

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605114

WANDA LOUISE MILLS, EMPLOYEE	CLAIMANT
ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
ARKANSAS INSURANCE DEPARTMENT/ PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED FEBRUARY 20, 2009

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

Claimant represented by HONORABLE CONRAD ODOM, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 and No. 2 represented by HONORABLE WILLIAM L. WHARTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she was entitled to a 60% loss in wage earning capacity in addition to her 13% permanent anatomical impairment rating. Specifically, the claimant appeals the 60% loss in

wage earning capacity because she contended that she was entitled to be found permanently and totally disabled. The respondents appeal the 60% loss in wage earning capacity contending that the claimant suffered no wage loss in excess of her anatomical impairment and that they offered appropriate work to the claimant and she declined to continue working for the respondent employer. Based upon our de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. However, we find that the claimant proved by a preponderance of the evidence that she is entitled to a 30% loss in wage earning capacity in addition to her 13% permanent anatomical impairment rating.

The claimant was employed by the respondent employer as a right-of-way acquisition negotiation. The claimant had worked for the respondent employer for 17 years when she slipped and fell on September 23, 2005, and injured her back. The claimant's injuries were accepted as compensable by the respondent employer. The claimant underwent conservative treatment for approximately one year but ultimately underwent surgery by Dr. Wayne Bruffett. The

surgery performed on September 26, 2006, included a lumbar fusion, pedicle instrumentation, and placement of a pain pump catheter. The claimant received additional physical therapy after the surgery. Dr. Bruffett determined that the claimant had reached maximum medical improvement on February 12, 2007, and sent her for a functional capacity evaluation. This evaluation was performed on February 20, 2007. The functional capacity evaluation was invalid due to the claimant giving inconsistent effort. Specifically, the FCE stated:

RELIABILITY AND CONSISTENCY OF EFFORT
The results of this evaluation indicate that Ms. Mills gave an unreliable effort, with 21 of 47 consistency measures within expected limits. Analysis of the data collected during Ms. Mills' evaluation indicates that the effort put forth during her evaluation was not consistent. During Ms. Mill's evaluation, she exhibited numerous inconsistencies which were sufficient to invalidate the test.

These inconsistencies included a dynamic lifting profile which was not consistent when cross validated which other material handling tasks performed by Ms. Mills. During her lifting test, Ms. Mills demonstrated that she was unable to lift more than 5 lbs. to shoulder level. However, when performing

the carrying test, Ms. Mills was observed picking up a 10 lb. weight and raising it to shoulder level prior to carrying it 10 feet. This does not represent consistent effort.

In addition, Ms. Mills reports during her knuckle to shoulder lifting test that she was unable to lift a 5 lb. weight from knuckle level to shoulder level 5 times. When she was told the weight would be replaced with another weight, she lifted the new weight to shoulder level 5 times. The new weight weighted 5 lbs, the same as the previous weight she reported an inability to lift.

Ms. Mills also participated in a series of tests to identify the presence of non-physiological symptoms of low back pain. Ms. Mills tested positive on 3 out of 4 Waddell's tests given. She tested positive on the supine versus seated leg raise, rotation at the ankles and axial loading.

Ms. Mills also demonstrated an extremely low level of hand grip strength. Even though Ms. Mills reports a history of arthritis in her hands, she produced 0 lbs. of grips strength on several occasions at numerous settings. Even with severe arthritis, 0 lbs. of grip strength indicates less than maximal effort. Ms. Mills also reports increased pain in her low back when performing the hand grip strength testing which is not consistent.

FUNCTIONAL ABILITIES

Ms. Mills demonstrated the ability to perform work in the Sedentary classification. It should be noted, however, that due to the inconsistent nature of Ms. Mills' performance these levels should not be considered her true maximum values. Ms. Mills performed the following Lifting activities at the Sedentary level with an Occasional lift of up to 10 lbs. when lifting from 12" above the floor to waist height.

Ms. Mills demonstrated the ability to perform the following activities on a Frequent basis: Reach Carry - 5 Lb, Push Cart - 45 Lb, Balance, Crouch, Kneel, Climb Stairs, Reach Immediate (L), Reach Overhead (L) and Reach Overhead (R).

FUNCTIONAL LIMITATIONS

Although Ms. Mills did not demonstrate ability to perform several activities, these activities should not be considered limitations due to the inconsistent nature of Ms. Mills' performance. Activities which Ms. Mills reports an inability to perform included: Lifting or Carry over 10 Lb, Pulling Cart - 45 Lb. and Reaching with a 5 Lb. Weight with either UE.

CONCLUSIONS

Ms. Mills completed functional testing on this date with unreliable results.

Overall, Ms. Mills demonstrates the ability to work at only the Sedentary work level over the course of a normal workday. She did exhibit sufficient inconsistencies to completely invalidate the entire evaluation. Therefore,

Ms. Mills' actual functional status remains unknown due to inconsistent effort on her part.

The claimant met with Mr. Perry Johnston, the director of the right-of-way division of the respondent employer. They discussed the claimant returning to work. The claimant lives in Perryville, Arkansas, and worked out of the department headquarters in Little Rock. The claimant complained to her employer and to her physician that she could not drive long distances due to the pain. Mr. Johnston had an office set up for the claimant in Morrilton whereby she could do work from that office and not from the Little Rock office. The office was set up at the department's county maintenance facility at Morrilton. There was no space available in the Perryville office to accommodate the claimant.

On March 14, 2007, Dr. Bruffett issued the claimant a 13% permanent anatomical rating which was accepted and paid by the respondents. Dr. Bruffett did not give specific conclusions about the claimant's capabilities because of the results of the claimant's functional capacity

evaluation were invalid due to an unreliable effort. On April 2, 2007, Dr. Bruffett issued a physician's status report stating that the claimant could return to work and he listed no restrictions. There appears to be three copies of this report in the record. The first report saying there are no restrictions, the second appears to have sedentary work restrictions, and the third appears to show a sedentary work restriction that the claimant could not drive back and forth to Little Rock to work.

The claimant worked for two or three weeks out of the Morrilton office and complained of having headaches, tightness in the throat, itching and irritating to the eyes, and thirst with shortness of breathe or cough due to chemicals that were stored in the closet near her work area. On April 5, 2007, the claimant's family physician noted that the claimant was going to contact her supervisors to investigate whether or not the area could be cleaned up to make adjustments in how the chemicals were stored. On April 18, 2007, the claimant's family physician filled out the paperwork for the claimant to receive disability

retirement from the respondent employer. The claimant was diagnosed with the following problems:

Chronic hypertension, acute depression,
chronic lumbago/deg. spine, chronic
degenerative arthritis of the hand.

The claimant also applied for Social Security disability. The disability retirement as well as Social Security disability were approved.

The claimant underwent a vocational assessment by Dr. Bob White who opined that the claimant was incapable of performing sedentary work.

The claimant contends that she is permanently and totally disabled. Respondents contend that the claimant is not entitled to any wage loss disability benefits in addition to her 13% permanent anatomical impairment. Based upon our de novo review of the record, we find that the claimant is entitled to 30% wage loss in wage earning capacity in addition to her 13% permanent anatomical impairment.

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 he/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, he/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.

The evidence demonstrates that the claimant has a GED, 18 months of college, a real estate sales and broker's license, an abstractor's license and an appraiser's license. The claimant has extensive work history in sedentary-type employment situations. She has experience working as a receptionist in a law firm, as a tax preparer, real estate sales and broker, title researcher and has 17 years of experience in negotiating real estate acquisitions for the respondent employers. The claimant's supervisor testified that the claimant was excellent at her job and was a very good employee.

The claimant's treating physician, Dr. Bruffett, who performed the surgery on the claimant's back issued the claimant a 13% permanent anatomical impairment rating. He noted that the claimant had already filed for disability and

stated that he could not place any restrictions on her activities after her functional capacity evaluation was found to be invalid due to inconsistency of effort. The respondent employer, in an effort to return the claimant to work, had an office area set up in a county maintenance headquarters in Morrilton so the claimant could be closer to home and not have to drive back and forth to Little Rock. The respondent employer accommodated the claimant in every way including giving her flexible hours.

When we consider the fact that the claimant's doctor has not given her any restrictions and the claimant is capable of sedentary work, the fact that the respondent employer attempted to return the claimant to work at a location closer to her home, the fact that the claimant has already applied for disability retirement as well as Social Security disability and the fact that the claimant gave inconsistent effort in her functional capacity evaluation which indicates that the claimant has a complete lack of interest in returning to the work force, we cannot find that the claimant is permanently and totally disable. However, we do find that the claimant is entitled to a 30% loss in wage

earning capacity in addition to her 13% permanent anatomical impairment rating. Accordingly, we hereby affirm, as modified, the decision of the Administrative Law Judge.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant proved, by a preponderance of the evidence, that she has been rendered permanently and totally disabled as a result of her compensable injury, therefore, I must respectfully dissent.

The claimant is now 62 years old. She completed the ninth grade and obtained a GED. She sustained a serious back injury on September, 23, 2005. After one year of conservative treatment involving lumbar epidural steroid

injections and a diskogram, she underwent a complex back surgery. On September 28, 2006, Dr. Wayne Bruffett, orthopedic surgeon, performed a two-level lumbar fusion at L4-L5 and L5-S1, pedicle instrumentation, with bone grafts and bone spacers, and placement of a pain-pump catheter. On the day of surgery, Dr. Bruffett wrote:

Ms. Mills would like to proceed with surgical treatment for her pain. She says she desperately wants to try to get back to work, but says she cannot handle the driving, the sitting, and the prolonged travel. She cannot work in her current state, and she has had almost a year of nonoperative treatment for her problem. I am not sure if she will be able to return to work or not, even with a good operation. However, she is not going back in the state she is in now.

I think it is reasonable for her to consider surgery, but she needs to understand that operative intervention for her problem is an extensive undertaking. I am hopeful that she would get better to the point where she can return to work and finish out her employment studies until she can retire. She says she is due a bonus if she can do this, and so she is motivated in that regard.

On the other than (sic), there is a chance she could have surgery and have just as much pain as she is having now, or there is a chance she could have pain

that is even worse than what she is having now.

After the surgery, follow-up evaluations with Dr. Bruffett revealed that the claimant did not obtain any significant relief from pain and that it was Dr. Bruffett's opinion that the claimant was unable to work. On November 20, 2006, Dr. Bruffett said that "she is not really capable of working yet". On February 12, 2007, he said that "she's not going to be able to return to her previous job". At this time, Dr. Bruffett ordered a functional capacity evaluation. On March 14, 2007, Dr. Bruffett gave the claimant a 13% permanent impairment to the body as a whole. He reviewed the functional capacity evaluation and stated the following:

Ms. Mills returns for followup, after having obtained a functional capacity evaluation. She continues to complain of pain. She is not really able to do much...I reviewed the functional capacity evaluation with Ms. Mills and her husband. Unfortunately, specific conclusions about her capabilities cannot be drawn from this study because the results are invalid. Apparently, she gave unreliable effort.... Unfortunately, I can't really place any restrictions on her. I doubt she's going to go back to work. She had a job that

she loved and she's just not able to do it.

On April 18, 2007, Dr. Melissa Seme completed a report for the Arkansas Highway Employees' Retirement System. In response to a question as to the degree and permanency of disability suffered by the claimant, she responded: "permanent and total".

The claimant made two unsuccessful attempts to return to work. In February of 2007, the claimant reported to work but was sent home by her supervisor, after less than one hour, because she was in obvious pain and was shaking. In March of 2007, the supervisor decided to set up a desk for the claimant in a maintenance facility in Morrilton which was closer to her home and would require less driving. Her desk was located in a storage room, which she shared with a refrigerator, leftover junk, and herbicides. The claimant attempted this work for approximately twelve days, but the driving involved and just sitting in the office gave her such difficulty that she always went home without completing a full day. Her supervisor confirmed that the claimant was never actually given any work to do. In

addition, the chemicals which were stored in the facility caused her to have physical reactions, such as headaches, burning eyes, and a sore throat. The claimant consulted Dr. Seme with regard to the chemical exposure. In a report dated April 5, 2007, Dr. Seme recommended that the claimant avoid contact with the area where the herbicides were stored.

After the two unsuccessful work attempts, the claimant, again, contacted her supervisor to discuss any other available options so that she could complete another three to four years of work. The claimant was informed by the supervisor that "there is nowhere to put you". At this time, the claimant and her employer discussed filing for disability. As a result, the claimant filed for disability with the Arkansas State Highway Employees' Retirement System which required proof that the claimant was "totally and permanently incapacitated for the performance of the duties of his position". The claimant was found to have met this requirement and benefits were awarded. In addition, when the claimant visited Dr. Bruffett in February of 2007, to discuss the fact that she was not improving, he told her to

file for Social Security Disability benefits. To be entitled to Social Security disability benefits, a claimant must prove inability to pursue any form of gainful employment. She filed for these benefits and they were awarded in six weeks.

The claimant was evaluated by Bob White, vocational specialist, on May 29, 2007. Mr. White interviewed the claimant, reviewed medical records, and came to the following conclusions:

As she is currently she is not able to meet the sitting required in sedentary work and cannot meet the standing requirements of light work. Exertionally she cannot meet the requirements of sedentary or light work.

While she does have skills that would transfer to clerical jobs she cannot use her hands to write, keyboard or use office equipment on a regular basis, and again cannot sit for over a few minutes without unscheduled breaks and frequent rest periods.

Her focus, attention and concentration have all been affected.

All jobs which she could perform based on her education, training and work history require attention to detail, complex cognitive and analytical skills, all of which are affected by her pain.

Even after this accident the Highway Department did try to accommodate Ms. Mills by moving her office closer to her home, but with no success as she was able to work only two weeks.

At age 61, it is highly unlikely her back problems will improve and in fact, Louise believes they are getting worse. Based on the documentation set out in this report, my professional opinion is Louise Mills is not capable of returning to her past work or any other work for which she would otherwise be qualified based on her age, and deficits regarding her back and hands.

Permanent total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (e) (1). The Arkansas Court of Appeals' decision in the case of Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W.3d 916 (2004) should control the result herein. In that case, the Court reversed the Commission's 50% wage-loss disability determination and awarded permanent total disability benefits. The Claimant in Whitlatch was a forty-four year old, manual laborer, with an eleventh-grade education, who had sustained a back injury, had back surgery, and received an anatomical impairment

rating of 9% to the body as a whole. Mr. Whitlatch did not obtain a good result from surgery and was left with significant limitations in his ability to walk, bend, stand, and sit. He had difficulty sleeping because of pain and experienced significant problems from the side effects of pain medications. The doctors and the vocational expert were of the opinion that the claimant could not work. According to the Court, the Commission based its award of 50% wage-loss disability on the following:

[Appellant] is relatively young and has sustained a physical impairment rating of only 9% to the body as a whole. [Appellant] contends that his pain prevents him from returning to the work force, but he has not even attempted to seek any type of employment to determine the true extend (sic) of his wage loss disability.

The Commission also noted that appellant underwent a functional capacity evaluation, which determined that he "displayed the functional abilities of working in the sedentary category for an eight-hour day.

While Whitlatch certainly contained a solid factual justification for reversing the Commission's 50% wage-loss disability award in favor of one for permanent

total disability, this case presents an even stronger factual basis for such a decision. The claimant in this case is 62 years old, while Mr. Whitlatch was only 44 at the time the determination in his case was made. The claimant herein has more anatomical impairment. And, most importantly, Ms. Mills has demonstrated a high degree of motivation to return to work which was not displayed by the claimant in the Whitlatch case. Finally, both claimants had a functional capacity evaluation which indicated that they could return to work. The Court in Whitlatch acknowledged this fact but gave the test little weight in light of the other evidence of record contradicting the test's conclusions. Therefore, unless we are to totally ignore the holding in Whitlatch, the disability award in this case must be increased to permanent total disability.

Rather than basing its decision on the burden of proof set out in Ark. Code Ann. §11-519 (e) (1), which I would note the majority decision fails to even cite, or, on the precedent set in Whitlatch, the majority appears to base its decision on two main factors. First, at the hearing, the respondent contended that the claimant should be prohibited

from receiving wage-loss disability benefits because of the claimant's receipt of a bona fide offer to be employed at comparable wages in accordance with Ark. Code Ann. § 11-9-522. The Administrative Law Judge correctly concluded that the respondent failed to meet its burden of proof on this issue. As stated previously, the claimant demonstrated that she was unable to perform the job offered to her in the storage facility. While the claimant was never actually given any work to do, the required driving and sitting, alone, prevented her from being able remain at the job site for the full work day. In addition, working in a facility where herbicides were stored was unsuitable and eventually prohibited by Dr. Seme. The majority has apparently affirmed the Administrative Law Judge's finding on this issue.

Despite the fact that the majority appears to affirm the Administrative Law Judge's finding that the respondent did not meet its burden of proving a bona fide job offer under Ark. Code Ann. § 11-9-522, the majority states, as part of its basis for denying permanent and total disability benefits: "the fact that the respondent employer attempted to return the claimant to work at a location closer to her

home." This statement is clearly error. As the respondent did not prove a bona fide job offer, the majority cannot consider the claimant's failure to work at a non-suitable, and in fact, non-existent job, a factor in denying permanent and total disability benefits.

Second, the majority states:

the fact that the claimant gave inconsistent effort in her functional capacity evaluation which indicates that the claimant has a complete lack of interest in returning to the work force, we cannot find that the claimant is permanently and totally disabled.

Not only is the above statement rather beside the point as for the burden of proof set by Ark. Code Ann. §11-519 (e) (1), which I would again note was not considered by the majority, the above statement is also contrary to the facts. The uncontradicted testimony of the claimant is that she continued with the test until she was in tears and had to call her husband to pick her up before she finished the last five parts of the test. While this effort may have been deemed "inconsistent" by the examiner, it is a great leap for the majority to find that the claimant's effort

indicated a "complete lack of interest in returning to the work force."

In conclusion, I find that the majority has completely failed to analyze this claim under the appropriate legal standard. According to Ark. Code Ann. §11-519 (e) (1) and the precedent set by the Court of Appeals in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W.3d 916 (2004), this claimant is permanently and totally disabled.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner