

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610765

LISA FERRARI, EMPLOYEE	CLAIMANT
STEPPING STONE SCHOOL EXCHANGE, EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 1, 2008

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross-appeals an opinion and order of the Administrative Law Judge filed November 14, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On September 20, 2006, the relationship of employee-employer-carrier existed between the parties.
3. On September 20, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$278.00 for total disability and \$208.00 for permanent partial disability.
4. On September 20, 2006, the claimant sustained a compensable injury to her lumbar spine.
5. There is no dispute over the payment of medical expenses or temporary total disability benefits and all such benefits have or are being paid.
6. The claimant's healing period from the effects of her compensable injury ended on or about February 26, 2007.
7. The respondents have accepted liability for and are paying permanent partial disability of 7 percent to the body as a whole.
8. The claimant has sustained a permanent partial disability for permanent functional disability or loss of wage-earning capacity in excess of the permanent partial disability for permanent physical impairment, in the amount of 10 percent to the body as a whole. The respondents, Stepping Stone School Exchange and Commerce & Industry Insurance Company, are solely liable for the permanent partial disability attributable to permanent functional disability or loss of wage-earning capacity.
9. Ark. Code Ann. §11-9-525 is not applicable, under the facts of the present claim and the Second Injury Fund has no liability in this claim. Specifically, the greater weight of the credible evidence fails to prove that the claimant has experienced any "combined" disability or impairment and that the degree or percentage of disability or impairment that has been caused by combined disability or impairment is greater than that which would have resulted from the last injury considered alone and of itself.

10. The respondents have controverted the claimant's entitlement to any benefits for permanent functional disability or loss of wage-earning capacity.

11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability for functional disability or loss of wage-earning capacity.

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 November 14, 2007 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she was entitled to a 10% loss in wage earning capacity in addition to her permanent anatomical impairment rating. After conducting a de novo review of the record, 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 in addition to her permanent anatomical impairment rating. In my opinion, the claimant has failed to meet her burden of proof.

The claimant's job duties with the respondent employer required her to pull pallets off a truck. The claimant's injury was accepted as compensable and the respondents paid benefits accordingly. The claimant was ultimately assessed a 7% permanent anatomical impairment rating which the respondents accepted and paid. The claimant is now asking for wage loss disability benefits in excess of her permanent anatomical impairment rating. In my opinion, the claimant is not entitled to any wage loss disability benefits.

At the time of the hearing, the claimant was forty-three years and had a GED. She had previously worked as a program service instructor for Bost Human Development Services and had a prior back injury in 1999. The claimant underwent surgery for that condition and received a permanent anatomical impairment rating and was also able to return to her normal activities. After sustaining the injury in 1999, the claimant moved out of state and worked in various jobs, including

working in a casino as a pit clerk for high-stakes black jack, working for the health department and working as a bookkeeper. While employed by the respondent employer, the claimant was also employed by Bost Human Development as a night sitter. She would spend the night with a mentally challenged client of theirs and help the person do different things like mop and sweep and take care of their apartments. The claimant has returned to work for her brother-in-law in a regular full time job. The claimant is making \$10 an hour and was making \$10.44 an hour when she was injured.

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. 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,

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 her 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 her claim, but the failure may impede a full assessment of her 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 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

her average weekly wage at the time of the accident, 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 her 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.

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to any wage loss disability benefits in excess of her permanent anatomical impairment. The claimant has a work history of sedentary and light jobs. She went to work for her brother-in-law so she could get health insurance. She is making slightly less an hour than what she was making at the time of her injury. The claimant has not looked for any other employment even though she stated that she could do other jobs. In fact, the claimant went to work for her brother-in-law before she was even released by

her treating physician. She freely admitted that she has made no other effort to look for a job. The claimant is forty-three years old and has worked with mentally challenged individuals most of her working life. When I consider the claimant's age, education, work experience and all other factors affecting wage loss, I cannot find that the claimant is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner