

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607106

THAEO KHAMPAE, EMPLOYEE	CLAIMANT
RHEEM MANUFACTURING COMPANY, EMPLOYER	RESPONDENT NO. 1
OLD REPUBLIC INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 21, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed December 30, 2009. 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 prehearing conference conducted on July 22, 2009, and contained in a pre-hearing order

filed July 24, 2009, are hereby accepted as fact.

2. He claimant failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
3. The issue of whether the Permanent and Total Disability Trust Fund has controverted this claim is moot.
4. The claimant has proven she is entitled to wage loss in this matter in an amount that is equal to a 45 percent impairment to the body as a whole.
5. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability from February 28, 2007, to July 27, 2008.
6. The claimant has failed to prove by a preponderance of the evidence that her attorney is entitled to a fee on temporary total disability benefits from July 9, 2008, until February 17, 2009.
7. The claimant's attorney is entitled to a fee in this matter is presently before the Full Commission on as set out by the Arkansas Workers' Compensation Act, except as set out in finding of fact six.

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.

Therefore we affirm and adopt the December 30, 2009 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. After a de novo review of the record, I find that the claimant is permanently and totally disabled. Permanent total disability is defined as 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 burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2). The same

factors considered when analyzing wage-loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Rutherford v. Mid Delta Community Services, Inc. ___ Ark. App. ___, ___ S.W. 3d ___ (2008). Such factors include the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Other factors include motivation, post-injury income, credibility, demeanor, prior work history and education. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

Here, the claimant is Laotian and does not read or write English. She is 43 years of age and has less than 12 years of formal education.

The respondent's company physician determined that the claimant is no longer able to perform her job duties at the respondent. The claimant testified that the only other job that she has held since she has been in the United States was a job at OK Foods, which she held for 14 years. She testified that the job required

her to stand on a concrete surface for eight hours per day, and that her job-related injury would cause her not to be able to perform that job.

The medical records clearly indicate that the claimant has weakness and pain in her right lower extremity as a result of her admittedly compensable injury. For example, Dr. Standefer, a neurosurgeon, opined on July 31, 2006, that the claimant should observe permanent restrictions, including alternating sitting, standing, and walking. His July 25, 2006 exam notes positive straight leg raising on the right at about 45 degrees.

In a February 28, 2007 Office Note, Dr. Cheyne notes decreased sensation in the right lower extremity and positive straight leg raise. In a February 17, 2009 Progress Note, Dr. Johnson notes that the claimant was still walking with a limp in the right lower extremity and having right lower extremity pain. He noted that the claimant had reached maximum medical improvement at that point, and would always have some residual pain in the right lower extremity.

The claimant's testimony that she could not perform a job that required her to stand eight hours at a time is supported by the fact that Dr. Standefer

placed a permanent restriction on the claimant that she should alternate between sitting, standing, and walking, and that restriction was applied to her when she only had a 15 to 20 pound lifting restriction. The claimant testified that the surgery that was performed by Dr. Johnson after Dr. Standefer released her, did not improve her condition. That testimony is supported by the fact that, when Dr. Johnson released the claimant in 2009, he placed a 7 to 10 pound restriction on her, and increased her impairment rating from 7% to 11%. Accordingly, the fact that Dr. Johnson did not specifically address whether the claimant should alternate between sitting, standing, and walking, is of no significance, because it should be obvious that if she needed to alternate between sitting, standing, and walking, when she had a 15 to 20 pound weight restriction and a 7% impairment rating, she should observe that same precaution when her condition is now such that she should observe a 7 to 10 pound weight restriction and she has an 11% impairment rating.

The claimant was evaluated by a Vocational Consultant, Dale Thomas. Mr. Thomas submitted a report, specifically indicating that he reviewed the claimant's medical records. He specifically noted that Dr.

Johnson's release did not limit the claimant's sitting and standing. However, without considering that limitation, he determined that Dr. Johnson's report placed the claimant at the sedentary physical demand level. Mr. Thomas specifically investigated the existence of unskilled sedentary jobs in the Fort Smith area, and found that such jobs do not exist in substantial numbers in the Fort Smith area.

In conclusion, due to the claimant's inability to read and write English, and the fact that the vocational expert has limited her to sedentary jobs which would most likely require English language skills, I cannot find anything other than that the claimant is permanently and totally disabled. Any other finding is not supported by substantial evidence.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner