

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312628

SUE J. COURTNEY, EMPLOYEE	CLAIMANT
SOUTHEAST ARKANSAS HUMAN DEVELOPMENT CENTER, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER/TPA	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 4, 2010

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

Claimant represented by HONORABLE KENNETH E. BUCKNER,  
Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by HONORABLE RICHARD SMITH,  
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondents No. 1 appeal a decision by the  
Administrative Law Judge finding that the claimant proved by  
a preponderance of the evidence that she was entitled to a  
50% loss in wage earning capacity in addition to her 17%  
permanent anatomical impairment rating. Based upon our de

novo review of the record, we find that the claimant has proven by a preponderance of the evidence that she has sustained a 35% loss in wage earning capacity in addition to her permanent anatomical impairment. Accordingly, the decision of the Administrative Law Judge is affirmed as modified.

The first issue to be addressed is the proffered surveillance video and report the respondents submitted. The Administrative Law Judge found that the video would not be accepted into evidence. The respondents contend that it was error for the Administrative Law Judge to refuse to allow the admission of the evidence. We agree with the finding of the Administrative Law Judge. The respondents had possession of the video which is dated February 5, 2009, well before the September 28, 2009, pre-hearing filing and the October 28, 2009, pre-hearing order. The respondents did not provide the claimant with the video until the week before the hearing. The claimant's attorney had problems with the video and was unable to view it. The respondent's attorney's letter sent with the video was dated December 10, 2009, but received by the claimant's attorney on December

14, 2009. The hearing in this matter was scheduled and held on December 18, 2009.

The pre-hearing notice very clearly requests the parties to provide their exhibits before the pre-hearing telephone conference and to identify any information requested but not yet received. The video was taken on February 5, 2009. It is clear that the respondent's attorney had possession of and/or notice of the video long before the pre-hearing telephone conference on October 27, 2009. In fact, the pre-hearing order states that the parties are bound by the exhibits and lists additional exhibits that will be included. There is absolutely no mention of a surveillance video and report in this order. Accordingly, we find that the decision of the Administrative Law Judge to not allow the proffered video and report into evidence should be affirmed.

The claimant is asking for wage loss disability benefits in addition to her permanent anatomical impairment rating. At the hearing the claimant contended she was permanently and totally disabled or in the alternative entitled to significant wage loss. The Administrative Law Judge awarded 50%. The claimant did not appeal this

finding. The respondents contended the claimant was not entitled any wage loss disability benefits in addition to her permanent anatomical impairment. We find that the claimant has proven by a preponderance of the evidence that she is entitled to a 35% loss in wage earning capacity.

Wage-loss is the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). When a claimant has an impairment rating to the body as a whole, the Commission has the authority to increase the disability rating based upon wage-loss factors. Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other factors affecting wage-loss such as the claimant's age, education, and work experience. Id. In addition, a claimant's motivation to work, post-injury income, credibility, and demeanor may be considered by the Commission in determining wage-loss. Henson v. Gen. Elec., 99 Ark. App. 129, 257 S.W.3d 908 (2008).

The evidence demonstrates that the claimant is not entitled to a 50% loss in wage earning capacity. The claimant has pre-existing degenerative disc disease. She underwent a function capacity evaluation (FCE) on January 8, 2009. The FCE showed that the claimant gave an unreliable effort with only 22 of 46 consistency factors within expected limits. The FCE concluded that the claimant put forth an inconsistent effort. The report reveals that the claimant "refused to perform all isometric strength and dynamic strength tests (bi-manually and with each UE)." The refusals were inconsistent with the claimant's "demonstrated ability to reach with three pounds in each upper extremity and to handle her purse which weighed approximately three pounds." The claimant reported a pain level of 7.5 on a 10 scale during the testing but this was inconsistent with her demeanor during the testing. The report indicates that the claimant was smiling and laughing many times throughout the testing. The evaluator concluded that the claimant could perform work in at least the sedentary category. He stated that "her true functional abilities remain unknown due to her unreliable effort on her behalf."

The claimant's testimony also supports the FCE's conclusion that she can perform work in at least the sedentary category. The claimant admitted that she is able to pick up her dog - a poodle that weighs six pounds - several times a day. She is also able to carry in groceries from her car. When asked why she did not give maximal effort on the FCE, the claimant testified that it was right after her surgery and she was still hurting and sore. She stated that she did not want to do something to hurt her back again. However, the claimant's surgery was in October of 2007, she was released in 2008, and the FCE was done in January of 2009.

The claimant also underwent a vocational evaluation. The evaluator determined, after consulting the claimant's medical records and FCE, that the claimant had at least ten transferrable skills and was able to do work as a receptionist, telemarketer, cashier, optical assembler, order clerk, telephone quotation clerk, surveillance system monitor, or telephone answering service work. The evaluator noted that the possibilities were not limited to those listed. The examiner noted that "it is my opinion, based on the current FCE, the medical reports and her work and educational history that Ms. Courtney could return to work

in certain sedentary job levels. The fact that Ms. Courtney perceives herself as being disabled from any work and is receiving SSDI are two significant barriers to her return to the work place."

Simply put, when we consider the claimant's age, education, her lack of effort on the FCE, the fact she considers herself to be disabled and all other factors affecting wage loss, we find that the claimant is entitled to a 35% loss in wage earning capacity in addition to her 17% permanent anatomical impairment. Accordingly, we hereby modify the decision of the Administrative Law Judge.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

**CONCURRING & DISSENTING OPINION**

I must respectfully concur, in part, and dissent, in part, from the majority opinion. I agree with the majority's affirmation of the Administrative Law Judge's evidentiary ruling. However, I find the majority's reduction of the Administrative Law Judge's wage-loss award from 50% to 35% to be completely arbitrary and I cannot agree. The evidence of record clearly supports a wage loss award of 50%.

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PHILIP A. HOOD, Commissioner