

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512182

MARGARET BOLING,
EMPLOYEE

CLAIMANT

SHERIDAN SCHOOL DISTRICT,
EMPLOYER

RESPONDENT #1

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT #1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT #2

OPINION FILED AUGUST 25, 2009

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.

Respondents #1 represented by the HONORABLE CAROL
LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent #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 and claimant cross-appeals
opinion and order of the Administrative Law Judge filed
January 20, 2009. 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 employer-employee-carrier existed among the parties on October 31, 2005 at which time the claimant sustained a compensable back injury at a compensation rate of \$161.00/\$154.00. Medical expenses, temporary total disability benefits until the end of the healing period on July 25, 2006 and a 7% rating to the body as a whole have been accepted.

2. The claimant has proven by a preponderance of the evidence of record that she has sustained wage loss in the amount of 10% in addition to her anatomical impairment rating of 7% for a total of 17%. The claimant's back injury is the major cause of this disability.
3. 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.

4. If they have not already done so, the respondents are directed to pay the court reporter, Linda Parker's fees and expenses within thirty days of receipt of the bill.

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 20, 2009 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 dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. Respondent appeals and claimant cross appeals from a decision of the Administrative Law Judge finding that the claimant sustained wage loss in the amount of 10% in addition to her anatomical impairment rating of 7% for a total of 17% to the body as a whole. 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 decrease in her wage earning capacity as a result of her compensable injury. Therefore, I find that the decision of the Administrative Law Judge should be reversed and this claim for permanent benefits in excess of the claimant's anatomical impairment rating should be dismissed.

The claimant sustained a compensable injury to her back on October 31, 2005. Although the claimant presented to the emergency room on that date, the only medical records introduced into evidence from the date of injury consist of lumbar and pelvic x-rays which did not reveal any evidence of injury. The claimant sought treatment at the Winston Clinic on November 29, 2005, at which time she denied any neuropathy. Claimant was diagnosed with a strain of the back and neck. Eventually, the claimant came under the care of Dr. Kenneth Rosenzweig who administered conservative treatment. Due to the claimant's bipolar disorder, Dr. Rosenzweig requested consultation with the claimant's psychiatrist since corticosteroid would put the claimant at risk for a manic episode. Dr. Rosenzweig ordered an MRI of the cervical and lumbar spine. The cervical MRI revealed: "mild spondylitic changes of the C4-C5, C5-C6, and C6-C7 levels without significant mass effect on the spinal canal or neural foramina." The lumbar MRI revealed: "small, 3 mm, right paracentral disk extrusion at the L2-L3 level without significant mass effect on spinal canal, neural foramina, or nerve root compression. Otherwise normal MRI of the lumbar spine."

In an office report dated February 21, 2006, Dr.

Rosenzweig described the MRI findings as follows:

Ms. Bowling returns for followup of neck and back pain for an injury sustained 10/31/05. we asked for an MRI since she didn't respond to conservative treatment. MRI showed spondylosis with non-compressive cervical spine. she has a non-compressive disc herniation at L2-3 of the lumbar spine. none of this requires spinal intervention or surgical management.

By the time of her March 14, 2006, follow up appointment, Dr. Rosenzweig noted that the claimant had been returned to limited duty work, which he continued to authorize. Claimant's only complaints at that time were of continued low back pain. Dr. Rosenzweig noted in his May 23, 2006, office report that the claimant had been doing better until she reinjured herself the previous day throwing out trash at work and that the claimant apparently strained her back. Dr. Rosenzweig opted to continue the claimant on her current course of conservative treatment, although he had recently received authorization to proceed with steroid injections. Dr. Rosenzweig also recommended a Medrol Dosepak to treat the claimant's inflammation which she took under advisement as she did not know if she wanted to risk chance of a manic episode from steroid use.

After school let out for the year, the claimant did not work during the summer. In her follow up visit with Dr. Rosenzweig on June 20, 2006, the claimant advised that she was doing well and that she had been fishing, taking care of her house, exercising on her own and that she was not really complaining of cascading difficulties. At that time, Dr. Rosenzweig wrote, "There is no contraindication that she cannot continue with her exercise efforts and plan to return back to work unrestricted at the end of the summer." At claimant's July 25, 2006, follow up appointment with Dr. Rosenzweig, the claimant advised that her neck pain was fine, but that she still had low back pain. Dr. Rosenzweig characterized claimant's pain as "static." After examining the claimant, Dr. Rosenzweig opined:

She is not a candidate at this time for a steroid injection or surgical management. She is scheduled to come back to work without restrictions, although, ergonomically she can make some adjustments to prevent injury. I think it is reasonable to declare MMI with her treatment date. She may require further assessment if she has increasing difficulties, but this is speculation.

Dr. Rosenzweig assessed claimant with a 7% permanent anatomical impairment for her documented

herniated disc and released the claimant to the care of her primary care physician for medication maintenance.

There is no indication in the medical records that claimant obtained any additional medical treatment for her back until she was seen by Dr. P. B. Simpson, a Pine Bluff neurosurgeon, on February 28, 2007. After taking a detailed history of the claimant's injury, treatment, improvement to some degree, and continued complaints of pain, Dr. Simpson made the following relevant findings:

MUSCULOSKELETAL/BACK: She has very mild restriction of motion of her back. She complains of a little tenderness over the R side in the mid back area. She states when she walks she has a little stiffness in her back. I can maybe appreciate that when she walks and looking at her from the back side. Generally, I do not really see that much of anything. NEURO: Her neurological exam is completely normal. She has +2 biceps, triceps, and patellar reflexes and at least +1 Achilles reflexes bilaterally. She has no anterior tibial or extensor hallicus longus weakness. She is able to toe and heel walk quite well. SLR test is negative. Her quadriceps function is normal. She does not complain of any sensory deficit. Again, she has never had any radiculopathy.

Her MRI of her lumbar area to my estimation is completely normal other than some very minor changes.

I certainly see nothing related to any trauma. Her neck x-rays certainly show some degenerative changes that are more than 4-5 mos old to my estimation. She is not complaining of any neck pain anyway.

After diagnosing the claimant with musculoskeletal back pain, Dr. Simpson wrote, "I told her that I thought further medical treatment is probably futile. She can get an FCE as to her ability to RTW. Other than that, I have no real suggestions to make."

The Functional Capacity Evaluation performed on May 9, 2007, produced an unreliable effort with only 39 of 55 consistency measures within expected limits. Overall, the Functional Capacity Evaluation revealed that the claimant could at least perform work in the LIGHT physical demand work classification.

Given claimant's psychological condition her memory with regard to whether or not restrictions were placed upon her by Dr. Rosenzweig prior to returning to work in the fall of 2006 is not credible. Claimant's medical records clearly show that Dr. Rosenszweig released the claimant to return to work without restrictions.

Claimant claims that an offer to return to work was extended that contained a promise of help. She

did not produce any credible evidence of this promise. Moreover, the medical records fail to document any need for restrictions. Dr. Rosenzweig stated that the claimant could make ergonomic adjustments to work and lift smarter. This is just plain, good, old-fashioned common sense. Dr. Rosenzweig did not place any restrictions upon the claimant nor did he advise that she needed help or assistance with her work. Ergonomic adjustments does not equate to work restrictions, only smarter working.

Claimant sustained a back injury and was released to return to work without restrictions. The medical records further show that the claimant has a pre-existing psychological condition. When the claimant was asked why she could not return to work, her first response was because of the stress, referencing this psychological problem. A thorough review of the medical records reveals that the claimant's first response was correct. Claimant's psychological condition, not her back injury, is responsible for the claimant's inability to work.

Although the claimant's x-rays revealed broad based disc osteophytes in the cervical region and a small paracentral disc extrusion at L2-3, Dr. Simpson

did not relate these findings to any form of trauma. Moreover, when Dr. Simpson examined the claimant in February of 2007, his neurological examination was "completely normal." Thus, while the MRI results were sufficient to warrant a permanent impairment rating, Dr. Simpson described the findings as completely normal changes. After reviewing the medical records as a whole, I am unable to find that the claimant has sustained any wage loss disability as a result of his compensable back injury which produced minimal "normal changes."

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 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.

Despite the Administrative Law Judge's comment, "This examiner does not understand how an injury can be severe enough to warrant a permanent anatomical impairment rating but not severe enough to warrant restrictions, especially for a manual laborer," it is the duty of this Commission to weigh the evidence before us to determine whether the claimant has proven entitlement to benefits by a preponderance of the evidence. The evidence of record clearly reveals that

the claimant was released to return to work on July 25, 2006, without restrictions. In light of the claimant's psychological condition, I cannot find that the claimant's testimony regarding otherwise is credible.

Claimant indeed returned to work in the spring of 2006, on light duty and help or assistance was provided for her. After being released to full duty, the claimant returned to work in the fall of 2006, and worked until September 13, 2006. Claimant testified that she discontinued working because she needed physical assistance to carry out her work duties, which she claims was promised to her but never provided. First, I cannot find that such assistance was ever promised in the fall of 2006. When claimant was released to return to work on light duty, assistance in the form of a helper or assistance from a co-worker was provided for the claimant. Thus, respondent-employer has demonstrated its willingness and ability to accommodate the claimant when she was released to return to work with restrictions. If assistance was indeed promised, respondent-employer has shown that it can and will provide such assistance. Since no assistance was provided, I cannot find that any assistance was promised. Second, after reviewing the claimant's

medical records with regard to her treatment for bipolar disorder, it is evident that the claimant's memory is not always accurate. Accordingly, I cannot find that the claimant was offered assistance in the fall of 2006. Therefore, I find that the claimant was offered work upon her release earning the same or greater wages than she was earning at the time of her injury. The claimant returned to work, but left after only a few weeks. There is no indication in the record, aside from the claimant's own self-serving testimony, that her compensable back injury was the cause of her inability to continuing working. Therefore, pursuant to A.C.A. § 11-9-522(b)

I find that the claimant has failed to prove entitlement to any wage loss disability.

However, even if suitable employment was not offered to the claimant, a finding I specifically do not make, I still find that the claimant has failed to prove by a preponderance of the evidence that she sustained a decrease in her wage earning capacity as a result of her compensable injury. It has long been held that wage loss in a workers' compensation claim is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v.

Gatson, supra., Cross v. Crawford County Memorial Hosp., supra. Stated another way, the compensable injury must be the major cause of the wage loss disability. A.C.A. § 11-9-102(4)(F)(ii)(a).

At the time of the hearing, the claimant was 54 years old. The claimant had a high school diploma and she has received training and certification to be a Master Plumber. Claimant has kept books for and managed a business. At the time of her injury, the claimant was employed as a custodian earning as much as \$14,000 per year. In her previous employment as a Master Plumber she earned more than \$30,000 per year. The claimant sustained a minor strain injury superimposed upon "normal changes" in the lumbar spine. Furthermore, claimant's activity during her manic episode shortly after her compensable injury reveals the ability to work as a custodian when "she completely emptied the back bedroom into the living room, cleaned the room, cleaned every item in it and put everything back into the bedroom."

Claimant was deemed to have reached maximum medical improvement by July 26, 2006, and released to return to work without restrictions. The claimant returned to work making the same money until she quit in

September of 2006. Claimant is currently drawing \$1,285 per month in Social Security Disability benefits.

Although the claimant has training as a bookkeeper and office or business manager, the claimant testified that she cannot perform these duties because of the stress, referring to her mental condition. Claimant also described the stress of her job as a custodian has kept her from working.

The record overwhelming reveals that the claimant has not returned to work due to her bipolar disorder, not her compensable injury. There is no credible evidence of record that the claimant's minor back injury has prevented her from returning to work. Claimant testified that she cannot work due to back pain, but the medical records do not corroborate her testimony. She was released without restrictions and even with an invalid Functional Capacity Evaluation, the claimant was found to be able to perform work in the light duty classification. The claimant performed her work for a few weeks and then left her employment. There are no corresponding, contemporaneous exhibits or testimony to verify why the claimant stopped working. A review of the medical records, suggests, however, that claimant's bi-polar disorder is the primary reason the

claimant cannot presently work. The claimant is currently drawing \$1,285 per month in Social Security Disability benefits, which is slightly more than she earned as a custodian for respondent-employer.

Accordingly, after I consider the claimant's compensable injury, her age, education, work experience, motivation, post-injury income, credibility, demeanor, and a multitude of other factors, including but not limited to her medical and psychological condition, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained any decrease in her wage earning capacity as a result of her compensable injury. There is no credible evidence of record that claimant's minor compensable injury has affected her ability to earn a livelihood. Any such decrease is attributed solely to her pre-existing psychological disorder.

Therefore, I find that the decision of the Administrative Law Judge should be reversed and this claim for permanent disability benefits denied and dismissed.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner