

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708034

CAROL J. LOVE,
EMPLOYEE

CLAIMANT

CENTRAL ARKANSAS DEVELOPMENT COUNCIL,
SELF-INSURED EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED SEPTEMBER 25, 2009

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed February 2, 2009. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The claimant has failed to prove by a preponderance of the evidence that she is entitled to the 28% permanent impairment rating assigned by Dr. Kravetz.
2. I find the appropriate impairment rating is 10%, as assigned by Dr. Barry Baskin. (sic)
3. The claimant has failed to prove by a preponderance of the evidence that she is entitled

to wage loss benefits over the 10% permanent impairment rating assigned.

4. The claim for benefits is respectfully denied and dismissed.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that she sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the February 2, 2009 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After a de novo review of the record, I must respectfully dissent from the majority opinion. I would award the claimant a 28% permanent anatomical impairment rating and an additional 30% wage loss disability benefits, as well as attorney's fees.

The claimant was involved in a single car motor vehicle accident causing compensable injuries in the form of a T12 compression fracture and a herniated disc at L4-5. The claimant underwent a kyphoplasty, in which a cement-type substance was injected into the T12 vertebral body to stabilize it. The claimant also underwent epidural steroid injections and physical therapy for her lumbar injury as well as pharmaceutical treatment.

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). There is no question that the claimant sustained permanent physical impairment as a result of the compensable injuries. The current issue on permanent physical impairment is a matter of quantity.

On March 20, 2008, Dr. Kravetz saw the claimant with the purpose of placing her at maximum medical improvement and evaluating her permanent anatomical impairment. He noted that she was "doing quite well" and was "happy with her progress." She had returned to work without restrictions. Dr. Kravetz stated that "I, of course, remind her that she is certainly not 100% better and that she certainly may have more back complaints." Dr. Kravetz emphasized that he would not be surprised if she experienced further

problems with both her thoracic and lumbar spine and also required further treatment.

With this prologue, Dr. Kravetz made his evaluation of her permanent anatomical impairment due to the T12 compression fracture and to the herniated disc at L4-5, according to the AMA Guides of Evaluation of Permanent Impairment (4th Ed. 1993). While Dr. Kravetz did not specifically identify the tables of the Guides which he used to make his evaluation, it is a simple matter to identify them. He referred to the T12 injury as a DRE (diagnosis-related estimates) thoracolumbar category four, which is part of the Injury (or Diagnosis-Related Estimates) Model and is explained in the Guides as a "loss of motion segment or structural integrity," with a documented history of muscle guarding and pain, and includes "more than 50% compression of one vertebral body without residual neural compromise. . . ." Guides, p. 3/106, Sec. 3.3i. Table 70 shows that a vertebral body fracture with or without loss of motion segment integrity or radiculopathy may be Category IV. Table 71 shows that guarding, including muscle spasm, is useful in differentiating between one impairment and another. Table 74 states that a DRE Thoracolumbar Spine

Impairment of Category IV equates to a 20% impairment of the whole person.

For the claimant's herniated disc at L4-5, Dr. Kravetz used the Injury Model to identify this injury as DRE lumbosacral category 3 radiculopathy, which equates to a 10% whole person impairment pursuant to Table 72. According to Dr. Kravetz's report and the Guides' Combined Values Chart, the two impairments combine for a total of a 28% permanent anatomical impairment to the body as a whole. (Guides, p. 322.)

The claimant was also evaluated for purposes of an impairment rating by Dr. Baskin, who reviewed the claimant's medical file and performed a physical examination of the claimant on May 6, 2008. Dr. Baskin used Table 75, which is part of the Guides range of motion model to assess a much different impairment rating. Section 3.3j of the Guides states that the "Range of Motion Model should be used only if the Injury Model is not applicable. . . ." (Guides, p. 3/112, Sec. 3.3j.) Dr. Baskin found that the claimant had a 3% impairment to the body as a whole, according to Table 75, section I.A. for a compression of one thoracic vertebral body from 26-50%.

For the herniated disc at L4-5, Dr. Baskin assessed a 7% permanent anatomical impairment rating based upon Table 75. He used the Guides' Combined Values Chart to combine the two ratings for a total permanent anatomical rating of 10% to the body as a whole.

I would accept Dr. Kravetz's combined rating of 28%. First, he was the claimant's treating physician, following her from September 12, 2007 forward. He performed the kyphoplasty on the claimant. He is the most familiar with her injuries, her treatment, the results of that treatment and her condition. He observed the objective signs including evidence of the compression fracture and herniation, as well as the muscle spasms, scoliosis and kyphosis. He noted her radicular symptoms. Secondly, Dr. Kravetz used the Injury Model of the Guides for his assessment of impairment, which is, according to the Guides, the preferred method of assessment: "The Range of Motion Model should be used only if the Injury Model is not applicable, or if more clinical data are needed to categorize the individual's spine impairment." Guides, p. 112, Sec. 3.3j. Each of the claimant's injuries are easily classified under the Injury Model, with no need

to revert to the Range of Motion Model. On the other hand, Dr. Baskin, hired by the respondents, only saw the claimant once. He utilized the Range of Motion Model of the Guides, and Table 75, which, while used regularly in workers' compensation cases, is not by the Guides' own definitions the only choice for back injuries and is not always the appropriate choice.

I find Dr. Kravetz's opinion to be the more credible one in this claim, and I would assign the claimant the 28% permanent anatomical impairment rating per Dr. Kravetz's opinion.

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 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. 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 claimant sought 30% wage loss benefits. The claimant testified that she was 57 years old at the time of the hearing, with an eleventh grade education. The only other education she had was some computer classwork for a former employer, more than five years prior to the hearing. Her work experience included a little time driving a log truck, five years working for a quarry driving, operating heavy equipment, maintenance of quarry machinery, and before that ten years with Red Roof Inn, working her way up from front desk clerk to general manager. She never had any problems with her

back prior to the motor vehicle accident. She performed heavy work on the job and at home, including digging holes, building a deck and chopping and carrying wood. The claimant had a commercial driver's license and could drive any type of vehicle. Prior to her injury, she did not have any problem doing her job for the respondent employer. She had no restrictions on her activities and had no problems with her mid back or low back.

She had severe pain after the accident and was off work for months. Her thoracic injury was not problematic after Dr. Kravetz performed a kyphoplasty in September 2007. Her lower back was better in some ways, but she had "a lot of spells that I can't get up and down." She gave an example of the difficulty she had with her lower back:

Well, just for instance, about last week I was in bed for four days. I was helping my husband put some wood in the tractor bucket so I could carry it into the house for the fireplace. And it was in bed or four days. So it comes and goes, you know. There is a constant burning in my back, even now as we sit. I mean it's just a constant. It's there. The lower part of her back.

In regard to her condition at the time of the hearing, she explained that:

It seems like it is about the same. The pain mainly is not as bad as, you know, as it always was. But I just have spell that I just

can't get up and down. I know we took a trip to Connecticut over the weekend to see my granddaughter, and two nights I woke up in the middle of the night cramping. From the sitting and driving and different things.

The claimant returned to work full duty, but the driving and assisting clients was too hard on her back. Shortly after she returned to work, she carried out a trash bag to the dumpster, and she tripped, twisting her ankle. She reported it to Patricia. She does not recall filling out forms or not. When she drove the trucks and vans, the bouncing was a problem. She had to pull wheelchairs, which caused her problems. Helping clients in and out of the vehicles and climbing up and down stairs also caused her problems. These activities caused her increased pain. She explained that there was one incident when she hurt her back pulling a wheelchair, and that she told her supervisors that she could not do the wheelchairs.

The claimant testified that she called Keith Patton, the assistant supervisor for the respondent employer, on his cell phone on May 11, 2008. She had to leave a message, which stated that she could not do her job anymore and that she quit. She left, because the job increased her pain and she could not do it anymore. After she left her job with the respondent employer, she

opened a restaurant, but she shut it down because it was physically too hard. She could not do what she needed to do because of her back.

The claimant had worked for Securitas Security Company since before she started with the respondent employer. Before her injury, she was able to do security patrol outside the premises, but not since that time. She worked, one to two days a month, sitting behind a desk and answering the phone at Ouachita Baptist University, since February 8, 2008. She made not quite \$8 an hour. When she did security patrol, she made \$9.11 per hour, but she was physically unable to do security patrol.

The claimant was not working anywhere else and had no other sources of income. Her back problems had been going on since the motor vehicle accident, pretty much constantly. She could only do a little yard work at a time, just a little raking or blowing, but not for long. She could not work in her flower beds or other work like that. Her weight had increased from around 175 to around 250, which she attributed to her inactivity which was caused by her back pain.

The claimant testified about that, for her back pain, she took Oxycodone occasionally and a

medication for fibromyalgia that Dr. McDonald prescribed that might help. She did not take other medication, other than over the counter medications when needed. The doctors recommended that she continue her home exercises, stretching and strengthening, that kind of thing. She did them at home, and they helped "some." She had to stretch to get out of bed some mornings.

The last visit to the doctor that the company paid for was in February of 2008, to Dr. Baskin. She had gone on her own to her doctor, not Dr. Kravetz. Dr. Kravetz was still her authorized treating physician in Little Rock, but it was a long way for her to travel. She saw Dr. McDonald, a general practitioner and her family doctor, in Arkadelphia. The insurance company did not pay for him. If she wanted to go back to Dr. Kravetz, she thought she would be able to do so.

The claimant saw, on December 19, 2007, Dr. Kravetz, who repeated his recommendation of epidural steroid injections to address her lumbar pain related to her herniated disk at L4-5. She had increased pain after a fall on December 6. Dr. Kravetz reported:

At this time, I had a lengthy discussion once more with the patient and her case manager. Really there is nothing different we are going to do today other than I am willing to put her back to a sedentary type of job at this time.

I did mention to her the fact that there is probably going to come a point where she does not get enough benefit from her treatment and that we are going to be left having to decide if perhaps she needs to seek a different kind of job altogether. While ultimately if injection therapy fails we can at surgery. I cannot say that I am particularly enthusiastic about it, although the truth is the patient certainly has responded appropriately to the previous treatment, and I do not have any reason to think that she is in any way not motivated to get better. At this point again we will hope that injection therapy does the trick. I will see her back in six weeks to assess her progress.

Dr. Kravetz reported improvement and returned her to work with no restrictions on February 8, 2008. On March 20, 2008, he put her at maximum medical improvement and assessed the impairment rating, with the following comments:

At this time, I had a lengthy discussion with the patient and her case manager. The patient, overall, has done well. I, of course, remind her that she is certainly not 100% better and that she certainly may have more back complaints. From the standpoint of her fracture, she has done well, but clearly she has developed I believe a slight kyphosis, as well as additional scoliosis secondary to that fracture. Whether or not there are additional problems down the road from this are difficult to predict. As far as her herniated disc, the injection therapy seems to have helped quite a bit, although clearly there are still symptoms from this. I would not be surprised if this is a problem again down the road. At this point, the patient has returned to work without restrictions and I am not anticipating any treatments in the immediate future, but again would not be

surprised if there are more treatments down the road.

I would award the claimant thirty percent wage loss benefits above her permanent anatomical impairment. The claimant is obviously motivated to work, as evidenced by her willingness to return to work, to return to vigorous physical work, after her injury, as well as her history of vigorous physical work in regular and part-time employment and at home. Her attempts to operate her own restaurant business likewise emphasize her desire to remain actively employed. Her age and her work history, in mainly heavy labor and driving type jobs, and limited education restrict the type of employment available to her, especially when considered in conjunction with the physical limits her back injury has caused. She has a limitation at a minimum of 10%, and more appropriately of 28%, due to her injury. She has experienced increased pain in performing her job with the respondent employer, with regular household activities and with her other attempts at employment. Dr. Kravetz cautioned her in more than one medical report that she was not fully healed to her full capacity and that it would not be a surprise for her to experience further pain and problems due to her back

injuries. Her ability to perform services for remuneration has easily been reduced by 30% over and above her permanent anatomical impairment.

I also find that the claimant has not forfeited her right to wage loss disability benefits. She relinquished her job after experiencing re-injury and further pain while performing her regular job duties. The law does not require the claimant to remain in her job doing work which causes her pain and further damage. The claimant's injury in December 2007 was no secret to the respondents. Further, the respondents chose to ignore the claimant's message to the supervisor instead of following up on the allegedly garbled message. The claimant made contact, reporting that she could not physically do the job, and the respondents did not follow up on this message. Interestingly, this supervisor did not testify at the hearing. Dr. Kravetz had cautioned the claimant that she would at some point have to make a decision to seek a different type of employment, which the claimant did. Unfortunately, her attempts have not met with success.

I would award the claimant a 28% permanent anatomical impairment rating, with an additional thirty percent wage loss benefit, based upon her compensable

injuries, Dr. Kravetz's reports, and the limitations she has experienced since the injury.

For the aforementioned reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner