

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700630

DENISE BISHOP, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICE, INC., EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED MARCH 26, 2010

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

Claimant represented by the HONORABLE SCOTT A. SCHOLL,  
Attorney at Law, Jacksonville, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL E.  
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY  
KING, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE DAVID  
SIMMONS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

This matter is currently before the Full  
Commission on remand from the Arkansas Court of Appeals.  
In an opinion delivered February 11, 2010, the Court of  
Appeals affirmed the Commission's finding regarding  
compensability. However, the Court of Appeals reversed

and remanded for specific findings of fact on the wage-loss issue and on the issue of combination of impairment leading to Second Injury Fund liability. Pursuant to the Court's remand, and based on our de novo review of the entire record, the Full Commission hereby modifies its prior opinion to include further findings of fact on the wage-loss disability issue and the issue of combination of impairment leading to Second Injury Fund liability.

#### Wage Loss Disability

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 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). 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). Here, the claimant is 48 years old. She has an associates degree in nursing and a bachelor's degree in organizational management. However, the claimant also has a compensable neck injury. She has had three cervical fusion surgeries, the most recent, resulting from the lifting incident, was performed by Dr. Richard Jordan. She now has a combined anatomical impairment rating of 13%. Prior to this surgery the claimant worked as a nursing supervisor. The claimant testified that now she is unable to perform physical activities she performed before the compensable injury. The claimant testified that she is unable to fish, garden or even sew because she is still experiencing pain and spasms in her neck. The claimant testified that when she was released to return to work she was given limitations on flexion/extension of her neck, as well as a lifting restriction. After an unsuccessful three day return to work as a nursing supervisor, the claimant has not returned to work. The claimant testified that before the injury she was making \$35-\$36 per hour. The claimant testified she believes the only jobs she can perform

today would pay \$22-\$23 per hour. Based on the above evidence, particularly evidence of the claimant's physical condition, and considering the claimant's age, education and work experience, the Full Commission finds that the claimant is entitled to wage-loss disability in the amount of 25% over and above her total anatomical impairment rating of 13%.

#### Second Injury Fund Liability

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. See, Mid-State Constr. Co . v. Second Injury Fund, 295 Ark. 1, 746 S.W. 2d 539 (1988). Here, despite two prior cervical surgeries, the claimant was able to work without any formal restrictions before her compensable injury. The claimant testified that although she did not have any formal restrictions before her third surgery, she was always cautious when lifting. After her third cervical surgery, the claimant was able to return to work for three days before her employment

was terminated for unrelated reasons. The claimant testified that when she was released to return to work she was given limitations on flexion/extension of her neck, as well as a lifting restriction. However, the medical evidence of record does not indicate what restrictions the claimant was given after the third surgery. It is unclear whether the claimant was given formal restrictions, or, as before the third surgery, the restrictions were self-imposed. As such, the Commission finds that the evidence of record is insufficient to show that the prior impairment combined with the recent compensable injury to produce the current disability status. Therefore, the Second Injury Fund has no liability in this claim.

In conclusion, the Full Commission finds that the claimant sustained a compensable cervical injury during the patient lifting incident on November 15, 2006. The claimant is entitled to the reasonably necessary medical treatment provided by and at the direction of Dr. Jordan. The claimant is also entitled to an additional 1% anatomical impairment rating due to her compensable injury. The claimant is hereby awarded 25% wage-loss disability. The claimant has failed to prove entitlement to any temporary total disability

benefits. The Second Injury Fund does not have liability in this claim.

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. 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's findings. After conducting a de novo review of the record on remand, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment.

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 in addition to her permanent anatomical impairment rating. The evidence demonstrates that the claimant returned to work for the respondent employer after she was released to return to work. On her third day back, the claimant was terminated for cause by the respondent employer. The claimant testified that she did not know why she was being terminated. However, the respondents offered the testimony of Sherry Belenger, who is the director of nursing for the respondent employer. Miss Belenger testified why the claimant was terminated:

Q Well, there were several reasons, and it was poor performance and employee morale. I almost had a revolt from the employees stating that they had not been treated well, their morale was very down. They named specific things of not getting breaks, of the manager and the charge nurse yelling at them, even using curse words, the cleanliness of the

department and the organization of the department.

Q Was there a complaint from any one particular person about Ms. Bishop?

A Well, there were several complaints, but one specific complaint I had --

MR. SCHOLL: I would object to any hearsay that she would try to produce, Your Honor.

MR. MURRAY: I would say that's probably right. I would have to agree with him, Judge.

JUDGE WEBB: I'll sustain the objection.

BY MR. MURRAY:

Q I'm going to ask my question again, but don't tell me what somebody told you. Were there complaints from co-employees?

A Yes.

Q Okay. And you said that you about had a revolt on your hands.

A Yes.

Q What was going on?

A They felt that the treatment had --

MR. SCHOLL: Objection, Your Honor. She wouldn't have any foundation to know what other people felt or thought.

MR. MURRAY: That's fine. I'll approach it a different direction.

BY MR. MURRAY:

Q As a result of the complains that were made, did you do an investigation?

A Yes, I did.

Q And did you visit with those employees?

A Yes, I did.

Q And as a result of that investigation and those complaints, did you make a determination to dismiss Ms. Bishop from the employ of St. Vincent's?

A Yes.

Q Did it have anything to do with her workers' compensation injury?

A Absolutely not.

Q Did it have anything to do with her continued complaints of pain in her neck and shoulders before this incident?

A Absolutely not.

It also appears that the claimant's work limitations are self-imposed. The claimant was asked if her current health problems were keeping her from getting further employment. She testified as follows:

Q Is your -- do you believe -- are you having -- is it your health problems that's keeping you from getting further employment?

A I don't think it's -- no, it's not my health problems. I -- I believe that my imposing, you know -- again, you know. Just being careful in what I do. I don't know that going into an operating room and moving patients and doing the physical aspect of it is something I'm going to be able to do.

Q Okay.

A Not without a lot of resources and help and that's not always available.

Q So if you don't believe that you're going to be able to do the physical duties of working in an operating room, what other jobs would be available to you with your nursing background and your educational skills?

A That's -- I've thought about that, and I've looked into -- when I say "looked," I'm looking at job descriptions online and stuff like that of other positions in nursing and case management and stuff like that, that is desk jobs. It doesn't pay what I'm accustomed to earning.

The claimant's contention that she would make only \$22 or \$23 an hour in another job is contradicted in her testimony. When she was asked about making that, the following testimony is particularly enlightening:

Q And then you're saying that the jobs you believe you can perform today, you would only make \$22 to \$23 an hour?

A Yes, ma'am, unless I was to go specialize in some field like some things that I am not real familiar with. I love education. I would like to know -- there is a legal nurse consulting program that maybe, you know, I could go through educations and learn that. That would bring my wages back to where -- what I'm accustomed to making.

Q What kind of educational program would that be?

A It's course work through the clinical-legal nurse program, and I believe they're based out of Florida.

Q Is that something you've pursued?

A That's something I would -- I would certainly not turn down an opportunity to do. I mean, it would bring my income back up, and it would also -- I like education, and I -- it would be a job where it doesn't require

lifting, moving, pushing, pulling, or inadvertently getting -- catching patients.

Q Is it available to you here in Arkansas?

A It's available online, and there's some clinical sessions that you would have to attend down in Florida. So it's a mixture of the both. Clinical settings are actually done onsite from what I understand and what I've read, and then the majority of it can be done online.

Q And what kind of cost is involved?

A I didn't price the complete program when I was looking at it. It I recall correctly, it cost between \$6,000 and \$8,000 to complete.

Q Is there any other training that you're aware of that you could go through that would made you -- put you in a position where you would be making similar money to what you made at the time of the accident?

A In the research I've done, that's the only thing I have come up with.

Q Have you undergone any type of functional capacity evaluation by any doctor?

A As far as what my mobility and stuff is?

Q Right.

A I did the physical therapy for --

Q But you haven't been evaluated by a doctor on your functional capacity, right?

A No, no ma'am.

Q Have you met with any rehab specialist or anything like that as far as what jobs might be out and available to you?

A Occupational therapist? No, ma'am, I have not.

I find the claimant not to be a credible witness. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a

claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

In my opinion, the evidence demonstrates that the claimant is contradicting herself. She states that she is not able to find a job, but then says she's able to find a job making less money. She states that she has restrictions, but yet she admitted that those were self-imposed restrictions. Further, her contention that she would be making less money is not supported by the records. Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that she is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment rating. Accordingly, I must dissent from the majority's award of benefits.