

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512595

RHONDA STEPHENS, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 6, 2009

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

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

Respondent represented by the HONORABLE CURTIS NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals and Respondent cross-appeal from a decision of the Administrative Law Judge filed May 8, 2009.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Because I find that the Claimant's recurrent hernia was an incisional hernia, Ark. Code Ann. § 11-9-523(Repl. 2002) does not apply.

4. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from October 29, 2007 to February 12, 2008, subject to a credit for whatever has already been paid for that period.
5. Because the evidence did not show that Claimant received any unemployment benefits during her healing period, no offset under Ark. Code Ann. § 11-9-506(b) (Repl. 2002) applies here.
6. Claimant has not proven by a preponderance of the evidence that she is entitled to permanent partial disability benefits and/or an impairment rating.
7. Due to the above finding, Claimant is not entitled to wage loss disability benefits.
8. Claimant has not proven by a preponderance of the evidence that she is entitled to relief under Ark. Code Ann. § 11-9-505(a) (1) (Repl. 2002).
9. Claimant's attorney is entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

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.

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). 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 (Repl. 2002).

Thus, we affirm and adopt the 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

I must respectfully dissent from the majority opinion. I believe the majority has erred on two major issues. First is the question of whether the claimant is entitled to benefits under Ark. Code Ann. §11-9-505(a)(1) due to the respondent's failure to return the claimant to work when suitable positions were available. I believe this is a clear cut case of liability under §11-9-505(a)(1), and would award benefits accordingly. Second is the question of whether the claimant is entitled to a permanent impairment rating for a recurrent hernia condition. I believe she is. The third issue addressed at the hearing, the claimant's entitlement to vocational retraining or wage loss disability benefits, is in my opinion, premature, and should be addressed in a later hearing. However, in conjunction with awarding the claimant an anatomical impairment rating, I believe the Commission should order the respondent to pay for a vocational rehabilitation evaluation.

I. Benefits Pursuant to §11-9-505

Ark. Code Ann. §11-9-505(a)(1) provides as follows:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical

and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

The parties stipulated that the respondent terminated the claimant's employment due to the physical restrictions assigned for her compensable hernia injury. On December 5, 2007, and again in January 2008, the claimant asked the respondent's human resources manager, Jeff Bolden, to transfer her to a job within her physical restrictions. Both times, Mr. Bolden told her there was no position available. Yet, on January 5, Tracie Vaughn was transferred to an open position in the traffic office, doing the same type of work the claimant had done when she worked there after her first surgery. Mr. Bolden admitted that this position required lifting of no more than 20 pounds, which was within the claimant's physical restrictions. He admitted he knew of nothing that would disqualify the claimant from holding or performing that job. He also admitted that the respondent had light-duty work available, but only for those employees who met the criteria of respondent's policies. He admitted that the respondent

would provide light-duty work to accommodate temporary restrictions, but not permanent restrictions.

In short, the testimony of the respondent's own witness establishes that, at the same time the claimant was told nothing was available within her physical restrictions, Tracie Vaughn was awarded a job that the claimant had done before, a job she was qualified to perform, and a job that was within her physical restrictions. The testimony of the respondent's own witness establishes that the respondent had work available within the claimant's restrictions - both the specific traffic office job awarded to Tracie Vaughn, as well as the light-duty work made available to employees with temporary restrictions. Indeed, in a facility of more than 1,000 employees, it is certain that the respondent could have identified and provided a position for the claimant consistent with her restrictions. Yet not only did the respondent refuse to return the claimant to work, the respondent actively misled her by telling her there were no suitable jobs available when, in fact, the traffic job position filled by Tracie Vaughn was available.

The respondent refused to return the claimant to work, even though appropriate work was available. The respondent has failed to articulate any legitimate reason

for this refusal. Therefore, the claimant is entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a)(1) for the respondent's unreasonable refusal to return her to work. This is a classic §11-9-505(a)(1) case. The respondent had multiple positions that could have been provided to the claimant, regardless of any "bidding" process raised as a defense by the respondent. In fact, the respondent's testimony regarding the "bidding" process shows that the claimant was not guaranteed one of the suitable positions even when she "bid." The "bidding" process the respondent relies on as a defense is not a suitable offer of employment as required by §11-9-505(a)(1). Under §11-9-505(a)(1) the respondent had a duty to provide the claimant with one of the suitable positions available and failed to do so. Therefore, the respondent is liable for benefits under §11-9-505(a)(1).

II. Permanent Partial Disability Benefits

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Permanent disability, in contrast, is statutorily defined as a loss of

wage-earning capacity due to a compensable injury. Ark. Code Ann. §11-9-102(8). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole, regardless of whether her earning capacity is diminished or not. Id. The Full Commission has held that permanent impairment exists "when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole." Key v. Owens Corning Corporation, A.W.C.C. F108142 (October 13, 2005).

In this case, the claimant testified that she still has discomfort with bending, squatting, and lifting, as a result of her compensable hernia injury. Her surgeon, Dr. Rex Luttrell, specifically opined that she has a physiological abnormality as a result of her compensable injury - a weakened abdominal wall. He opined that she is now more susceptible to recurrent hernias as a result of her compensable injury, particularly if she were to return to an "exertional duty". He recommended that she avoid heavy lifting, and he assigned her a permanent restriction of lifting no more than 25 pounds. His opinion is plainly based on the objective findings of the hernia he observed and the surgery he performed. Given this permanent

restriction and permanent physical injury, claimant has proven by a preponderance of the evidence that she has sustained permanent physical impairment, in that, she has permanent functional loss - the loss of her ability to engage in heavy lifting and exertional work. The only remaining question is quantifying the extent of that impairment.

Where no doctor has assigned an acceptable anatomical impairment rating, the Commission is empowered to translate the medical evidence into a finding of permanent impairment. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). The claimant contends that she meets the criteria of the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993) for an impairment rating for a hernia. The Guides establishes three criteria for a "Class 3 Hernia-related Impairment": 1.) A 'palpable defect in [the] supporting structures of [the] abdominal wall', 2.) A 'persistent, irreducible, or irreparable protrusion at [the] site of [the] defect'; and, 3.) 'limitation in normal activity.'" Guides §10.9, Table 7 (p. 247).

The claimant testified that she has a defect in her abdominal wall that is palpable. Specifically, she

testified that she still has a "big, hard mass kind of like a knot" on her abdomen where the hernia was. She testified that there is a persistent, irreducible protrusion at the site of the defect - she can press the mass back in, but it then pops back out. She still has discomfort with bending, squatting, and lifting, and Dr. Luttrell has placed a permanent lifting restriction on her, meaning she has a limitation of normal activity. The claimant meets all the criteria of a "Class 3 Impairment" pursuant to Table 7 of §10.9 of the *AMA Guides*, (p. 247); she is, therefore, entitled to an impairment rating of 20% to the body as a whole.

III. Conclusion

As the claimant has an anatomical impairment rating and has not been returned to work by the respondent, I find that she is entitled to a vocational rehabilitation evaluation at the respondent's expense.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner