

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202950

CHARLENE CATLETT, EMPLOYEE	CLAIMANT
AREA AGENCY ON AGING, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 23, 2007

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 did not otherwise appear.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 13, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including December 31, 2001, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On December 31, 2001, the claimant sustained a compensable injury to her lumbar spine.
4. There does not appear to be, at the present time, any dispute over the payment of medical expenses or temporary disability benefits.
5. The claimant's healing period ended on or about September 20, 2005.
6. The respondents have accepted liability for and have paid permanent partial disability benefits for a permanent physical impairment of 5% to the body as a whole. The evidence presented reveals this to be the appropriate degree or percentage of permanent physical impairment that has been caused by her compensable lumbar injury of December 31, 2001.
7. Ark. Code Ann. §11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability

in this case. Specifically, the greater weight of the credible evidence presented fails to prove that at the time of the claimant's compensable injury, on December 31, 2001, she was experiencing any permanent impairment or disability that subsequently combined with the permanent impairment and disability that resulted from the compensable injury to produce a greater degree of permanent impairment or disability than would have resulted from the compensable injury, considered alone and of itself.

8. The claimant has failed to prove by the greater weight of the credible evidence that she has been rendered permanently totally disabled by her compensable lumbar injury of December 31, 2001.

9. The claimant has proven by the greater weight of the credible evidence that she sustained a permanent partial functional disability or loss of wage-earning capacity from the compensable injury of December 31, 2001, in the amount of 10% to the body as a whole. This degree or percentage of permanent partial disability is in addition to the 5% permanent partial disability attributable to permanent physical impairment. Thus, the claimant is entitled to permanent partial disability benefits for a total permanent partial disability of 15% to the body as a whole.

10. The provisions of Ark. Code Ann. §11-9-522(f) are not applicable to the present claim.

11. The respondents have controverted the claimant's entitlement to any permanent disability benefits in excess of the 5% permanent physical impairment.

12. The respondent Second Injury Fund has controverted the claimant's entitlement to any benefits from the Fund.

13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded for permanent functional disability or loss of wage-earning capacity, in the amount of 10% to the body as a whole.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion, finding that the claimant is not entitled to wage loss benefits over and above those previously awarded by the Administrative Law Judge. After a de novo review of the record, I find that the overwhelming weight of the evidence shows the claimant is permanently and totally disabled, or

at a minimum, entitled to wage loss benefits greatly in excess of those awarded by the Majority.

The claimant sustained an admittedly compensable injury on December 31, 2001. The injury occurred as the claimant was in the process of lifting a patient when she injured her back. The claimant sought medical treatment shortly after the injury and complained of back pain that radiated down her right leg and numbness in her foot. A CT scan was performed on January 3, 2002, and revealed the claimant had dextroscoliosis of the spine and moderate spondylotic changes. The claimant was also noted to have a, "mild broad based disc bulge at the L3-4 level." The claimant continued to present with back pain and radiculopathy in her right leg. On January 15, 2002, the claimant was diagnosed with degenerative joint disease in her lumbar spine, an acute lumbar strain, a bulging disc at L3-4, and radiculopathy.

On January 30, 2002, the claimant submitted to an MRI. The radiology report indicates the claimant suffered from multilevel degenerative disk disease, spondylosis and

mild dextroscoliosis. The claimant was also noted to have moderate diffuse disk bulging at L1-2 and L2-3 and mild disk bulging at L3-4.

On February 9, 2002, the claimant returned for treatment and it was noted that she continued to suffer from back pain with radicular symptoms of numbness and paresthesias to her right leg. The report further provides,

We did tell her that she probably did not need to do any types of jobs where she does heavy lifting. She asked about disability and I did tell her she probably should check into it, contact a lawyer and go from there. She may qualify. Her other option is to look for a job where she does not have to do any manual labor, and she states she will look into that also.

The claimant proceeded with physical therapy and underwent fluoroscopic facet joint injections. On June 28, 2005, the claimant submitted to an EMG it revealed the claimant suffered from, "diffuse abnormalities which are felt to be associated with an axonal type peripheral polyneuropathy.

The claimant underwent an FCE on August 25, 2005. The report provided the claimant had given an inconsistent

effort throughout the evaluation process. Despite this, the report provides the claimant could only perform sedentary work. The claimant was placed at MMI on September 20, 2005. The claimant returned for treatment with Dr. Capocelli on September 21, 2005. Dr. Capocelli assigned the claimant a 5% impairment rating and noted the results of the FCE. He further indicated, "She does not seem to have made the maximum effort, however, at this point as the patient is essentially under disability I would not recommend anything more than sedentary work level at best." (Emphasis added).

At the hearing, the claimant testified that she was 64 years old and that she had finished the 10th grade. She indicated she had received no other formal training and had limited work experience. The claimant indicated she had worked at Ace Comb Company for nine years performing assembly line work and that she worked for the respondents for around nine years as a home health aid. The claimant described that her job with the respondents required her to perform various services for clients including shopping, paying bills, housekeeping, assisting people in their homes

and helping them in and out of the tub. She further indicated that she would be required to lift clients on a regular basis. The claimant said that she worked at least five days a week and usually worked approximately nine hours a day. She was earning \$7.10 per hour at the time of her injury.

The claimant also testified that she attempted to perform light duty work after her accident and was unable to complete her duties due to her compensable injury. The claimant relayed that she continues to take various medications including, Naproxin, Neurontin, Relafin, and Amitriptyline. The claimant also takes BC Powder multiple times per day to limit the amount of prescription pain medication she takes. She also described she continues to suffer from persistent pain and numbness in her right leg and that she has recently noticed swelling in her right leg.

The claimant said that due to her symptoms her daily activities have decreased substantially. She is no longer able to go to church or to yard sales and has difficulty performing housekeeping and yard work. The

claimant also described that, "I mean, you do a lot of things and then pay for it later; you sort of learn what you can and can't do." The claimant also said she can walk one block and two blocks according to how she felt. She further said she could not stand more than 15 minutes or sit more than 20 minutes without pain.

Wilma Karo, the claimant's cousin, testified that prior to the injury, the claimant was very active and, "able to do anything." She indicated that since the accident, the claimant is no longer able to engage in as many activities. She said she and her son have assisted the claimant in mowing her yard and lifting wood or other items to help the claimant. She also testified that she had previously worked as a home health aide and that the claimant would be unable to perform the required duties. Specifically, she indicated that the claimant would be unable to perform lifting as required and would be unable to sit for long periods of time.

James Catlett, ex-brother-in-law of the claimant, also testified on behalf of the claimant. He said the

claimant's abilities have declined dramatically since her injury. He indicated that prior to the accident the claimant was active and even helped him work with things such as Quik-Crete and bird bathes. He indicated that now, "She is nothing compared to what she was before." He further said, "... there are times I go up there and she is so stove up that I literally have to pull her out of the chair to help her up. And I know it's not like that every time but it's like that most of the time. And some days, its bad. I mean it hurts me to watch her."

Finally, Ala May Swain, the claimant's cousin, testified. Swain said that the claimant used to frequent garage sales. She said that when she saw the claimant she often had large plants that she was carrying around. She also said the claimant regularly attended church. She testified that after the accident, the claimant was no longer able to engage in those activities. She testified,

A. Well, I never saw her at yard sales, and she'd still come to church pretty frequently at first, but she couldn't sit, and after she learned that, she was embarrassed. She'd have to get up and walk around and everything and it was

hard on her, so she didn't come a lot because she can't sit. She further testified that the church has assisted the claimant by providing her monetary assistance and providing her food.

The claimant has not attempted to return to work since her injury and was awarded social security disability benefits in 2002. The claimant explained that she has not attempted to return to work because she felt she was unable to given her physical condition and because she could not think of anyplace she could work.

The sole issue in the present case is the claimant's entitlement to wage loss benefits. After reviewing the record, I find that the preponderance of the record shows the claimant is unable to work. In particular, I find that the claimant is unable to return to work due to her admittedly compensable injury. Furthermore, I find that her lack of education and work experience limits her ability to return to work.

After an anatomical rating has been assigned to the body as a whole, the Commission has the authority to increase the disability rating or to declare a claimant

permanently and totally disabled based on wage-loss factors.

Ernest Dale Lohman v. SSI, Inc. & Villanova Insurance Company, ___ Ark. App. ___, ___ S.W.3d ___, (Opinion filed March 15, 2006) citing, Lee v. Alcoa Extrusion, Inc., ___ Ark. App. ___, ___ S.W. 3d ___ (January 26, 2005).

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. 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), 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).

In the present case, the claimant has sustained an injury which has severely limited her ability to return to work. Since the time of the injury, the claimant has suffered from back pain and radiculopathy to her right leg. Pursuant to the prior decision issued by the Commission, both of these conditions are directly related to the claimant's work-related injury. The claimant credibly

testified that she now has to take medications, including strong narcotics, for her condition on a daily basis. She also credibly testified that she has difficulty standing or walking which would inhibit her from performing even sedentary work. Likewise, the claimant's testimony was corroborated by three witnesses who gave virtually identical accounts of the claimant's limitations, which increases the veracity of the claimant's testimony regarding her abilities and limitations.

The medical reports also substantiate the claimant's inability to return to work. As early as February 2002, the claimant was urged by her treating physician to seek disability benefits, illustrating the severity of her injury. In fact, the claimant testified she had been approved for disability, demonstrating her inability to return to work. The respondents accepted liability for and paid the claimant temporary total disability benefits from a short time after the claimant's injury until September 20, 2005. This indicates the claimant was admittedly unable to work for a period of almost four years. Likewise, there is

no evidence in the medical reports after September 20, 2005, to indicate the claimant's condition changed in order to allow her to return to work.

I note the Majority's reliance on the FCE report indicating the claimant gave submaximal effort and presumably indicating the claimant lacks motivation to return to work. I find this argument to be unconvincing. The same FCE report indicates the claimant would only be able to return to sedentary work, which would be in contradiction to all the claimant's past work experience. I also note the claimant's own treating physician, Dr. Capocelli, seems to rebuke the findings of the FCE. Instead, in his September 21, 2005, report Dr. Capocelli indicates the claimant was "under disability" and that she would be able to perform sedentary work "at best". Certainly, the use of the aforementioned language, when considered with the claimant's past exemption from working by the same doctor demonstrates the claimant is unable to return to work.

I further find that the claimant would likely be unable to return to even a sedentary job. The claimant

testified she is unable to sit or stand for long periods of time. This testimony was corroborated by each of her witnesses. Furthermore, the claimant has an extremely limited education and a lack of other work experience. As the claimant has no high school degree or GED and has no work experience performing work that is sedentary in nature, I find it is unlikely she will be able to secure work, particularly given her age, use of pain medication on a continued basis, and her need to stand or sit at will.

I also find that even if the claimant is not entitled to permanent and total disability benefits, she is entitled to benefits greatly in excess of those awarded by the Majority.

In sum, I find that the Majority errs in denying the claimant permanent and total disability benefits. The claimant is 64 years old and now suffers constant pain in her back and suffers numbness and pain in her right leg. She has a limited education and has only worked two jobs in her life. Those two jobs required the claimant to lift or stand for long periods of time, which she has been expressly

prohibited from doing. The claimant's FCE report indicates she is only capable of performing sedentary work and her treating physician seems to disagree that she can perform even that level of work. As the claimant had no known restrictions before the injury in question, she has suffered a loss of multiple categories of available work. As such, wage loss benefits in the amount of 10% above her impairment rating simply does not provide adequate compensation. Accordingly, I find that it is highly unlikely she will ever procure employment. Therefore, I must respectfully dissent.

PHILIP A. HOOD, Commissioner