NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405712

SANDY BISHOP, EMPLOYEE	CLAIMANT
SMALL FLORISTS, EMPLOYER	RESPONDENT NO. 1
ZURICH INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 27, 2009

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

Claimant represented by the HONORABLE H. OSCAR HIRBY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, 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 September 9, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-

carrier existed among the parties on May 17, 2004 at which time the claimant sustained a compensable back injury at a compensation rate of $120.00. Medical expenses, temporary total disability benefits (until the end of the healing period on June 28, 2005) and a 10% rating to the body as a whole have been accepted.

2. The claimant has failed to prove by a preponderance of the evidence of record that her cubital tunnel syndrome is a compensable consequence of the back injury based on discrepancies in the medical records.

3. After considering the claimant (sic) age, education, work experience, and transferable skills, I find she is entitled to permanent partial disability benefits equivalent to a 30% in addition to the 10% impairment rating for a total award of 40%.

4. The Fund has no liability in this case.

5. If they have not all ready (sic) done so, the respondents are directed to pay the court reporter, Celia Jamison's, fees and expenses within thirty days of receipt of the bill.

6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

> As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney’s fees on medical benefits and services for injuries after July 1, 2001.

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 September 9, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority opinion finding that the claimant failed to prove by a preponderance of the evidence that the claimant's elbow injury was a compensable consequence of her compensable back injury and awarding a 30% loss in wage earning capacity in addition to her 10% permanent anatomical impairment

rating. Specifically, I concur with the finding that the claimant failed to prove by a preponderance of the evidence that her elbow injury was a compensable consequence of her compensable back injury. However, I must dissent from the finding that the claimant sustained a 30% loss in wage earning capacity in addition to her 10% permanent anatomical impairment rating. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits.

The claimant was employed by the respondent employer as a floral designer. The claimant worked for approximately two and a half years when she sustained an admittedly compensable injury to her back on May 17, 2004. The claimant testified that she was lifting a potted plant when she felt a pain in her back. The claimant continued to work for a few more days but stated that her pain worsened. She testified that her left leg gave way and she fell, injuring her left elbow.

The claimant came under the care of Dr. Steven Cathey. Ultimately, on February 23, 2005, Dr. Cathey performed a L3-4 laminectomy and discectomy on the claimant. On June 28, 2005, he released the claimant from his care without any work restrictions and assigned the claimant a 10% whole body permanent anatomical

impairment rating. The respondents accepted this rating and have paid it to the claimant. When Dr. Cathey released the claimant from his care, he stated as follows:

> At this point, I believe Ms. Bishop has reached maximal medical improvement with regard to her occupational injury and the subsequent lumbar disc surgery. According to the AMA Guideline, I believe she is entitled to a 10% permanent partial impairment rating to the whole person.
>
> With regard to future employment, I believe she has three options. She can return to work at regular duty, find another line of employment where she could handle herself or file for long term disability benefits through social security. I have encouraged her to discuss this with an attorney to see how next to proceed.

The claimant sought treatment from Dr. Cathey on November 6, 2006, for complaints of left arm numbness. Dr. Cathey noted that it began "insidiously six weeks ago." Dr. Cathey diagnosed the claimant with ulnar root entrapment at the cubital tunnel and referred her to Dr. Thomas Frazier. Dr. Cathey commented:

> Although the patient was convinced this problem was related to her workers' compensation injury and subsequent low back surgery, I have reassured her that this is a completely independent and unrelated problem...The patient was a little disappointed that this problem was

> not related to her workers' compensation claim.

The claimant was seen by Dr. Frazier on November 20, 2006, and reported that she had left hand numbness present for a little over 2 years. She reported to Dr. Frazier that her leg had given way and she fell striking her elbow. Electrodiagnostic testing was done and the claimant was diagnosed with left cubital tunnel syndrome. Dr. Frazier performed a left cubital tunnel decompression in December of 2006. In a report dated July 30, 2007, Dr. Frazier noted that the claimant showed improvement and he released her to "resume activities as tolerated, without restriction".

In a letter dated July 23, 2007, respondent attorney David Jones sent a letter to Dr. Cathey seeking clarification if his prior report. Mr. Jones stated:

> I am writing in regard to your prior patient, Ms. Sandy Bishop, the Claimant in this workers' compensation claim. Please note that I am representing her former employer and the insurance company, with Ms. Bishop represented by Mr. Oscar Hirby, of Little Rock. I am writing to request clarification and confirmation on your prior impairment report and your release for the Claimant to return to work from June 28, 2005 (see enclosed report). We recently had the Claimant's deposition, and it appears that it was her impression that you were not indicating that she was physically capable of

> returning to full duty, and therefore, gave her what she considered to be "options" concerning her work status. Obviously, my interpretation of your report was that you indeed did indicate she was released to essentially full or "regular duty," at least implying that she had no type of restrictions. Therefore, we would greatly appreciate you clarifying your earlier opinion as soon as possible, so we may avoid your deposition being necessary. We simply need you to confirm if she was indeed released to full duty with no restrictions back in June of 2005.

Dr. Cathey replied to Mr. Jones' inquiry by return mail. In a letter dated July 24, 2007, he stated:

> Mr. Jones, your interpretation of my June 28, 2005, office note is indeed correct. Ms. Bishop was released to return to work at "regular duty" as of that clinic visit. Whether or not she decided to return to work was entirely up to her. I also opined at that time that her other choices were to find a new line of employment or to file for disability through Social Security.

The claimant has not returned to work nor has she sought employment any where else. The claimant instead elected to file for Social Security disability benefits and began receiving them in August of 2007. On May 11, 2006, the claimant underwent a physical examination for social security. She listed her medical

problems as head injury, hip, rib, shoulder and knee problems. Glaringly absent from this list is any mention of a left arm problem.

The claimant underwent a vocational rehabilitation assessment with Ms. Tanya Owens. Ms. Owens stated in her evaluation:

> Ms. Bishop's previous positions have consisted of light level work. Dr. Cathey has indicated that she may return her (sic) to her previous employment as a flower arranger. In addition, she has previously held work at the light level (i.e. general office and hotel work) for which she would also qualify given her education and experience. She currently possesses an Associates Degree, computer skills, and professional experience in clerical work. If she desires to update her computer skills, there are local resources (outlined above) to do this. There are numerous job placement options available to Ms. Bishop in the Pine Bluff area. It is my opinion that given her current age, education and experience, she would be employable in the above outlined vocational objectives.

The issues on appeal were the compensability of the claimant's left arm problems and wage loss. The claimant raises new issues on appeal. The claimant cannot ask for wage loss at the hearing level and then request temporary total disability on appeal. The issue of wage loss is not ripe until the claimant has reached the end of her healing period. Clearly, the claimant

was at the end of her healing period when she was released by Dr. Cathey in June of 2005 when he released her without restrictions with a 10% permanent anatomical impairment rating. Since the claimant failed to properly raise this issue before the Administrative Law Judge, we will not consider it on appeal. Paul Story v. Highland Resources, Full Workers' Compensation Commission Opinion filed August, 4, 1998 (E416465 & E407572).

The claimant contended that she sustained a compensable injury to her left arm. After conducting a de novo review of the record, I concur with the majority that the claimant failed to meet her burden of proof that her arm injury was a compensable consequence of her back injury.

The claimant must prove by a preponderance of the evidence that she sustained a "compensable consequence" pursuant to all of the statutory elements of compensability. Jones v. B.A.E. Sys., Full Commission Opinion filed May 6, 2004 (F001696); Atchison v. John P. Marinoni Const. Co., Full Commission Opinion filed September 19, 2001 (E616344). The burden of proof rests upon the claimant to prove the compensability of her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is

compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979).

The medical records do not contain any mention of an arm injury until Dr. Cathey's report of November 6, 2006. Although Dr. Cathey's January 20, 2005, report states that the claimant's leg gave away, there is no reference whatsoever to a left elbow injury until November 6, 2006. At that time she told Dr. Cathey that the pain started about 6 weeks prior. The claimant was told by Dr. Cathey that the elbow pain was not related to her workers' compensation injury. Curiously, when the claimant went to see Dr. Frazier, she told him she had left hand numbness for a little over two years. The claimant tried to explain during her testimony that she experienced pains and numbness in her left arm from May 17, 2004 through October of 2007. The medical records simply do not bear that out. In fact, the claimant had a physical examination for Social Security on May 11, 2006, and that report does not mention an arm problem either. The claimant only indicated that she had problems with her head, hip, rib, shoulder and knee.

The claimant has also requested wage loss disability benefits in addition to her 10% permanent anatomical impairment rating. The majority has awarded the claimant a 30% loss in wage earning capacity. I find that the claimant failed to prove by a preponderance of the evidence that she was entitled to any wage loss disability benefits.

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, 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 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).

The evidence demonstrates that the claimant did nothing to refute the fact that she did not explore any employment opportunities despite her release to return to full duty by Dr. Cathey in November of 2005. It is clear the claimant lacks motivation to return to work. In her vocational assessment of the claimant, Ms. Owens, when questioned at the hearing regarding the claimant's motivation to return to work, testified as follows:

> Q. In terms of motivation, do you think she is motivated to return to work?

A. No. I think she thinks she can't work. I don't know if it's a matter of choosing, you know, of actively doing one, I really believe psychologically she believes she can't work.

The Judge asked Ms. Owens to expound on her reasoning as to why age and lack of work experience are not factors currently precluding the claimant from returning to some type of employment:

Q. She's only worked about five years altogether.

A. Right. But she's done work that's sedentary and light level types of work. It's computer work. It's work that, there should be no physical reason why she couldn't continue to do that type of work. Which would not be in the case necessarily if someone were say heavy equipment operator or an iron worker or something like that. As they age their scenario becomes very different. So if we are looking at general office type of work, people can continue to do that, you know, until they chose not to. There should be no physical reason not to. The other thing that I looked at in her case is, you know, we look at, as people age their cognitive abilities, you know. And she's still benefitting from, she went back to school and graduated in 2001, which was not terribly long before she was injured in 2004 so we know that cognitively she was still in tact and still able to benefit and learn new

> information. So those are the types of things that I would be looking at is, you know, has she worked in the past, the type of work she's done has been more semi-skilled type of work. It's been more sedentary and light type of work. There are those jobs available so it's not a scarcity of jobs pushing her out of the labor market because of course as you age you do face age discrimination. Older people tend to get salary increases less than younger workers because younger workers tend to have more vocational options available to them.

The claimant thinks that she cannot work, therefore she has been content to draw Social Security disability. She admitted that she never contacted the respondent employer about returning to work. She has never sought out or applied for any jobs. The claimant's employment history had almost exclusively been in sedentary-type jobs. The vocational rehabilitation assessment concluded that these type of jobs were well within the claimant's abilities. The claimant returned to college in her late 50's and received an associates degree in business. Her cognitive skills are excellent as well. Simply put, I find no justification whatsoever for an award of wage loss. The claimant's inability to return to the work

force is based upon her own subjective belief that she is unable to work.

Therefore, for those reasons set forth herein, I respectfully concur in part and dissent in part from the majority opinion.

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KAREN H. McKINNEY, Commissioner