

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F004211

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| MARGARITA GARCIA BARBOSA BASSON, EMPLOYEE | CLAIMANT   |
| CURT BEAN LUMBER COMPANY, EMPLOYER        | RESPONDENT |
| COMPENSATION MANAGERS, INC., CARRIER      | RESPONDENT |

**OPINION FILED JUNE 27, 2008**

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on May 25, 2007, finding that the claimant sustained an 8% wage loss disability. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the claimant has failed to meet her burden of proof. Therefore, we find that the decision of the Administrative Law Judge must be and hereby is reversed.

At the hearing held February 26, 2007, the claimant contended that she sustained wage loss disability

exceeding the level of her anatomical impairment. Conversely, respondents contended that the claimant suffered no wage loss disability as a result of her compensable injuries, and that the claimant has returned to work, performing similar work and receiving wages equal to or greater than her average weekly wage at the time of injury. We agree with respondents.

It is undisputed that the claimant sustained a compensable injury to her right shoulder and face when she was involved in a rollover accident with her tracker-trailer on April 6, 2000. The parties stipulated that the claimant earned an average weekly wage of \$671.68 and was paid a 12% permanent anatomical impairment rating to the body as a whole for her shoulder injury.

Initially, the claimant received conservative medical treatment for her injuries. However, she subsequently underwent plastic surgery to her forehead and nose at the initiation of the nurse case manager. In addition, after conservative treatment failed to improve her shoulder condition, an arthrogram was performed in January

of 2001 which revealed a torn rotator cuff. The claimant underwent surgery to repair her torn rotator cuff in February of 2001.

After her compensable injury, yet prior to her shoulder surgery, the claimant returned to work for respondent employer both as an over-the-road driver and a dispatcher. However, after her shoulder surgery, the claimant did not return to work for respondents. According to the claimant's hearing testimony, she was not permitted to return to work for respondent. Although the claimant's deposition testimony reflects that she was told she could return to work for respondents after her surgery, the claimant contends this testimony was not accurately recorded. Nevertheless, the claimant did not have any difficulty in securing employment as an over-the-road driver for CX Roberson within just a few days of being released to return to work. The claimant testified that she sought employment with CX Roberson because they had tractors with automatic transmissions which she felt would be better for her right shoulder. However after just a few months of

driving for CX Roberson, the claimant purchased her own truck with a manual transmission and became an owner-operator/operator for CX Roberson. The record is unclear as to how long the claimant actually drove as an owner-operator for CX Roberson. By the time she left CX Roberson, the claimant had purchased a second truck and hired a second driver, operating as her own trucking company. When she left CX Roberson, the claimant immediately began driving for Conley Transport as an owner-operator and brought her second truck with her to Conley Transport as well.

The claimant testified that when she drove for Conley Transport, she drove as a team with her husband. When her husband decided that he wanted to get off the road, she continued driving for just a short period of time. The claimant testified that she tried to get another team driver after her husband stopped, but she never found one, so she quit driving as well. After getting off the road, the claimant has worked for Cogswell Motors as a service advisor earning \$7.00 per hour. After working only six months for Cogswell Motors the claimant quit this job because she did

not like getting paid every two weeks because it was putting a strain on her family situation. After quitting Cogwell, the claimant secured employment with the Conway School District as a bus driver earning \$7,450 a year, plus extra for summer driving or school trips. In addition, the claimant worked 36 hours per week for Deaver's Dairy Queen until it closed, earning \$7.50 per hour. Finally, the claimant obtained employment as an over-the-road driver for Conley Transport again, but only worked one week after developing nose bleeds while driving. The claimant did not offer any medical evidence as to the cause of her nose bleeds, but she attributed them to her high blood pressure.

The claimant testified that when she operated as an owner-operator, she earned more money than she did when she drove for respondent employer. Pursuant to the claimant's testimony she actually netted between \$3,000 and \$15,000 per month for the truck she drove with her husband and between \$6,000 to \$8,000 per month for her second truck. Thus, the claimant admitted to making substantially more

money working as an over-the-road driver after her compensable injury.

In her deposition, the claimant admitted that when she went to work for CX Roberson she had to get a new DOT physical, which she was able to pass. In fact, the claimant passed all of her DOT physicals after her injury except for one in 2005 when she tried to hire on with Wells Shavings. According to the claimant's testimony, she had developed high blood pressure and nose bleeds. However, the claimant testified that she did pass her DOT physical in 2006. When asked on cross examination why she did not want to go back to over-the-road driving, the claimant testified:

A. It's not that I don't; most companies right now won't hire me.

Q. Well, when I took your deposition, you didn't tell me about any of them that refused to hire you.

A. They don't quite say, "We will not hire you." A lot of the comments are, "At this time, we're not hiring." "Get your blood pressure more regulated, we'll take you on." Then, if they hear that I have sleep apnea, that totally throws me out of it.

Q. Okay. So the reasons you don't think you can get a job as an over-the-road driver now is because of the nose bleeds, which are high blood pressure, and sleep apnea?

A. Yes, sir.

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 he/she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); 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/she is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of

"physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). 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); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility,

demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. 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. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). 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).

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).

Finally, Ark. Code Ann. § 11-9-102(4) (F) (ii) (Supp. 2005) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

The claimant clearly returned to work as an over-the-road driver after her compensable injury. Although respondent employer did not return the claimant to work after her surgery, the claimant did not have any difficulty securing employment as an over-the-road driver with another

company. The claimant initially sought employment with a company that provided automatic transmissions in their trucks believing that an automatic transmission would be better for her injured shoulder. However, this did not last long as the claimant purchased her own truck with a manual transmission and drove for several years as an owner-operator. Without even considering the money the claimant brought in on her second truck, she clearly earned as much or even more money as an owner-operator than she did at the time of her injury. Admittedly, the claimant drove as a team with her husband and the income must be divide by two; nevertheless by the claimant's own testimony she clearly earned more money after her compensable injury. Moreover, the record clearly reveals that the claimant quit driving because her husband and partner wanted to get off the road. The claimant provided unsubstantiated testimony that she was unable to continue to drive because she could not find a suitable driving partner. However, the medical records reveal that the claimant quit driving in August of 2003, because she was having problems sleeping and could not stay

awake to drive her truck. It is just as likely as not that the claimant chose to get off the road because of this sleep apnea problem or because her spouse was no longer her road companion and she wanted to stay home with him. As evidenced in the record, the claimant has not always been motivated by income when making her employment decisions. For instance, the claimant currently drives a school bus earning \$7,450.00 per year. The claimant quit a second job as a cashier at Lowe's which paid about \$7.65 per hour because it conflicted with her job driving a school bus approximately three hours a day. Simple mathematics reveals that had the claimant chosen to stay with Lowe's and work full time, even working only 48 weeks out of the year she would have earned twice as much as she does driving a school bus. The claimant testified that the job at Lowe's was clearly within her physical limitations and that she was not required to do anything that exceeded these limitations. Presumably, this job was even more appropriate for the claimant than driving a school bus which requires her at the very least to operate the bus door with her right upper extremity several times

throughout the day. Interestingly, the claimant offered no testimony that this physical requirement of her school bus driving job was in any way hindered or bothered by her compensable right shoulder injury.

The claimant is only 38 years of age. Although the claimant did not graduate from high school, she did complete her GED, obtain an Accounting Specialty Degree which required a two year course, and earn an A.S.E. Certified Mechanic Degree which required a six months course; thus evidencing her ability to learn and improve her education and training. The claimant has a vast work history and has demonstrated a willingness and ability to work in not only office settings, but also in the service industry as a fast-food worker, grocery store cashier, restaurant cook, and hardware store associate, as well as an over-the-road driver, and school bus driver. Many of these jobs the claimant has held since her compensable injury.

The claimant's only injury to the body as a whole was to her right shoulder and when she was released to return to work she was able to return to her pre-injury

profession as an over-the-road driver. The claimant earned substantial income as an owner-operator, earning more wages than she did at the time of her compensable injury. Accordingly, pursuant to A.C.A. § 11-9-522 (b) (2) the claimant is prohibited from receiving any wage loss disability benefits.

The claimant would have this Commission believe that the reason she no longer earns the same wages is because of her compensable injury; however, the evidence does not bear this out. The claimant admitted that she can no longer drive because her current health problems of high blood pressure and sleep apnea prevent her from being hired as an over-the-road driver. The claimant further admitted to her physician that she had to quit driving in August of 2003 because of her sleepy condition which latter turned out to be sleep apnea. Accordingly, the preponderance of the evidence reveals that even with her compensable injury the claimant was physically capable of earning wages equal to or greater than her wages at the time of her compensable injury. The claimant continued to earn these wages until she

developed additional health problems which forced her off the road. No evidence has been admitted, beyond the claimant's own self-serving belief, that these new health problems are in any way related to her compensable injury. However, no matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249). Accordingly, we can reach no other finding than that the claimant has failed to prove by a preponderance of the evidence that she sustained any wage loss disability or is entitled to wage loss disability benefits as a result of her compensable injury. The Full Commission therefore reverses the opinion of the Administrative Law Judge. This claim for wage loss disability is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion denying the claimant any benefits for loss of earning capacity. Based on a de novo review of the record, I find that respondents did not meet their burden of proof under Ark. Code Ann. §11-9-522 and that the claimant is entitled to at least 8% to the body as a whole for wage loss disability, as awarded by the Administrative Law Judge.

The majority opinion reverses the Administrative Law Judge's wage-loss disability award based on Ark. Code Ann. §11-9-522(b)(2), which states:

However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at the wages equal to or greater than his or her 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.

In accordance with Ark. Code Ann. §11-9-522(c)(1), the respondents have the burden of proving the elements of Ark. Code Ann. §11-9-522(b)(2), as follows:

The employer or his or her workers' compensation insurance carrier shall have 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 or her average weekly wage at the time of the accident.

In denying the claim, the majority concluded that "the claimant earned substantial income as an owner-operator, earning more wages than she did at the time of her compensable injury". This conclusion is not supported by the evidence of record. While it is true that the claimant did return to work as an owner-operator for a period of approximately two years, the evidence does not support a finding of equal or increased wages during this period of employment. The only evidence of earnings was given by the claimant at the hearing and through pre-hearing deposition testimony. According to the claimant, her work as an owner-operator involved the ownership of two trucks. For the truck

driven by the claimant and her husband, \$3,000 to \$15,000 a month was generated. For the second truck, operated by a hired driver, \$6,000 to \$8,000 a month was produced. However, out of these amounts, the claimant had to pay her husband and a driver for the second truck. In addition, fuel expenses and repair costs were not considered in these figures. There was no evidence introduced showing the amounts paid to the claimant's husband, the wages paid to the hired driver, or the amounts expended on fuel and repairs. Under these circumstances, the record is extremely unclear as to the claimant's post-injury wages in this employment. If the respondents intended to prove that the claimant's post-injury wages equaled or exceeded her pre-injury wages, they should have procured records so indicating and introduced those documents into the record. This is required by Ark. Code Ann. §11-9-522(c)(1). Because they failed to supply sufficient evidence on this issue, the respondents have failed to meet their burden of proof in establishing that the claimant earned a wage equal to or in

excess of her stipulated average weekly wage at the time of the accident (\$671.68).

It is conceded in the majority opinion that the claimant's most appropriate employment, following her compensable injury, was the job she held at Lowe's as a cashier. In this job, the claimant earned \$7.65 per hour which would generate an average weekly wage of \$306.00 per week. Therefore, this employment resulted in an approximate 54% decrease in pre-injury wage earnings. Under these circumstances, the meager 8% wage-loss disability awarded by the Administrative Law Judge seems quite conservative.

For the reasons stated above, I must respectfully dissent from the majority opinion reversing the Administrative Law Judge's award of wage-loss disability.

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PHILIP A. HOOD, Commissioner