

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801206

MARIANN MORRISON, EMPLOYEE	CLAIMANT
CONFECTIONATELY YOURS, EMPLOYER	RESPONDENT
WAUSAU INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 4, 2010

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

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

Respondent represented by HONORABLE JAMES ARNOLD, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed June 8, 2009.

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

1. The stipulations agreed to by the parties at the prehearing conference conducted on November 5, 2008, and contained in a pre-hearing order filed November 6, 2008, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss.
3. The claimant's attorney is not entitled to an attorney's fee in this matter.

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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion in this claim. I find that the claimant has proven by a preponderance of the evidence that she is entitled to 80% wage loss in addition to her permanent anatomical impairment rating.

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. 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). 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 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 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).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood

Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

The claimant was injured while moving heavy buckets of icing while at work. She was treated for low back and radicular pain and eventually diagnosed with left L5 and S1 radiculopathy secondary to a left-sided disk protrusion with compression of the S1 nerve root as well as lateral extension and compression of the L5 nerve root posteriorly. She has been under strict restrictions, and while released to return to work with these restrictions, there was no job within them for her to do. Dr. Blankenship offered her surgery, stating that there was no alternative treatment of her injury in June 2008. He placed her at maximum medical improvement on July 21, 2008, stating that unless and until she decided to have surgical treatment of her back, she was at maximum medical improvement. At that time, he issued a permanent anatomical impairment rating of 7% for an unoperated upon herniated disc under Table 75 of the Guides. The claimant has not been able to decide to have the surgery.

The claimant thus has met the first hurdle for permanent benefits, that she is at maximum medical

improvement, as well as the second, that she has a permanent physical impairment supported by objective findings (an MRI showing the herniation and impingement).

The claimant was twenty-five years old at the time of the hearing, which would at first glance weigh against a finding of wage loss disability. However, her young age has complicated her treatment. Dr. Blankenship noted in June 2008 that the treatment decisions were difficult because of her youth.

The claimant has a high school education, and while she was an A and B student, she chose not to go to college. As a fifteen year old high school student, the claimant began work as a cake decorator. She remained actively employed as a cake decorator until the date of her injury. The claimant's entire work history was cake decorating. She explained that this was a painstaking job, physically demanding in terms of lifting cakes and layers of cakes, sometimes utilizing a ladder to reach the tops of tall cakes, and in terms of the bending, reaching and keeping very still for long periods of time for precision work. The claimant's high school education and work history

limited to cake decorating leave her with a short supply of transferable work skills and education.

In regard to her attitude, the claimant returned to work as directed by her physician, but her employer had no work for her within her restrictions. There is no evidence that she is no longer an employee of the respondent employer. She participated in an aggressive physical therapy program in hopes of improving her condition without surgery.

The claimant testified as to her pain and the affect her medication had on her:

I take [Lyrica] at night before I go to sleep to help me get through the night. The next day it's - I still feel very dizzy and disoriented. It's hard to focus and to concentrate after I take it... It's difficult to do chores around the house and it's hard to do pretty much my daily, you know, my daily routine. I had to learn how to, you know, to move things again and how to bend down and how to - how to do things again. And it's hard for me to do anything that I used to like to do, like outdoor activities and such. It makes it a lot harder with my back injury...

Her back condition interfered with her daily activities differently every day. She testified that her condition could be "anywhere from dramatic and where, you know, I lay in bed and, you know, try to not be in so much pain. Where other days, you know, it does feel like that

it's getting better and I can do a little bit more." At the hearing, she sat "one-sided" in her chair. The pain was in her left leg and her left back and going down to her foot, and if she leaned over to my right, it helped "to get off some of that pain."

The medical records reflect that the claimant reported significant low back and radicular pain into left leg, as well as numbness. Also reflected is her concerns about the effects of the Lyrica on her mental state, such as memory loss.

The most significant factor is the claimant's restrictions, which have been in place since her first doctor visit after her injury. In January 2008, she was limited to lifting no more than 15 pounds and no repetitive back motion. In April, the restrictions were increased and applied at least through the date of the hearing:

She may continue to work, but should not lift, push, or pull with more than 10 pounds of force. She should go from sitting, standing to walking on an as needed basis and should limit bending and twisting at the waist. ..

The claimant lived in Fort Smith, Arkansas. There are few imaginable jobs, paying \$10.50 per hour, in which she could avoid repetitive back motion, bending and twisting

at the waist, and lifting pushing and pulling more than 10 pounds, and could be free to sit, stand and walk as needed, while managing her pain with Lyrica, which significantly impacts her mental clarity.

There is no doubt that the claimant is bright and pleasant. Likewise, she was a successful high school student. This is insufficient to outweigh the factors limiting her ability to work at this time. Her decision to defer surgery, or to defer the decision to have surgery, does cloud the issue somewhat, but it is clear that the claimant has suffered wage loss above the 7% impairment rating she has received. I find that the claimant has suffered wage loss in the amount of 80%, based upon the complicated nature of the treatment of her young spine, her work history of ten years in the same type of employment which was limited in scope and transferability, the physically demanding nature of that employment, her willingness to attempt to return to work after her first doctor visit, her careful participation in an aggressive conservative treatment regimen, her significant pain, the impact of the pain medication on her mental acuity, her

residence and the severe restrictions on her activities imposed by her treating physicians.

In regard to the respondents' suggestion that the claimant could get a windfall if she does have surgery which improves her ability to earn wages, as the claimant's attorney noted, the Workers' Compensation Act does contemplate changes in disability status. To follow the respondents' argument, any time a doctor opined that a treatment option existed, which the claimant decided not to undergo, then the claimant could not get wage loss disability above his or her impairment rating. The claimant has explained her reasoning for the delay. She wanted to give conservative care a period of time to work, in hopes that her young body will respond, before she undergoes a significant surgery which could leave her worse or the same and also which may require another surgery later. She recognized that this would affect the wage loss determination. While it is important to note that the claimant has a treatment option available, this is not enough to bar her from wage loss benefits in the amount of 80% in light of her significant restrictions and the effects of her pain and medication.

I find that the claimant has proven by a preponderance of the evidence that she is entitled to 80% wage loss in addition to her permanent anatomical impairment rating, and therefore I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner