

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F004667

ETTA M. ODOM, EMPLOYEE	CLAIMANT
BLYTHEVILLE SCHOOL DISTRICT, A SELF-INSURED EMPLOYER	RESPONDENT
ASBA WC TRUST, CARRIER RISK MANAGEMENT RESOURCES, INC., TPA	RESPONDENT

OPINION FILED NOVEMBER 8, 2005

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

Claimant represented by HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE DAVID C. JONES, Attorney
at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision filed by an Administrative Law Judge on January 31, 2005. The sole issue on appeal is whether the claimant has proven by a preponderance of the evidence that she is entitled to wage loss benefits. In his Opinion, the Administrative Law Judge awarded the claimant 38% wage loss disability benefits, above her 12% anatomical impairment rating, which

has been accepted by the respondent school district. Our carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she is entitled to 38% wage loss disability benefits above her 12% anatomical impairment rating, as accepted by the respondents.

Therefore, the decision of the Administrative Law Judge is hereby reversed and this claim for wage loss disability is denied and dismissed.

The compensability of the claimant's left shoulder injury is undisputed. On April 14, 2000, the claimant, who was employed as a school bus driver for the respondent employer, had driven a group of students to Little Rock on a field trip. While exiting the school bus, the claimant tripped and fell, resulting in a dislocated left shoulder and torn left rotator cuff. The claimant received emergency medical treatment for her injury at UAMS. Upon returning to her home town of Blytheville, the claimant came under the care and treatment of orthopedic surgeon, Dr. Joseph Yoa. Eventually, concluding that the claimant's injury would

require surgery, Dr. Yoa referred the claimant to Little Rock orthopedic surgeon, Dr. David Collins, for a second opinion.

On July 7, 2000, Dr. Yoa performed surgery on the claimant's left shoulder to repair her torn rotator cuff. The claimant continued to complain of pain and stiffness in her left shoulder after this procedure. As the result of an MRI taken of the claimant's injured area on October 26, 2000, Dr. Yoa referred the claimant back to Dr. Collins. On January 29, 2001, Dr. Collins performed a second surgical procedure on the claimant's left shoulder. On April 25, 2001, Dr. Collins released the claimant to return to work without restrictions, and he assigned her with an impairment rating of 18% to the upper extremity, and 11% impairment to the body as a whole. On April 27, 2001, the claimant underwent a DOT exam and was found to be physically fit for any type of employment. Thereafter, the claimant continued to discharge her employment duties with the respondent employer.

The claimant continued to complain of residuals from her shoulder injury. On August 24, 2001, the claimant was examined for her complaints by Dr. James Russell. Suspecting that she might be having "some kind of TIA", Dr. Russell referred the claimant back to Dr. Yoa for an ultrasound of her carotids. In addition, the claimant testified that she experienced a "mini-stroke" sometime in August of 2001 that affected the left side of her body.

On June 25, 2002, the claimant underwent an MRI arthrogram which revealed evidence of a recurrent rotator cuff tear. On July 19, 2002, the claimant underwent a second DOT exam under the direction of Dr. Collins. Other than the claimant's left rotator cuff surgery, this exam showed no significant physical findings.

In August of 2002, the claimant returned to work driving a bus for the respondent employer under a renewed contract. On the first day of school, the claimant completed her morning bus route, but she failed to return to work that afternoon. Notwithstanding attempts by the respondent employer to communicate with the claimant concerning her

intentions, the claimant failed to return to work for the respondent employer. When the claimant failed to return an intent to work form for the following school year, her employment contract was not renewed.

The claimant continued under the care of Dr. Yoa until June of 2003, when he recommended that she return to Dr. Collins for consideration of rotator cuff repair. At that time, Dr. Yoa authored a "Work Status Report" noting that the claimant was unable to return to work due to a recurrent left shoulder rotator cuff tear. On October 7, 2003, Dr. Collins performed the claimant's third rotator repair surgery. On February 23, 2004, Dr. Collins reported that the claimant had made "good progress" in healing from this third procedure. As of April 19, 2004, Dr. Collins noted that the claimant's continuing complaints of pain and popping in her left shoulder were attributable to subcromial scar tissue. Dr. Collins released the claimant to return to her former type employment as a bus driver at that time. In addition, Dr. Collins increased the claimant's physical impairment rating to 20% for her upper extremity and to 12%

for the body as a whole. In spite of Dr. Collins's opinion that the claimant could return to driving a bus, on July 9, 2004, Dr. Yoa opined that the claimant could not return to driving a bus due to rotator cuff syndrome. The claimant applied for unemployment benefits on several occasions during the course of her medical treatment, and she was eventually approved for social security disability benefits.

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). Furthermore, 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. More specifically, 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.

So long as an employee, subsequent to 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 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).

After her release from Dr. Collins in April of 2001, the claimant returned to her previous employment with the respondent employer. The claimant finished out her contract for that school year, and she renewed her contract with the district for the next year. Moreover, the testimony of the claimant's co-worker in the maintenance and transportation department, Ms. Carol Shannon, confirms that the claimant even drove extra routes after her return to work for the respondent employer. Also testifying was Mr. Merrill Burnett, who in his capacity as the director of maintenance and transportation for the respondent employer was the claimant's supervisor. Mr. Merrill offered corroborating testimony regarding the claimant having taken on extra routes after her return to work following her surgery. In addition, commencing in June or July of 2002, the claimant testified that she drove a van for the local

EOC head start program. Although the claimant renewed her contract with the respondent employer for the 2002-2003 school year, she only fulfilled one-half day of that contractual agreement. However, the claimant continued to drive for the EOC and discharge other duties for that employer until November of 2002.

Mr. Merrill testified regarding the claimant's failure to return to work for the respondent employer as follows:

Q. And please tell us basically what happened. Ms. Jenkins has already testified as to the contract for 2002-2003. Is that correct? She [the claimant] had a contract?

A. Yes, sir.

Q. And that contract, I believe, started in August of 2002?

A. Yes, sir, those contracts are issued to all bus drivers for the exact number of days that the students are going to school. So if it was 187 days that year, she would receive a contract for that school year for 187 days.

Q. Okay. What did you do, what happened when she came back in August of 2002?

A. She came back that morning, which was the first day of school, and went through her routes and came back and never showed up again for the afternoon route. Bill [the district's bus mechanic] said that she had called in.

Upon further questioning, Mr. Merrill testified that he made several unsuccessful attempts to contact the claimant by phone that day in order to "find out what was the matter." Under the circumstances, Mr. Merrill arranged for a substitute to take the claimant's route that afternoon. Mr. Merrill stated that on the following morning the claimant again failed to come to work, and that he was informed by another driver that she was seen that same morning driving a van for the EOC. Mr. Merrill explained that upon learning that she was seen in the EOC van, he immediately drove to the EOC facility in order to speak with the claimant. Mr. Merrill eventually located the claimant "sitting in a chair in the dark". The claimant was apparently supervising head start students during their nap time. Upon speaking with the claimant, Mr. Merrill arranged for a meeting between the two that afternoon. The claimant

did not report for their afternoon meeting. In this regard, Mr. Merrill testified as follows:

Well, I left [the EOC] then, expecting her to come to my office at one before bus time, and we could get everything straightened out. And she never showed up. So we had to call in another sub again and take the run that day. And that morning, after the buses already left to go pick up their students, she came to me around seven o'clock and wanted to talk, and of course, this is an extremely busy time of the morning, second day of school. ...

Mr. Merrill instructed the claimant to return at nine o'clock, which she did. According to Mr. Merrill, the claimant explained to him that she was trying to earn extra money, and that she was currently under contract with the EOC starting at six-thirty a.m. each morning. The claimant was required by contract to start work for the respondent employer at seven o'clock each morning. Due to the obvious conflict in schedules, Mr. Merrill explained to the claimant that she would have to make a choice between the two employers. In the meantime, Mr. Merrill suspended the claimant from driving for the respondent employer.

Mr. Merrill insisted, however, that the claimant was not fired.

A. And so I put someone else in her place. I didn't fire her. All I could do was suspend her, get somebody else in her place. It's my responsibility of getting the kids to and from school.

Q. And it was her responsibility to return to work if she wanted to fulfill her contract at that point?

A. If she would give up her job [at the EOC], she could come right back.

Mr. Merrill stated that the claimant was not replaced during the 2002-2003 school year, thus "giving her an opportunity to come back". Ms. Bernice Jenkins testified that she is the primary contact person for all of the respondent employer's workers' compensation claims. Ms. Jenkins testified that the claimant failed to contact her supervisor concerning her work status, and that she failed to return her intent to return form that was mailed to her by the district in the spring of 2003. Therefore, the respondent employer did not renew the claimant's contract for the 2003-2004 school year.

Prior to her bus driving job with the respondent employer, the majority of the claimant's work experience was factory work. The claimant testified that she began driving a school bus for the respondent employer in December of 1991. The claimant stated that she worked five hours a day for the school district, and that only two of those hours were spent driving a bus. The claimant testified that she spent the rest of her time waiting for kids in the gym. In addition to her bus driving job, the claimant worked briefly on the weekends as a 911 operator for the Blytheville Police Department.

The claimant testified that after receiving her GED in 1975, she completed training to become a hospital ward clerk. The claimant also stated that she "went through training" when she was hired to drive a school bus in 1991. The claimant worked continuously as a school bus driver up until the date of her compensable injury.

The claimant's employment with the EOC commenced in the summer of 2002, a little over a year following her second surgery. The claimant's employment duties for the EOC

included transporting people to and from doctor's appointments. The record reveals that the claimant left her employment with the EOC in November of 2002, and she has not actively sought employment since that time. Furthermore, the claimant conceded during cross examination that her employment with the EOC ended, rather than her having quit her position there due to her physical problems, as she had previously asserted.

Finally, the claimant first applied for unemployment benefits in the summer of 2002, but was denied those benefits because she was simply between her two contract periods for the respondent employer, rather than being actually unemployed. On her application for unemployment benefits, the claimant in no way asserted that she could not work due to any type of physical restrictions. Instead, the claimant wrote that she was seeking those benefits because the "school term ended." On her November 18, 2002, application for unemployment benefits, the claimant indicated that she could begin work immediately, which was in contradiction to her testimony

that she was physically unable to work during that period of time. The claimant sought unemployment benefits again in April of 2003, once more indicating on her application that she was available to work without limitations. The record reveals that the claimant received unemployment benefits from November 23, 2002, through March 29, 2003, with those benefits being reinstated on April 12, 2003, and paid through January 3, 2004, which were all times during which the claimant testified she was physically unable to work.

The claimant testified that she continues to have pain and weakness in her left shoulder and wrist on a constant basis. The claimant testified extensively regarding her present limitations of the use of her left arm and shoulder due to her ongoing symptoms. The claimant stated that she is now unable to work because of those limitations, and she admitted that she has not actively sought any type of employment since she left her employment with the EOC. The claimant, who currently lives in Blytheville, testified that she drives herself around, including to her doctor's

appointments in Little Rock. The claimant was 56 years old at the time of her hearing.

Taking into consideration the claimant's age, work experience, and level of education, it might appear that she has sustained some degree of wage loss due to her compensable shoulder injury. However, taking into consideration such other factors as the claimant's motivation (or lack thereof) to return to work and the medical evidence, wage loss disability should be denied in this claim. First, the claimant admitted that she applied for unemployment after she left the EOC, but that she was denied those benefits because she was still under contract with the respondent employer. Furthermore, the claimant had been released by her doctor to return to work, and the school district stood ready to return her to work. The respondent employer even went so far as to send the claimant an intent to return form for the next school term, after she had failed to fulfill her contractual obligation for the current school year. Although the claimant failed to return to work for the district, she continued to drive a bus (or

van) for the EOC until her contract with them expired. Furthermore, the claimant admitted that she has not sought employment in a sedentary position, such as a ward clerk for a hospital, although there is nothing contained within the medical record which restricts her from doing so. In spite of her ongoing symptoms, which are no doubt problematic for her at times, the claimant has either failed or refused to explore employment opportunities for which she may be well suited. And, even if Dr. Yoa's opinion that the claimant cannot return to driving a school bus for what amounts to two hours a day is accurate, a finding that we do not specifically make, the claimant's work activities have not been medically restricted otherwise.

Therefore, and for the above stated reasons, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss disability benefits in excess of her 12% physical impairment rating. The decision of the Administrative Law Judge is hereby reversed, and this claim for wage loss benefits is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The respondent appeals the decision of the Administrative Law Judge, finding that she is entitled to receive wage loss benefits in the amount of 38% over the previously accepted 12% anatomical impairment rating accepted by the respondents. The Majority now rejects that finding and declines to award the claimant any wage loss benefits in excess of her previously accepted 12% anatomical impairment rating.

The Majority's decision is primarily based on the finding that the claimant could have returned to work after sustaining her compensable injury, but simply failed to due

to lack of motivation. I find that this argument ignores the evidence indicating that the claimant attempted to return to work after receiving the injury; but was simply unable to due to physical restrictions caused by her compensable injury. I further find that even if the claimant has no motivation to return to work, that should not serve as a complete bar for receiving wage loss benefits. It is undisputed that the claimant now has a limited range of motion that was caused by her compensable injury. It is also undisputed that she has to take pain medication in association with that injury. Furthermore, the medical evidence indicates that the claimant's own treating physician has indicated that the claimant is unable to continue working as a driver. Accordingly, I find that the claimant should have received wage loss benefits in excess of her anatomical rating. For these reasons, I respectfully dissent.

The claimant sustained her admittedly compensable injury on April 14, 2000, while working as a bus driver for the respondent. The injury occurred when the claimant

tripped and fell. As a result of the accident, she tripped and fell, which resulted in her dislocating her left shoulder and tearing the rotator cuff in her left shoulder. On July 7, 2000, Dr. Yao performed surgery to repair the rotator cuff tear.

On October 2, 2000 the claimant returned to Dr. Yao complaining of left shoulder pain. On October 26, 2000, another MRI was performed. The claimant was then directed by the respondents to be treated by Dr. Collins. On January 29, 2001 Dr. Collins performed surgery on the claimant. His operative diagnosis was:

1. FAILED ROTATOR CUFF REPAIR, LEFT.
2. PAINFUL STIFF SHOULDER FOLLOWING ROTATOR CUFF REPAIR.
3. RULE OUT FULL-THICKNESS ROTATOR CUFF TEAR.

A doctor's note from Dr. Collins, dated April 25, 2001, indicates the claimant had, "adhesiolysis performed and superficial cuff repairing." He also indicated there was "minimal crepitation" and assigned an impairment rating. He further indicated that she could return to work as of that date. However, a doctor's note from the same day indicates

she was released to return to work as of April 30, 2001. After the release was issued, the claimant returned to work for the respondent.

On August 24, 2001 the claimant was treated for pain in her left shoulder. The doctor referred her to Dr. Yao. It was subsequently discovered that the claimant had suffered from a "mini-stroke". The claimant continued to seek treatment for having a painful left shoulder.

On June 10, 2002, the claimant applied for unemployment benefits. On her application for benefits, she indicated that she could begin work immediately and that she had no disabilities that limited her ability to work.

On June 25, 2002 the claimant underwent another MRI on her left shoulder. In August of 2002, the claimant returned to work for the employer. She was placed in a bus with a hand brake, which was difficult to operate in light of her injury. The claimant did not return to work. The respondent contacted her and learned that she was working for EOC. The claimant did not return to work for the respondent. On September 23, 2002 Dr. Collins treated the

claimant for her shoulder. At that time the claimant requested to be treated by Dr. Yao.

The claimant worked as a driver for another company named EOC in the fall of 2002. The claimant filed another application for unemployment benefits on November 11, 2002. On her application, she indicated "NO" to the question, "Can you begin work immediately." She responded "Yes" to the question, "Do you have any disabilities that limit your ability to work."

On February 20, 2003 the claimant reported to Dr. Yao that she had quit work because of her shoulder. On the same date the claimant was instructed to do "ROM exercises". The note also references that the claimant reported another doctor told her she might need an implant or surgery if the pain was severe enough.

On June 19, 2003, Dr. Yao indicated that the claimant should see Dr. Collins for consideration of surgery to repair her rotator cuff tear. On the same date Dr. Yao indicated that the claimant was unable to work due to her rotator cuff tear.

The claimant applied for unemployment benefits on April 1, 2003. The claimant indicated that she was able to begin working immediately. However, she indicated "Yes" to the question, "Do you have any disabilities that limit your ability to work."

On February 23, 2004, Dr. Collins indicated that the claimant still had "very slight crepitation" and that, "it is not a surprise that there should be some slightly noticeable crepitation." He further indicated that he anticipated releasing her to return to work as a driver in two months. On April 9, 2004, Dr. Collins increased the claimant's rating from 11% to 12% and indicated that the claimant would be able to return to work. However, he also indicated that the claimant might need surgery in the future to address "painful crepitation".

On June 21, 2004, Dr. Collins treated the claimant for having a painful shoulder. He indicated that he, "would consider her a candidate for operative treatment".

Dr. Yao's medical report from July 9, 2004 indicates that the MRI showed evidence of a rotator cuff

tear and that the best evidence would be shown at surgery. A doctor's note from July 16, 2004 indicates that Dr. Yao did not believe that the claimant would be able to return to her previous employment as a bus driver. The respondent refused payment of the fourth surgery. As a result, at the time of the hearing, the claimant had not submitted to the surgery.

The sole issue on appeal is whether the claimant is entitled to wage loss benefits in the amount of 38%. This 38% is in addition to the 12% anatomical rating that was previously accepted as compensable by the respondent and amounts to a 50% permanent partial disability rating. The respondent argues that the claimant lacks the motivation to return to work, thus impeding the Commission's ability to assess her entitlement to wage loss benefits. I find that the claimant does not lack the motivation to return to work, and that when reviewing her previous work experience, age, and all other factors, she should be entitled to the wage-loss benefits previously awarded by the Administrative Law Judge. I further find that even if the Majority is correct in its finding that the claimant lacks motivation to return

to work, that should not serve as a complete bar to her receiving wage loss benefits, particularly in light of her condition, her need for additional treatment, and her ongoing pain.

The Majority argues that the claimant's physical impairment did not render her unable to return to work and that she simply lacked the motivation to return to work. In supporting this argument, the Majority argues that the claimant was able to return to work after each of her surgeries and that she essentially abandoned her job.

First, I note that these arguments revolve around the claimant's return to work or failure to return to work prior to June 2004, when Dr. Collins indicated the claimant would need additional surgery. While the evidence indicates that the claimant was able to return to work after her first two injuries, she continued to have additional problems due to her admittedly compensable injury. Ultimately those problems rendered her unable to continue working as a bus driver. Accordingly, in my opinion, when determining the claimant's wage loss entitlement, the Commission should look

at her present condition and ability to work rather than her abilities after having her first or second surgery.

Furthermore, I find that even when viewing the claimant's prior behavior, she did not lack the motivation to return to work. It is undisputed that the claimant returned to work for the respondent after her second surgery in 2001. In fact, the claimant actually drove extra routes for the employer.

The Majority and the respondent argue that because the claimant quit her job in order to accept additional hours with the EOC, she abandoned her job. First, I note that this behavior shows ambition on the part of the claimant, rather than a lack of motivation to work. Secondly, the claimant testified that she quit her job because she was unable to operate the respondent's bus without pain. The claimant further testified that she was placed on a "rough" route for the 2002-2003 school year and that she worked on an older bus with hand brakes that were difficult to operate. The claimant also indicated that she went to work at EOC but ultimately that job ended, in part

due to her difficulty working due to her compensable injury. As the claimant attempted to return to work in two different positions after having surgery, I find that she was motivated to return to work, but that her medical condition prevented her from being successful.

The Majority also asserts that because the claimant applied for unemployment benefits, she lacks the motivation to return to work. They also argue that the claimant was dishonest on her applications for unemployment benefits. Specifically, they and the respondent argue that the claimant asserted that she was able to work when she was not. I find that when looking at the various applications for unemployment benefits, the claimant was honest with regard to her abilities. Accordingly, any error made on the part of the Employment Security Department in awarding the claimant unemployment benefits when she was not entitled was due to an error by the Employment Security Department, rather than due to the claimant's dishonesty. Likewise, the Commission should not penalize the claimant for any errors made by the Employment Security Department.

The claimant filed her initial claim for unemployment benefits on June 10, 2002. On the Application for Unemployment Insurance Benefits, the claimant indicated that her separation occurred because, "School Term Ended." She indicated that she could return to work immediately and that she had no disabilities limiting her ability to work. This application corresponds with the claimant's testimony that she was able to work at that time and is corroborated by the fact that she did attempt to return to work. Though the claimant did apply for unemployment benefits, she in no way misrepresented any information, nor is there any evidence that she intended to draw benefits instead of returning to work. In fact, on the Claimant's Worksheet, she disclosed that she had signed a "letter of intent", indicating that she did intend to return to work at the start of the school year. In my opinion, she should not be penalized for attempting to ascertain if she was eligible for unemployment benefits, particularly since it appears she intended to return to work in accordance with her contract and in fact, did return to work.

The claimant next filed for unemployment benefits on November 18, 2002. At that time the claimant indicated that she had separated due to being "laid off." This is corroborated by a letter sent by her former employer. The answers to the questions on the application indicate that the claimant did in fact disclose her disabilities. In response to the question, "Can you begin work immediately?", the claimant checked "No". The claimant also responded "No" to the question "Can you work Full Time?". She also answered "Yes" to the question, "Do you have any disabilities that limit your ability to work?".

The claimant filed another unemployment claim on April 1, 2003. The claimant indicated that she could begin to work immediately and that she could work full time. However, in response to the question, "Do you have any disabilities that limit your ability to work?", the claimant circled, "Yes". Accordingly, this indicates that the claimant was honest with regard to her medical condition. Though the respondent points to the fact that the claimant indicated that she could return to work, I note that the

application for unemployment benefits does not ask if the person could return to their former profession, but rather if they are able to work. Accordingly, even if the applicant could not return to their prior profession, they could still be able to be gainfully employed in another capacity. Additionally, I find that wage loss benefits are designed to compensate injured workers that might have difficulty returning to the workforce making the same wages as they had at the time of the injury. Accordingly, the claimant's admission that she could work at the time she filed the claim is not indicative that she would be able to return to the workforce in another profession and make equal or higher wages than that she was earning at the time of her injury.

The Majority next contends that the claimant should not be entitled to wage loss benefits because there is inadequate medical evidence to support a finding that she was unable to return to work as a bus driver. They also rely on this argument to determine the claimant was unmotivated to return to work. In my opinion, this argument overlooks the fact that Dr. Collins, who released the claimant to

return to work as a bus driver in April 2004, later indicated that the claimant would need to have surgery on her rotator cuff in order to treat, "painful crepitation." This indicates the claimant was unable to return to work.

Additionally, the medical report from July 9, 2004 from Dr. Yao, indicates the claimant's MRI showed evidence of a rotator cuff tear and that the claimant needed surgery. A doctor's note dated July 16, 2004, indicates that Dr. Yao did not believe the claimant would be able to return to work as a bus driver. As Dr. Yao's note is the most current medical note in the record, I find it to be more persuasive than the prior opinions of Dr. Collins.

The medical records and the claimant's own testimony indicate that the claimant has ongoing medical conditions, directly related to her admittedly compensable injury that make it unlikely that she will be able to return to work as a bus driver.

While the Majority argues that even if the claimant is unable to return to work as a bus driver, she could perform sedentary type work, I note that the

claimant's prior work history consists of factory work, requiring her to lift over 50 pounds, as a stocker, and of answering 911 calls. Though the claimant apparently took a course to become a ward clerk, she has never worked as a ward clerk. Furthermore, the record also reflects that the claimant had a stroke in 2001. The claimant testified that as a result, she has weakness and "freezes up" on her left side. Additionally, the claimant said that she was unable to do heavy lifting and that she was in persistent pain. When considering that the claimant is 56 years old, has an educational background of having a GED, and cannot use one entire arm without experiencing pain, it becomes apparent that the claimant will likely have great difficulty in finding future work, even if it is sedentary in nature.

Even if one believes that the claimant is not motivated to return to work, a finding which I do not make, that should not act as a complete bar to her receiving benefits. The Courts and this Commission have consistently held that even in situations where a claimant is not motivated to return to work, they are still entitled to

receive wage loss benefits in excess of their anatomical ratings. See Douglas Tobacco Products, Co. v. Gerrald, 68 Ark. App. 304(1999); Johnson v. Latex Construction Co., 2005 AWCC 163, Claim No. F301922; McKinney v. Plastics Research & Development,. 2004 AWCC 201, Claim No. E901881; Cumbie v. Bost Human Development Services, 2004 AWCC 126, Claim No. E913515; Weber v. Best Western of Arkadelphia; 2006 AWCC 210, Claim No. F100472.

In the present case, the claimant suffers from ongoing problems with her arm and those problems are due to her admittedly compensable injury. The record indicates that the claimant is likely to have ongoing problems in association with that injury and that the claimant may no longer work as a bus driver. Furthermore, in my opinion, when considering the claimant's age and limited education, in conjunction with her testimony that she has ongoing pain, is in need of surgery on her arm, and that she has no experience working in a sedentary capacity, it is apparent that the claimant's ability to replace her income at the

time of the injury has been severely diminished, regardless of whether she has the motivation to return to work.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner