

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303362

DONNA F. JOSLIN, EMPLOYEE	CLAIMANT
WHITE HALL SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 21, 2006

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant was entitled to wage loss disability benefits in the amount of 52% in addition to her permanent anatomical impairment of 6%. Based upon our de novo review of the record, we hereby modify the decision of the Administrative Law Judge. Our review of the evidence demonstrates that the claimant is only entitled to 12% loss in wage earning capacity.

The claimant was employed as custodian for the respondent employer. The claimant sustained an admittedly compensable injury on December 10, 2002, to her lower back when she twisted her body while she was folding up cafeteria tables. The respondents accepted the claimant's injuries as compensable and paid medical expenses as well as temporary total disability benefits until September 15, 2003. The respondents also accepted a 6% permanent anatomical impairment rating. At the hearing, the claimant contended that she was permanently and totally disabled or that she was entitled to wage loss disability benefits in excess of her permanent anatomical impairment rating. The respondents contended that the claimant was not entitled any wage loss disability benefits, much less permanent and total disability benefits. The Administrative Law Judge assigned a 52% loss in wage earning capacity to the claimant.

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).

In our opinion, the evidence demonstrates that the claimant is not permanently and totally disabled, nor is she entitled to a 52% loss in wage earning capacity. The evidence demonstrates that the claimant received a 6% permanent partial anatomical disability rating by Dr. Baskin on September 15, 2003. The claimant has not undergone any surgery for her compensable injury. All the claimant complains of is cramp-like dull pain in her back and legs when she tries to do physical activities.

The claimant presented the testimony of her friend, Ms. Wava Cox, who testified that the claimant was a good thinker and good at organizing and planning things as well as dealing with money. Ms. Cox also testified that the claimant was able to maintain her house and that the only

thing that she could not do on a regular basis was vacuuming.

The claimant underwent two vocational rehabilitation evaluations. Ms. Edie Nichols performed an evaluation of the claimant for the respondents and Mr. Bob White performed an evaluation for the claimant. Ms. Nichols presented the claimant with more than ten (10) different employment opportunities that were potentially within the restrictions placed upon the claimant by Dr. Baskin in September, 2003. The claimant never took the time to see about any of these positions. Instead, she summarily dismissed any possibility that she would be able to perform the jobs based upon her perceived notions of what the job duties entailed. The claimant had an excuse for every one of the possible jobs that were presented to her. For example, the claimant was presented with a job as a teacher's aide. The claimant stated "[A]s far as taking care of a child that's in a wheelchair or whatever, no, I couldn't do that. I wouldn't want to hurt some baby." With respect to the

catering assistant job, which the claimant had done catering in the past she stated, "because there's a lot of walking and you have to carry your trays up above the people's head and all that" she could not perform that job. The claimant was presented with a job as a correctional officer. The claimant's excuse was "no, I have a girlfriend that got herself hurt bad. I couldn't control those people."

Ms. Nichols also presented the claimant with the job as a daycare instructor. The claimant's response to that job prospect was "lifting babies, I don't think so." As for the carcass inspector job, the claimant says that she could not do it because she said, "I don't drive Little Rock." The claimant also added at the hearing that the drug Aleve prevented her from inquiring about the job because it made her sleepy and act kind of drugged out. The claimant repeatedly stated that she acted the jobs out at home to see if she could do them. This is her explanation for why she did not even call about those jobs. However, this reasoning was undermined by the testimony the claimant's counsel

elicited from her at the hearing. The claimant's counsel had the claimant state under oath that she could not tell what the job duties were from the descriptions. It is also of note that the claimant directed Ms. Nichols to cease sending her job leads.

The evidence demonstrates that the claimant also failed to diligently pursue opportunities to return to work with the respondent employer. The claimant waited for over three months after being released to return to work to contact the respondent employer. The claimant was released in September of 2003, and did not contact the respondent employer until January 2004. When the claimant did present to the respondent employer, she was given an application and told to complete the application so she could be considered when a suitable employment opportunity arose. The claimant failed to submit that application for another eight months; and this was not until the claimant was asked by Ms. Nichols to complete the application. Mr. Young, a school district employee, requested that Ms. Nichols get the claimant to

complete an application. The claimant was ultimately terminated by the school district and was informed of this termination in a letter dated February 27, 2004. That letter also stated that the claimant could appeal that termination. The claimant took retirement instead.

When we consider the fact that the claimant failed to pursue any job leads that have been provided to her as well as her severe lack of motivation to return to work for the respondent employer, which is evidence by the fact that it took her five months to even contact the respondent employer after she had been released to return to work, and another eight months to return the completed application and only at the insistence of the Vocational Rehabilitation person, we cannot find that the claimant is entitled to a 52% loss in wage earning capacity. The evidence does demonstrate that the claimant is entitled to some wage loss disability benefits, but only in the amount of 12%. The claimant has worked as a substitute teacher, making \$50.00 per day. The claimant is not completely restricted from

returning to work by her doctor. She does have twisting and bending restrictions. However, it is clear from the evidence that the claimant lacks sufficient motivation to return to work. Accordingly, we hereby modify the decision of the Administrative Law Judge and find that the claimant is only entitled to a 12% loss in wage earning capacity.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The only issue presently before the Commission is the claimant's entitlement to wage loss disability benefits. After a hearing, the Administrative Law Judge handed down an Opinion dated March 11, 2005, where she found that the claimant had sustained a wage loss equal to 52% to the body as a whole. The respondent has appealed that award. The

Majority now reduces the claimant's wage loss to 12% to the body as a whole. Based upon my de novo review of the record, I find that the Administrative Law Judge's decision should have been affirmed. For this reason, I must respectfully dissent.

At the time of the hearing, the claimant was 63 years of age. For several years preceding her compensable injury, she had been employed by the respondent school district as a custodian in one of their facilities. On December 10, 2002, she injured her back while attempting to lift some tables. Her back injury was treated conservatively and she was eventually assessed with a 6% anatomical impairment to her whole body as a result of the injury. The restrictions placed upon her by her treating physician precluded her from returning to her employment as a custodian. At the time of her injury, the claimant's income was approximately \$9.00 per hour.

The claimant does not have any education beyond a high school level nor does she possess any technical degrees

or certifications. Her prior employment had generally been in some type of manual labor, requiring some degree of lifting, bending, standing or walking.

At the respondent's direction, the claimant's vocational abilities were evaluated by Edie Nichols, a vocational counselor, with Rehabilitation Management Company. In evaluating the claimant's vocational ability, Ms. Nichols appeared to be of the opinion that the claimant's best chance of returning to work would be with her former employer. In that regard, Ms. Nichols stated that the respondent might have a position available which the claimant could perform. However, since the claimant had already been terminated because she could no longer perform her custodial duties, Ms. Nichols suggested that she file a new job application with the respondent. The claimant did this in August 2004.

In exploring the claimant's job opportunities with other employers, Ms. Nichols found that the claimant had few transferable job skills. As noted in the vocational report,

the claimant's typing skills were limited to a typing class in high school and she had no computer training or experience. Ms. Nichols also discussed the claimant's rambling and disoriented speech pattern and stated that she tended to repeat herself and provide information which had already been given.

Ms. Nichols recommended a number of job possibilities. However, given Ms. Nichols' knowledge of the claimant's lack of transferable job skills, limited typing ability, lack of computer abilities, and poor communication skills, her suggestions are somewhat surprising. For example, one of the positions was that of a sales representative. However, this job had an on-line job application procedure and required a person with "good communication skills." Another job was that of a clerical worker which required a typing ability of 40 words per minute. Other recommended employment avenues appeared to be in a factory setting (such as a carcass inspector), retail sales, correctional officer, and other jobs with which the

claimant had little or no experience or training. I also note that some of the other employment which may be within the claimant's vocational ability, such as convenience store cashier or a day care teacher, paid substantially less than her pre-injury salary.

In reducing the Administrative Law Judge's wage loss award, the Majority places considerable weight on the claimant's alleged failure to promptly apply for positions within the respondent's school district. However, I do not believe that this argument in any way helps the respondent's case. There is no doubt that the respondent was fully aware that the claimant had been released to return to work but had significant restrictions placed upon her. In fact, one of the witnesses who testified was Danny Young, the Superintendent of the respondent school district. Mr. Young testified that in January 2004, he received a letter from the claimant's treating physician setting out her restrictions and indicating that she would not be able to return to her duties as a custodian. Mr. Young stated that

he met with the claimant in regard to this letter shortly after receiving it and discussed the possibility of her returning to work. When asked about this conversation by respondent's counsel, Mr. Young stated as follows:

"And she asked if there were other positions in the District that she might, you know, apply. I said, we do not have any openings at this date but you are certainly welcome to apply for aide positions, things that did not involve manual labor. I excused myself from our meeting and went down and got an application and gave it to Ms. Joslin on that day."

When Mr. Young was later asked about whether the claimant would have been employed had she filed a new job application, his only response was that a rehire would have been possible. Under cross-examination, Mr. Young admitted that he had received a letter from the claimant's attorney asking him about any light duty jobs which would have been available for her. However, Mr. Young stated that he did not answer this letter other than to advise the claimant's attorney to deal with his "workers' comp. people."

Presumably, he meant either the administration company handling the claim or their attorney.

In my opinion, the record clearly establishes that the respondent employer knew that the claimant was released to return to work within certain restrictions and that she was desirous of returning to a position within the school district. However, they took no action to assist her in returning to work for them nor did they make any attempt to make contact with the claimant themselves regarding any possible openings. There was some discussion about a nurse's aide position that was filled during the summer of 2004. However, Mr. Young testified that since the claimant's application was not completed and returned to them until August 2004, she was not considered for the position. Significantly, the claimant did register as a substitute teacher for the first semester of the 2004-2005 school year, but between August and December 2004, she had only been called to substitute teach for three and a half days.

In my opinion, the Majority's finding that the claimant is responsible for their failure to return her to work is not in accord with the facts of this case or the spirit of the Workers' Compensation Act. The respondent was fully aware that the claimant wanted to return to work and what her restrictions were. If, in fact, the respondent had job openings within the claimant's restrictions, they should have advised her of those openings.

In this regard I note that Ark. Code Ann. §11-9-101 explicitly states that one the primary purposes of the workers' compensation laws is to see that injured workers are returned to work. In addition, Ark. Code Ann. §11-9-505 (a) provides that an employer can be required to pay additional benefits to the claimant if they, without reasonable cause, refuse to return an employee to work. While the claimant has not pursued a claim under this section, it certainly appears to me that the employer could have returned the claimant to work had they wished to do so. Their failure to do so is clearly contrary to the expressed

provisions fo the Workers' Compensation Act. Further, even the respondent concedes that the claimant did file a new job application with them in August 2004 and did sign up to be a substitute teacher. However, since that time, the most the respondent has done is provide her 3 and a half days of substitute teaching work. In my opinion, this clearly indicates a lack of effort on the part of the respondent in making an attempt to return the claimant to the work force.

In short, it seems to me that the employer has failed in their obligation to make an attempt to return the claimant to the work force. In fact, based upon the testimony of Mr. Young, it certainly appears that they could have put the claimant back to work had they chosen to do so. That conclusion is buttressed by the fact that the claimant, as a substitute teacher, only received three and a half days of work. Clearly, had the respondent wanted to do so, they could have provided the claimant employment. In my opinion, the respondent's failure to meet their obligations of the

Workers' Compensation Act should not be a basis for reducing the claimant's awarded wage loss disability.

Given the claimant's age, limited education, and job skills, I believe she sustained a significant loss in her earning ability. I therefore find that the claimant did sustain wage loss disability in an amount of 52% as awarded by the Administrative Law Judge. For these reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner