

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012020

CAROLYN SUE HAMMONS, EMPLOYEE	CLAIMANT
WEST FORK HIGH SCHOOL, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 24, 2006

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

Claimant represented by the HONORABLE AARON MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed August 15, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Full Commission's opinion of August 7, 2003 is final and res judicata.
2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury subsequent to March 4, 2004.
3. As a result of her compensable injury,

the claimant has suffered a permanent physical impairment in an amount equal to 2% to the body as a whole. In addition, claimant has suffered a loss in wage earning capacity in an amount equal to 20% to the body as a whole.

4. Respondent has controverted claimant's entitlement to all unpaid compensation benefits.

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

We therefore affirm the August 15, 2005 decision 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 on appeal.

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

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant was entitled to a 20% loss in wage earning capacity in addition to her 2% permanent anatomical impairment rating. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits.

The evidence demonstrates that the only restrictions that the claimant has are her own subjective complaints of pain. The claimant underwent a functional capacity evaluation approximately four months after her healing period ended on December 2, 2001. The physical therapist noted that the claimant lacked full physical effort and had some degree of symptom magnification. As a result, the physical therapist was unable to provide an accurate assessment of the claimant's abilities and limitations. The physical therapist also noted that with respect to rehabilitation, the claimant presented as a potentially difficult rehabilitation candidate due to her lack of physical effort and degree of symptom magnification.

The evidence demonstrates that the claimant has transferable skills. Prior to working for the respondent employer as a study hall clerk, the claimant spent eleven years working in a bank as a bookkeeper and a teller. The claimant testified that she is able to do household chores such as vacuuming, dusting, cooking, and works a little in her flower garden.

Further, the record does not contain any medical report that gives the claimant any permanent restrictions. The only assessment we have is the

permanent anatomical impairment rating of 2% for the claimant's compression fracture. The claimant is also drawing social security disability benefits which further indicates that she does not have a financial motivation to return to work.

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. 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).

After considering all the factors for wage loss, the claimant's age, education, motivation to return to work, and the claimant's skills, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits. Accordingly, I must respectfully dissent from the majority's opinion finding that the claimant was entitled to a 20% loss in wage earning capacity in addition to the 2% anatomical impairment rating.

KAREN H. MCKINNEY, Commissioner