her injury and cervical fusion and diskectomy.

Dr. Engelberg, wrote on June 19, 2001, that Claimant was three months out from surgery and "complains of

some neck, shoulder and arm pain." Nevertheless, he stated that "[w]e are going to give her a work release for July 2, 2001. What this indicates is that there is nothing more to be done surgically. There is nothing more I think that can be done for this lady. She needs to get together with the people where she works and discuss how they are going to proceed." (emphasis added). Claimant went to Dr. Kumar, the company doctor, on June 30, 2001, complaining of neck pain prior to her return to work on July 2, 2001.

On July 2, 2001, Claimant returned to work and resumed working as an 8600 machine operator without any restrictions despite her permanent impairment. The 8600 machine is an eight-chambered machine that seals lunch meat. Claimant was required to regularly lift each chamber, each of which weighed between 35 to 40 pounds, with one hand, apply a lubricant around the chambers with the other hand, and insert blades. Additionally, Claimant routinely lifted the meat, which varied in weight from 10 to 20 pounds depending on the type of meat being packaged. Claimant had to stand up during her entire shift. Because Dr. Engelberg released Claimant to return to work in this position three months post-surgery without any limitations or restrictions, she tried to operate the 8600 machine for a short time by

"taking a lot of pain medicine to try to stay in there, because it was too painful to keep working that job. Therefore, I took a lot of pain medicine," which included Oxycontin. Claimant testified that she took two Oxycontin pills each work day, one of which during her shift. She was never able to work an entire shift without pain medicine even though the medicine admittedly made her drowsy. Claimant's work day was seldomly limited to eight hours. She testified that she regularly worked one to two hours of overtime.

On July 20, 2001, Claimant returned to Dr. Kumar, the company doctor, complaining of neck pain. Dr. Kumar administered an injection into the maximum area of tenderness. He further noted "Follow up here prn and 1 mo. If not better will send her to Pain Clinic." Claimant was only able to continue working for two or three weeks after returning to work. She requested vacation time because she "was hurting a lot...[and] just had to do it." She did not return to work after that week of vacation and "had to resign because the pain was too bad to stay in that and work."

On August 6, 2001, Claimant returned to Dr. Kumar complaining of neck, arm and shoulder pain and headache on

the left side. Dr. Kumar's plan of treatment stated "Will get MRI of brain...[f]ollow up here prn and after MRI."

Claimant testified that she reported that she continued to have pain and difficulty working to Loretta Ruffett, who called a meeting with the company nurse and Claimant's supervisor. Claimant testified that after this meeting, she was sent for an FCE.

The MRI that Dr. Kumar recommended was never scheduled. Dr. Kumar did not follow through with these intended treatment plans. Instead, Claimant was apparently then sent for an FCE, which was conducted on August 10, 2001. In short, the FCE stated that Claimant was capable of work activities within the sedentary to light work range and the therapist opined that she exhibited self-limiting behavior during the exam. In response to the therapist's remarks, Claimant testified, "I did all I could to do what she wanted me to do, but I started hurting a lot, so I told her I couldn't do it no more."

Claimant testified that she took pain medicine following surgery because her "left arm was hurting and it would go all the way up into the back of [her] neck. It kept my left arm numb. It would just cause these neck and back pains, and I wouldn't have no use of my left hand."

Claimant testified that she felt that all of these symptoms were related to her compensable neck injury and that she did not take the medication to relieve any other types of pain.

Since being forced to resign from her employment with Respondent due to unresolved post-surgery pain caused by routine lifting of 10-35 pound weights, Claimant has worked for a trapping company, which required her to ride in a field in an all-terrain-vehicle and lift 6 lb. traps. She resigned from that job because of discomfort and pain related to her compensable injury. During the summer of 2002, she worked in North Dakota as a highway flagger for a private construction company while her husband was working there. She resigned from that job because it required too much standing that she could tolerate due to neck and back pain. She has not worked since that time and remains on medication, under the supervision of a doctor, including amitriptyline, oxycontin and a muscle relaxer. Claimant testified that she begins hurting after completing household tasks and can no longer maintain her home or care for her family as she did prior to the injury. Claimant also testified that she would like to return to work once her physical issues are resolved.

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. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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). 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).

The dissenting opinion, and Respondents on appeal, rely primarily on Dr. Engelberg's release and argue that Claimant is not entitled to wage-loss disability benefits. I find that Dr. Engelberg's release to return to work

without work restrictions is not credible for the following reasons.

I find that Dr. Engelberg failed to assess and assign work restrictions to Claimant and instead his notes, in essence, state that he was relying on Claimant and her employer to make those determinations. His June 19, 2002, office note state only that she was not a candidate for further surgery and appears to have left it up to Claimant's employer and the Claimant to assess how she could be implemented back into the workplace. Furthermore, the record shows that Dr. Engelberg released her to return to work without any work restrictions three months after Claimant's surgery even though he gave Claimant an 8% permanent impairment rating and noted that Claimant still complained of pain. Notably, Claimant reported to the therapist during the FCE that Dr. Engelberg released her to return to work because he stated that he was required to, by law, at three (3) months. Dr. Engelberg apparently thought that the law required that he release Claimant three months after surgery. Because Dr. Engelberg was under this mistaken knowledge and released Claimant, who had permanent impairment, without any restrictions at all, his release is not reliable. In sum, I find that Dr. Engleberg's "release"

is not reliable primarily because it contradicts logic that an injured worker, who was assigned a significant permanent impairment rating as a result of a neck injury, could be capable of returning to work in a manual labor position requiring consistent lifting of sizable weights without any lifting or work restrictions. Accordingly, I find that Dr. Engelberg's release is not credible.

Regarding the FCE, I find that it was prematurely conducted and, not surprisingly, unreliable due to Claimant's unwillingness to further injure herself after recently enduring such a trying and painful experience while attempting to return to work without any restrictions. The FCE was taken on August 10, 2001, just days after Dr. Kumar last examined Claimant and recommended an MRI and a few weeks after he recommended referral to a pain management clinic if the pain did not resolve. Neither of Dr. Kumar's recommendations were carried out. Instead, Claimant was sent for an FCE evaluation. In my opinion, this seemingly abrupt decision to send Claimant for an FCE is very surprising in light of the fact that Dr. Kumar had clearly opined that Claimant was in need of additional medical treatment and evaluation. I find, therefore, that any

hesitancy on Claimant's part noted in the FCE is reasonable under the circumstances.

Respondents argue that Claimant's credibility is suspect. I find that these allegations are unfounded. The record, for example, states that Claimant described the C4-5 diskectomy, allograft, fusion and plating procedure performed by Dr. Engelberg as "He removed two or three disks off my neck, and in removing those disks off my neck, he said he knocked a cision in my spine." She also states that the surgery was helpful because it "stopped me from being paralyzed neck down." While these are obvious blunders of medical terminology and represent misunderstandings of her condition, it is no reason to find that Claimant's testimony is not credible. Further, Claimant voluntarily corrected an answer given in her previous deposition testimony, acknowledged that she did not understand the question during the deposition, and admitted that she was not trying to be deceitful. I find, therefore, that Claimant gave credible testimony.

After reviewing the totality of Claimant's physical impairment and work environment, I find that reliance on Dr. Engelberg's release is not well-founded. Additionally, I find that the FCE is not entitled to great

weight because it was conducted at a time when Claimant was obviously still experiencing significant post-surgery pain that had very recently been aggravated by attempting to meet the demands of her work without any work restrictions.

After considering that Claimant has an 8% permanent impairment rating as a result of a cervical spine injury, has a minimum education, is 45 years old, and her only work experience is in manual labor positions, I find that the award of 17% wage-loss disability benefits is supported by the record. Therefore, I also find that the Administrative Law Judge's opinion should be affirmed.

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. A carefully conducted de novo review of the record as a whole reveals that the claimant has failed to prove by a preponderance of the credible evidence that she sustained a permanent partial disability rating of seventeen percent

(17%) above the eight percent (8%) impairment assigned by Dr. Engelberg. Therefore, I find that the decision should be reversed and wage-loss benefits to the claimant should be denied.

_____The claimant was employed with the respondent employer as a machine operator at the time of her compensable cervical spine injury on August 23, 2000. Born in 1959, the claimant was 44 years old at the time of her hearing in December, 2003. The claimant stated that, until her accident in 2000, she had worked most of her adult life in manual labor positions in factory-type settings, i.e, dry cleaners, sewing factory, & a uniform company. At the time of her compensable injury, the claimant had been employed with the respondent employer for approximately four years. Of those four years, she had been a machine operator for approximately two. The claimant testified that her job duties as a machine operator for the respondent/employer required frequent lifting up to ten (10) pounds, occasional lifting up to thirty-five (35) pounds, substantial standing, and the extensive use of her upper extremities. The claimant stated that her educational background consisted of a high school diploma.

The record is devoid of medical documentation from the date of the claimant's injury until June 2, 2001. Some history of the claimant's medical treatment is found within medical documents contained in the record and some is provided by the claimant. For example, the claimant testified that, upon referral by Dr. Sudhir Kumar, Dr. Jerry Engelberg was her primary treating subsequent to her compensable injury. In a clinic note dated June 19, 2001, Dr. Engelberg summarized the claimant's condition and treatment during that time as follows:

This is a 41 y/o lady that was seen after a workman's comp injury in September 2000. She was seen January 19, 2001. She had neck, right shoulder and arm pain. She was managed conservatively. MRI showed a central herniated disc at cervical 4 and a small one at cervical 5. On April 2, 2001, the patient underwent anterior cervical 4 and 5 discectomy, allograft, fusion and plating. She is 3 months out now. Her post-operative film looks quite good. She complains of some neck pain, shoulder and arm, pain. Her exam is unremarkable. She has no motor or sensory changes. I have told her that she could take the collar off. We are going to give her a work release for July 2, 2001. What this indicates is that there is nothing more to be done surgically. There is nothing more I can think of to be done for this lady. She needs to get together with the people where she works and discuss how they are going to proceed.

After she was released without restrictions to return to work in July of 2001, the claimant testified that she returned to work for the respondent employer in her former capacity as a machine operator. The claimant further testified that she resigned her job in August of 2001, some three weeks after having returned, because, "it was too painful to keep working on that job." The claimant admitted that she was taking "a lot of pain medicine" while attempting to work for the respondent/employer. Specifically, she stated that she was taking one OxyContin tablet during her shift, and that this medication kept her drowsy.

The claimant testified that she reported her problems to her employer's HR manager, Ms. Loretta Ruffett. According to the claimant, Ms. Ruffett informed the company nurse and the claimant's supervisor of the problems that the claimant was having, and Ms. Ruffett indicated that she would contact the company physician. The claimant claimed that her doctor was not contacted, but that she was sent for a functional capacity test instead.

An FCE was conducted on August 10, 2001. The report of this study indicates that the claimant was

referred by Dr. Kumar, and the findings of this study include the following conclusions:

Ms. Hamilton was found to be cooperative and compliant (sic) for the most part throughout testing. However, her true physical/functional capacities of strength and overall mobility were unable to be determined as a result of her submaximal efforts and declining to undergo all testing to its entirety. Ms. Hamilton's psychometric test results are reflective of an individual with poor psychometrics, high pain focused tendencies, and perceives herself as having a severe crippling disability. Ms. Hamilton's subjective complaints were found to be disproportionate to any objective findings.

When asked by the examining therapist specifically what job demands she felt she was unable to perform, the claimant stated "standing there. . . ."

The therapist reported that when the claimant was asked about her goals, she "became emotional and began to cry" stating that she had an appointment for family counseling in order to "get [her]self together." In addition, the claimant did not report any work related goals to the therapist, and when asked if she was interested in returning to work, the claimant stated "no, the way these people have treated me".

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). 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. Emerson Electric v. Gaston, supra. 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). In considering factors that may affect an employee's future earning capacity, the Commission may consider 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.

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).

Finally, 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).

The claimant's primary treating physician, Dr. Engelberg, released her to return to work without restrictions on July 2, 2001. The claimant returned to work for the respondent employer in her previous position. Thereafter, the claimant voluntarily resigned her employment with the respondent some three weeks later. She testified that she earned \$10.05 per hour while employed with the respondent employer. Subsequent to her employment with the

respondent employer, the claimant worked for about two weeks for her husband's employer as a "flagger" (someone who directs traffic) for \$8.95 per hour. The claimant also worked briefly for a trapping company as a "tracker" (someone who rides around on an ATV checking animal traps), for \$7.00 per hour. The claimant admitted that she has not sought employment since the summer of 2002. The claimant stated that she would like to return to work, possibly in a daycare, but she admitted that she has no immediate plans to pursue employment. Specifically she stated, "When I get my back and my neck straight, yeah, I will go to work." The claimant attributed part of her inability to return to work to problems that she is having with her back. The claimant agreed, however, that her back is not an issue in this claim.

Results of the FCE study conducted in August of 2001 indicated an exaggeration by the claimant of her physical symptoms as compared to her physiological findings, coupled with an unwillingness to return to work at that time. For example, under the heading Musculoskeletal Evaluation on page four of the FCE report, the examining therapist stated, "AROM of the bilateral LE's revealed exaggerated complaints and mannerisms during testing." Under

Dynamic Strengths/Materials Handling Capacities on page five of the report, the therapist noted, "As a result of Ms. Hamilton's over-exaggerated behavior and poor body mechanics, she was stopped by this therapist from performing at 20 pounds on an occasional basis." The therapist added, "However, it is this therapist's opinion that Ms. Hamilton is capable of performing at or above the 20 pounds if she so desires to." The therapist summarized the results of claimant's FCE study as follows:

In summary, due to Ms. Hamilton's high pain focused behaviors and poor psychometrics, we are uncertain of her overall motives and/or desires to hold onto her perceived disability. Her psychometric test results would be reflective of an individual who perceives herself as having a severe crippling type disability. At this time, we do not foresee that additional therapeutic efforts would be of any greater impact or benefit to Ms. Hamilton as a result of her high pain focused behaviors and self-limiting tendencies during our testing. In addition, Ms. Hamilton has self-limited the activities in this functional capacity evaluation to the extent that the data recorded from subjective and objective measures could not be used to conclude any definite levels of physical capabilities. However, it is this therapist's opinion that Ms. Hamilton could display much greater physical capacities than she was willing to do so.

Moreover, the claimant's testimony during her hearing, as well as statements she has made during her treatment, tend to support the therapist's above-stated conclusions. For example, the claimant insisted in her testimony that the surgery performed on her neck prevented her from being "paralyzed [from] the neck down." The claimant made this same statement to the therapist during her FCE study. However, nothing in the medical record supports the validity of this statement. In addition, the claimant stated to the therapist conducting the FCE study that Dr. Engelberg released her to return to work because "he had to by law at 3 months." Again, there is no evidence in the record to support this statement.

The claimant has continued to be seen by doctors at UAMS and the Lee County Co-Op Clinic for complaints of pain in her neck, arms, back, and legs. An MRI of the claimant's lumbar spine conducted on July 24, 2002, revealed central disc herniation and bilateral foraminal narrowing at L5-S1. A subsequent CT scan and MRI of the claimant's cervical spine revealed minor degenerative changes at the site of the claimant's cervical fusion, but no "definite residual abnormality at the postoperative levels," and "no abnormalities of the [spinal] cord." These findings indicate

that the claimant's cervical injury has healed normally, and that a herniated lumbar disc is the primary source of her current pain.

Consistent throughout the claimant's medical records is an indication of the claimant's pain drug seeking behavior. As seen in the claimant's progress notes from Lee County Co-Op, beginning in April of 2002, through September of 2002, and UAMS outpatient clinic notes from March 2003, through May of 2003, the claimant has consistently requested medications for pain, primarily in her back. Pain medications recently prescribed to the claimant include Hydrocodone and Methadone.

Based upon the totality of the evidence presented in this claim, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage-loss benefits for the following reasons. First, although she was assigned a permanent impairment rating, thus satisfying that statutory requirement, the claimant returned to work with her former employer in the same position at the same rate of pay after she was released by her primary physician to unrestricted duty. Second, after she quit her former job, the claimant found other employment. Third, by her own admission, the claimant has

not sought employment since the summer of 2002, and does not intend to seek employment until her back and neck problems are resolved. Moreover, it should be noted that the claimant's physical problems at this time appear from the medical records to stem primarily from a herniated disc in the claimant's lumbar spine, rather than from her compensable cervical spine injury. Whatever the true source of her present pain, the claimant displays a disinterest and lack of motivation to return to employment at this time. Fourth, the claimant's FCE study revealed that the claimant's subjective complaints are disproportionate to objective medical findings. In addition, this study showed that the claimant has high pain focused tendencies, she has self-limiting tendencies, and she perceives herself as having a severe crippling disability. In summary, the claimant's true functional capacity cannot be properly assessed due to the claimant's unwillingness to put forth a full effort. Finally, the claimant is in her mid forties, she has a high school education, and transferable job skills. It is more likely than not that the claimant could obtain employment at this time, but she refuses to even try.

Therefore, based upon the above and foregoing, I find that the claimant has failed to prove by a

preponderance of the evidence that she sustained a decrease in her wage earning capacity. Accordingly, I respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner