

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800254

KAREN HENDERSON, EMPLOYEE	CLAIMANT
ST. MARY - ROGERS MEMORIAL HOSPITAL, EMPLOYER	RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 7, 2010

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

Claimant represented by the HONORABLE ANDREW HATFIELD, Attorney at Law, Rogers, Arkansas.

Respondents represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed February 2, 2010. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 22, 2009, and contained in a pre-hearing order filed April 24, 2009, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle her to the maximum compensation rate in effect for 2007 is also hereby accepted as fact.
3. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits in an amount equal to 28% to the body as a whole. This includes a 3% impairment rating and wage loss in an amount equal to 25%.
4. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

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

We therefore affirm the February 2, 2010, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (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(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings that the claimant proved by a preponderance of the evidence that she was entitled to 25% loss in wage earning capacity in addition to her permanent anatomical impairment rating. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury to her hip on August 29, 2007. The claimant worked for the respondent employer as a nurse in the ICU. The claimant was kneeling on the floor to start an IV on a patient, and as she stood up to remove an IV from the other arm, she twisted and fell, injuring her hip as well as her left knee, right shoulder and neck.

The claimant testified that after a few days, the other injuries resolved, but she continued to have pain in her right hip. Her initial medical treatment was provided by Dr. Low. In a report dated September 6, 2007, Dr. Low stated that her examination was consistent with trochanteric bursitis of the hip. Dr. Low prescribed medication, ice, rest and stretching

exercises. He released the claimant to return to work with restrictions. When the claimant's condition did not improve, Dr. Low ordered physical therapy for the claimant and then referred her to Dr. Griffey for an orthopedic consultation. Dr. Griffey evaluated the claimant on October 18, 2007. He indicated that he believed the claimant suffered from trochanteric bursitis, but he also ordered an MRI. An MRI was performed on October 29, 2007, and was interpreted as being normal.

In a report dated November 1, 2007, Dr. Griffey noted that the claimant's MRI scan looked normal and indicated that he believed that the claimant suffered from severe and recalcitrant case of bursitis. Dr. Griffey provided the claimant an injection, physical therapy and rest. Dr. Griffey noted on November 13, 2007, that the claimant's condition had not improved and he ordered an MR arthrogram to determine whether there was evidence of a labral tear. The claimant underwent the arthrogram on December 12, 2007, which revealed a detached labrum. He referred the claimant to Dr. Chris Daugherty who could perform hip arthroscopic procedures.

The claimant was evaluated by Dr. Daugherty on December 12, 2007, who indicated that the labral tear required surgery. He also noted that the claimant

suffered from trochanteric bursitis and indicated that that region would be addressed with a bursal debridement and IT band release.

The claimant underwent surgery on January 2, 2008. The claimant continued to have some hip pain and Dr. Daugherty referred the claimant to his brother, Dr. John Daugherty for physical therapy. Dr. Daugherty treated the claimant with physical therapy, medication and work restrictions. The claimant underwent an evaluation by Dr. Safman in Little Rock and has been diagnosed as suffering with fibromyalgia.

In a report dated October 27, 2008, Dr. Daugherty indicated that the claimant had a permanent anatomical impairment in an amount equal to 7% to the lower body, which lower extremity which equated to a 3% permanent anatomical impairment to the body as a whole. He also released the claimant as being at maximum medical improvement and stated that she could return to work with her restrictions being permanent. The restrictions are set forth in Dr. Daugherty's June 30, 2008 dictation which stated that the claimant had the following restrictions: Bend (Limited); Twist (Infrequent); Stand (Frequent).

At this time, the claimant is requesting wage loss disability benefits in addition to her permanent

anatomical impairment rating. The Administrative Law Judge ordered a 25% loss in wage earning capacity. In my opinion, the claimant has failed to meet her burden of proof. I find that she is not entitled to any wage loss disability benefits in addition to her 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).

The evidence demonstrates that the claimant is a registered nurse who has a four-year bachelor's degree in nursing. The claimant has received extensive continuing education in nursing. She is ACLS trained, a hyperbaric nurse, and has served as a pediatric educator. Currently, the claimant is working as a charge capture analyst earning \$9.00 an hour less than she was earning as a registered in the intensive care unit. The claimant contends that she is physically incapable of performing a nursing care job. The claimant claims she is unable to "run up and down the halls" and to "turn and reposition patients". However, this evidence is

simply not born out in the records. The claimant's work restrictions following her hip surgery do not keep her from performing any nursing job. In my opinion, it is simply not believable that there are no nursing jobs that do not entail the vigorous physical activity the claimant contends she is unable to perform.

Although the claimant is earning less now as a charge capture analyst than she was in the intensive care unit as a nurse, her testimony that she could not pursue any position as a registered nurse, in my opinion, is simply not believable. The claimant is experienced and well-trained and has self-limited her abilities as far as pursuing employment making the same amount of money that she was making as a ICU nurse. The evidence demonstrates that the claimant has been diagnosed with fibromyalgia and depression, but both of these are unrelated to her compensable injury. Therefore, when I consider the claimant's age, work experience and the other factors, I find that the evidence does not support a finding that the claimant was entitled to any wage loss disability benefits in addition to her permanent anatomical impairment. In my opinion, it appears that the claimant lacks motivation to pursue alternative nursing opportunities.

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Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner