

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F212896

GENEVA LAY, EMPLOYEE	CLAIMANT
STAR CITY SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
ARKANSAS SCHOOL BOARDS ASSOC, WCT/ RISK MANAGEMENT RESOURCES (TPA), CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED OCTOBER 21, 2010

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

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent No. 1 represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 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 and respondent No. 1 cross appeals from a decision of the Administrative Law Judge filed August 4, 2010.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on October 15, 2002, and at all pertinent times, when claimant sustained a compensable injury.
3. The claimant's earnings were sufficient to entitle her to compensation rates of \$237.00 for temporary total disability benefits and \$178.00 for permanent partial disability benefits.
4. Respondents No. 1 have accepted and are paying towards a ten percent (10%) anatomical impairment to the body as a whole for claimant's low back.
5. Respondents No. 1 have accepted and are paying towards a thirty-seven percent (37%) anatomical impairment to the left lower extremity.
6. The claimant reached maximum medical improvement on January 26, 2005.
7. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled in that she has been released to return to light duty work.
8. The preponderance of the evidence demonstrates that there is no Second Injury Fund liability in this case since claimant's permanent partial impairment is directly related to her October 15, 2002, work related injury.
9. Considering the claimant's age, education, work experience, medical evidence, motivation, post-injury income, the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss benefits sustained as a result of her compensable injury.

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.

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. After a de novo review of the record, I would award the claimant permanent and total disability benefits.

HISTORY

The claimant sustained an admittedly compensable injury

on October 15, 2002, when her foot got hung on a telephone cord. The claimant fell, hitting her back against an industrial mixer. At the same time, claimant's left leg went underneath her, causing an injury to the left knee. Since that time, the claimant has seen multiple doctors for both the back and knee injuries. The claimant was at first treated conservatively by Dr. Whipple in Star City, by Dr. Barry Baskin, and by Dr. William Ackerman. The claimant failed conservative measures and was referred to Dr. Reza Shahim, who performed a lumbar fusion at L4-5 in May of 2003. The claimant was also treated by Dr. Kenneth Martin for her left knee injury. When conservative treatment on the knee did not work, Dr. Martin performed a total knee replacement in February, 2004.

In April of 2004, Dr. Martin released the claimant to light duty with standing limitations of two hours per day. On August 4, 2009, the claimant returned to Dr. Baskin for a follow-up evaluation with continued complaints of pain in the left knee and swelling in both lower extremities. He noted that claimant also complained of pain in her back. Dr. Baskin also observed that the claimant had tried a fairly light-duty job, but that she was not able to tolerate the job in the kitchen helping serve meals, which required her to bend, stoop, and twist. He disagreed with Dr. Martin's limitations, and restricted her to return to work only at a "fairly sedentary job". After reviewing

the respondent-employer's job description for the work claimant could not physically tolerate, Dr. Baskin opined on August 31, 2004, that: "She can't do the job described. She will only be able to do clerical sitting down work - No standing or prolonged walking or lifting > 10 lbs." In September, 2004, Dr. Baskin determined that the claimant had reached maximum medical improvement. On November 18, 2004, Dr. Shahim found that the claimant had reached maximum medical improvement on her back injury and assigned a 10% impairment rating. On January 26, 2005, Dr. Martin opined that the left knee was stable and that claimant had reached maximum medical improvement on her left knee and assigned a 36% impairment rating to the left lower extremity.

The claimant's condition, in particular her low back, has not improved, despite numerous attempts to manage her symptoms after reaching MMI. She began treating with Dr. Qureshi for pain management, including water therapy and a weight-loss program. Dr. Qureshi also recommended a spinal cord stimulator placement, but Dr. Baskin opined that a better option would be an intrathecal pain medicine delivery system. Respondents transferred claimant's treatment from Dr. Qureshi to Dr. Garlapati. In June, 2008, claimant underwent placement of a pain pump but, due to an allergic reaction, the pump was removed, and it was not successful. The claimant was then referred to Dr. Mahmood Ahmad, a third pain management doctor. On January 19,

2009, the claimant attempted a trial placement of a spinal cord stimulator, which appeared to help her symptoms. A permanent stimulator was surgically implanted in February of 2009. A month later, in March of 2009, the stimulator implant became infected and was removed. She has continued with medication management and epidural injections to manage her pain and she continues under active and frequent pain management treatment with Dr. Ahmad through the date of the hearing.

DISCUSSION

Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. §11-9-522(b)(1). Such other matters include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. 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). 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).

At the time of the hearing, the claimant was 54 years of age. The claimant completed high school and received some continuing education hours in school food service at UCA. She worked as a food service supervisor for the respondent-employer for 22 years. Prior to her work at the respondent-employer, claimant worked for a short time as a machine operator at Ben Pearson, making bow strings. The claimant stayed at home to raise her children prior to that.

The claimant has a 10% permanent impairment rating to the body as a whole in addition to a 37% permanent impairment rating to the left lower extremity. As stated by the Administrative Law Judge, the evidence clearly demonstrates that

the claimant is unable to return to work as a food service manager. She is motivated to return to work, as she did, in fact, attempt to return to work at the respondent-employer, but was unable to do so due to her physical condition. Her treating physician opined that the ligh-duty job offered by the respondent was unsuitable. The claimant testified that she is unable to stand for more than five minutes. She requires assistance dressing, as she cannot bend. The claimant is currently using a Fentanyl patch and Hydrocodone, in addition to a muscle relaxer (Amirex), an antidepressant used to treat pain (Cymbalta), and a sleep medication (Ambien). The use of strong pain medication and the side effects of the pain medication must be considered in a claim for wage-loss disability. See Whitlatch vs. Southern Development, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Due to her age of 54, her limited work experience, her education level, her physical condition, and her use of pain medication, I find that the claimant is unable to work as a food service manager or in any other employment. As such, I find the claimant to be permanently and totally disabled.

I do not find, as did the Administrative Law Judge, affirmed and adopted by the majority, that the respondent has offered the claimant a job that she can actually perform, after her doctor advised the respondent that the job they had offered the claimant was unsuitable. I would note that the claimant did

attempt to return to work, but was unable to do so due to her physical condition. I also find that an offer of employment is not a bar to permanent and total disability benefits, as a claimant who is permanently and totally disabled cannot perform any work, rendering an offer of employment meaningless.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner