

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509574

TAMMY MORGAN, EMPLOYEE	CLAIMANT
CITY OF JONESBORO, EMPLOYER	RESPONDENT NO. 1
MUNICIPAL LEAGUE WC TRUST, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JUNE 17, 2008

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

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

Respondent No. 1 represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North 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 an opinion and order of the Administrative Law Judge filed January 11, 2008. 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 December 29, 2003, the relationship of employee-employer existed between the parties when the claimant sustained an injury to her back arising out of and in the course of her employment.
3. On December 29, 2003, the claimant earned an average weekly wage of \$557.54, which yield (sic) a weekly compensation benefit rate of \$372.00/\$279.00, for total/permanent partial disability.
4. Respondent #1 has paid all appropriate temporary total disability and medical benefits in connection with the claimant's December 29, 2003, compensable injury.
5. The claimant reached the end of her healing period on November 15, 2005, (sic) with a residual 12% whole body anatomical impairment as a result of the compensable injury.
6. When the claimant's age, education, work experience, permanent limitations and restrictions and other matters reasonably expected to affect her future earning capacity, the evidence preponderates that the claimant has suffered a loss of earning capacity in the amount of 55% over and above her anatomical impairment.
7. Respondent #1 has controverted the payment of permanent partial disability benefits in excess of the claimant's 12% anatomical impairment, to include all wage loss disability 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 January 11, 2008, 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 sustained a loss of earning capacity or wage loss disability of 55% in excess of her 12% anatomical impairment rating. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained any wage loss disability. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

The claimant sustained an admittedly compensable injury to her lower back on December 29, 2003, which arose out of and in the course of her

employment as a police officer. As a result of this injury the claimant underwent a fusion surgery at the L5-S1 level in January 2006. By March 29, 2006, claimant's treating neurosurgeon, Dr. Scott Schlesinger, noted that the claimant complained of "persistent pain in the right buttock area running down the right leg" which he was quite certain was from the "nerve taking time to recover...." Dr. Schlesinger ordered epidural steroid injections at that time. After a series of three injections, the claimant reported to Dr. Schlesinger that although she received good benefit from the injections, it was shorted lived. Accordingly, Dr. Schlesinger ordered additional testing. In addition, Dr. Schlesinger advised that so long as the claimant did not have to wear her gun and holster, she was physically capable of returning to sedentary work. In a letter dated August 21, 2006, Dr. Schlesinger advised that the claimant's MRI and lab work were negative.

A Functional Capacity Evaluation was conducted on November 10, 2006. This evaluation revealed that the claimant gave a reliable effort and that she was consistent throughout the evaluation process. The Functional Capacity Evaluation evidenced the following:

FUNCTIONAL ABILITIES

Ms. Morgan demonstrated ability to perform the following Lifting

activities at the Light to Medium level with an Occasional bi-manual lift of up to 30 lbs. when lifting from floor level and 35 lbs. when lifting from knee level or above.

Ms. Morgan demonstrated the ability to perform the following activities on a Constant basis: Reach Immediate (L), Reach Immediate (R), Reach Overhead (L), Reach Overhead (R), Reach with 5 Lb. Weight (L or R), Handling (L), Handling (R), Bi-Manual Handling, Fingering (L), Fingering (R) and Bi-Manual Fingering.

Ms. Morgan demonstrated the ability to perform the following on a Frequent basis: Crouch, Kneel, Sitting, and Standing.

Ms. Morgan demonstrated the ability to perform the following of an Occasional basis: Walk, Carry up to 25 Lb, Push Cart - 60 Lb, Pull Cart - 6- Lb, Balance, Climb Stairs and Stoop.

FUNCTIONAL LIMITATIONS

Ms. Morgan did not demonstrate the ability to material handle more than 30 lbs. when lifting from floor level and she did not demonstrate the ability to material handle over 35 pounds from knuckle to shoulder level. Ms. Morgan demonstrates moderate lumbar AROM deficits that correlates with her decreased stooping/bending and twisting tolerances (Occasional). Ms. Morgan exhibits normal grip strength bilaterally which correlate with her fingering and handling abilities. Ms. Morgan exhibits functional deficits with prolonged standing and prolonged walking. Her overall

mobility is decreased as compared to an average worker.

After assessing the claimant's abilities and limitations, the claimant was determined to be capable of performing work in the Light work classification. The examiner noted that the claimant possessed several characteristics of a Medium level classification, but due to her decreased general mobility and decreased standing and walking, she was better suited for the Light work classification.

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 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, ___ S.W.3d ___ (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 was released by her treating physician with a 12% anatomical impairment rating. In addition, Dr. Schlesinger noted on several occasions that the claimant was capable of returning work in a sedentary capacity; however, he did not want her returning as a full fledged police officer.

The evidence reveals that once the claimant was deemed to have reached maximum medical improvement, she met with Suzanne Hackney, the Director of Human Resources for the City of Jonesboro to discuss possible employment positions within the City of Jonesboro. The claimant testified that although she later determined that she was never offered one of these jobs, at the time of the meeting the claimant clearly understood that she would be placed in one of these positions if she

requested it. Likewise, Ms. Hackney testified that she went over all of the potential job openings with the claimant in an effort to find the claimant an employment position within the City. Of all the job openings at the time of their meeting, Ms. Hackney and the claimant only found two positions that were within the claimant's physical restrictions. One was a temporary job as a grant's assistant. This position stated that it required a Bachelor's Degree with a preference for a Master's Degree. The claimant quickly dismissed this job stating that she was under qualified. The other position was a new advertising technician position that the city had just created. This position was rather sedentary, requiring calling on prospective advertisers both by phone and in person. The position also called for some familiarity with computers. The written job description recommended two years of experience in a related field, but Ms. Hackney testified that the claimant's lack of experience would not have prevented her from receiving this job. The job fell within the salary range of \$22,208 to \$33,793. The claimant declined this job as well. The claimant testified that she did not take this job because she was not qualified; however, Ms. Hackney testified that the claimant advised that she did not want to return to work at that time and would rather

help her husband remodel their new home, and to attend college classes.

In my opinion, the Administrative Law Judge, and now the majority, erred in interpreting the facts by finding that the claimant was never offered an opportunity to return to work for respondents. The evidence clearly indicates that Ms. Hackney met with the claimant with the intent of finding the claimant suitable employment with the city. Ms. Hackney was specifically asked whether she offer the claimant the advertising position to which she responded, "Yes, I offered all those jobs and we went through what she could and could not do." This is consistent with the claimant's testimony that at the time of her meeting with Ms. Hackney she thought that she would have been placed in one of the open positions if she expressed an interest in it. With regard to the recommendation that the applicant possess advertising experience, Ms. Hackney testified that the claimant's lack of experience was not an issue and that she specifically advised the claimant "that she could come into the job and learn it, they would teach her. It was a new job and she could come in from the beginning." As for the salary, Ms. Hackney testified that she was only authorized to offer the claimant the entry level salary, but that the

mayor could approve a higher salary for the claimant. The claimant simply did not express an interest in returning to work and advised Ms. Hackney that she wanted to remain at home and go to school. Thus, since the claimant did not even express an interest in returning to work, there was never an attempt to inquire of the mayor whether the claimant could return to work at her injury level salary.

The claimant was released to return to work by her treating physician in a sedentary capacity. The Functional Capacity Evaluation revealed that the claimant was physically capable of returning work in a Light duty capacity, and that she displayed several characteristic of Medium level work. In addition, the claimant possesses many transferable skills in that she has run, managed and operated a restaurant, and she has past experience in the very sedentary office work as a claims adjuster. Working as an adjuster, the claimant learned to work with computers. Respondents made an effort to return the claimant to work; however the claimant possessed a lack of interest and negative attitude towards the positions offered to her. The claimant's failure to return to the work offered, and her negative attitude regarding returning to work are a clear impediment to our ability to assess the claimant's

potential wage loss disability. Moreover, the claimant was offered work within her physical restrictions which she clearly declined to accept. Admittedly, the claimant was not officially offered work at her pre-injury wages, the offer was extended to seek higher wages should the claimant want the job. The claimant did not want the job regardless of the salary. Accordingly, A.C.A. § 11-9-522(b) is not a complete bar to wage loss disability in the claim, as the respondents did not present proof of an employment offer with pre-injury wages, nevertheless, the evidence did reveal that an offer was made with the potential for greater wages if only an interest in the position was expressed by the claimant.

While the claimant is not capable of returning to her position as a police officer, the claimant has failed to prove by a preponderance of the evidence that she sustained wage loss disability to the extent awarded by the majority. The claimant was offered work, which she refused to accept. She possesses many transferable skills which would suit her well in a Light or Sedentary job position. She is motivated to return to school and advance her education to become a nurse. After I consider the claimant's age, education, work experience, and all other factors which make up wage loss disability, I find that the claimant has failed to prove

by a preponderance of the evidence that she sustained a decrease of 55% in her wage earning capacity as a result of her compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner