

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F907562

MARSHA MONTGOMERY,
EMPLOYEE

CLAIMANT

ARKANSAS HIGHWAY & TRANSPORTATION
DEPARTMENT,
EMPLOYER

RESPONDENT NO. 1

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 11, 2011

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

Claimant represented by the HONORABLE PHILLIP WELLS,
Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM L.
WHARTON, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed April 13, 2011. The administrative law judge
found that the claimant proved she was permanently totally
disabled. After reviewing the entire record *de novo*, the

Full Commission reverses the administrative law judge's finding that the claimant proved she was permanently and totally disabled. The Full Commission finds that the claimant proved she was entitled to wage-loss disability in the amount of 25%.

I. HISTORY

Marsha Montgomery, now age 61, testified that she was a high school graduate. Ms. Montgomery testified that she had been employed on a farm for most of her life, which employment primarily involved driving a tractor with no heavy lifting. The claimant also drove a tractor for a land leveling service, and she had worked at a small restaurant. The claimant testified that she became a driver for the respondent-employer in October 2002. The claimant testified that she drove a mower for the respondents for about two years and then was promoted to chemical sprayer. The claimant's work as a chemical sprayer involved driving, loading trucks, and carrying equipment.

The parties stipulated that the claimant sustained a compensable injury on July 27, 2009. The claimant testified that her neck popped while she was lifting jugs. Deborah Miles, ANP saw the claimant on July 29, 2009 and noted,

"Presents with one week history of increasing neck pain, has been lifting heavy bottles at work, no paresthesias to upper extremities, no falls. Needs refills on meds." Deborah Miles assessed "1. Neck pain. 2. Spasm of muscle."

An MRI of the claimant's cervical spine was done on August 7, 2009, with the following opinion: "Non-discogenic and discogenic degenerative change of the cervical spine primarily involving C/5-6 and C/6-7 levels."

Dr. Aaron Thompson noted on August 27, 2009, "The tentative return to work date for Ms. Montgomery is 09/21/09. The reason this is a 'tentative' date is because the patient has an appointment with Dr. Ricca, neurosurgeon on 09/14/09. Ultimately, after examining the patient, it will be up to Dr. Ricca when the patient will be able to return to work."

Dr. Gregory F. Ricca performed surgery on October 27, 2009: "1. Complete anterior diskectomy at C6-7 with decompression of the spinal cord and nerve roots. 2. Anterior interbody fusion C6-7 with tricortical structural allografts. 3. Anterior instrumentation with Sea Spine anterior plate and screws." The pre- and post-operative diagnosis was "Herniated nucleus pulposus (HNP) with

spondylosis cervical C6-7." Dr. Ricca noted on December 10, 2009, "She no longer has UE pain, numbness or tingling....A: Doing well following ACDF C6-7 with SeaSpine anterior plate on 10/27/09."

Dr. Bobby A. Thompson saw the claimant on January 21, 2010: "60 year old female presents with c/o pain continues to have neck pain. Recently has filed for disability through the highway dept. She finally underwent surgery on her neck on 10/27/09. Pt claims she had fusion of C4/5/6. Since then she has been off work and continues to have pain in her neck...." Dr. Thompson assessed "1. Degenerative disc disease....Advised her to f/u with Dr. Ricca since she has not recovered as expected from her surgery. Will fill out disability papers to the best of my ability based on pt's hx and physical findings."

The claimant followed up with Dr. Ricca on January 25, 2010: "Ms. Montgomery drives a dump truck and she does not believe that she can return to work. 'It's in and out of it constantly all day.' She has to hold a 10 pound applicator out the window of a vehicle and spray. She also drives a tractor to mow....Ms. Montgomery does not appear to be in pain....She has prominent spasms of her trapezius muscles

bilaterally....I recommend an external bone growth stimulator."

Dr. Aaron Thompson stated in part on January 27, 2010, "Ms. Montgomery continues to have subjective pain after her surgery....I would say at this time that she is not going to be able to return to her regular job duties and I would anticipate probably at least three months more time for recovery. There is a good chance that she may have permanent disability from this and may not be able to return to her normal job functions."

The claimant followed up with Dr. Ricca on March 22, 2010: "Ms. Montgomery has officially retired. She said that she cannot do her job because of her neck. She used to do heavy manual labor at the highway department. 'The job I had was way too physical.' ... I recommend that she continue using the external bone growth stimulator."

The claimant followed up with Dr. Ricca on May 24, 2010: "Ms. Montgomery does not appear to be in pain today. She moves about the office normally and if she did not tell me that she hurt, I would have thought she was without pain. Neck has no spasms....It appears that there [are] nonanatomic factors causing some of Ms. Montgomery's

symptoms....When I asked about work Ms. Montgomery said that she is not working. 'I asked to be let go. They have no mercy and you work like a dog out there. I put in 7 and a half years. I can't do it.'"

Dr. Ricca stated on June 4, 2010: "Based on the information I have, I believe that Ms. Montgomery can work. I have not been able to identify an organic reason for her complaints of neck pain. I also have not found any abnormalities within my expertise that should prevent her from working. I am still getting some tests because of her reports of significant symptoms."

Dr. Ricca saw the claimant on June 16, 2010:

Complaints of neck pain. Diminished ROM of her neck with bilateral distal UE weakness. These appear to be functional. Solid fusion at C5-6. Essentially negative EMG/NCV of both upper extremities. I cannot find a significant structural cause within to account for Ms. Montgomery's symptoms....I told Ms. Montgomery that I cannot find anything to account for her symptoms. I told her that it is OK for her to resume taking Dolobid. I mentioned that she might want to see a rheumatologist. She said that she cannot tolerate injections in her neck. I told her to sometimes rheumatologists use injections and sometimes they just use oral medications....

If Ms. Montgomery were to need an opinion as to what she can and cannot do, I would recommend an FCE. I told her that she can do what she is comfortable doing. She asked if she could ride a motorcycle and I told her yes. I recommend she

increase her activity as tolerated. She said: "Hot dog. That's what I'm going to do. I'm just not going to lift." She also said: "I can't go without the muscle relaxer and that mild pain pill that I am on. Don't think I'm a phoney, because I'm not."

The parties stipulated that the claimant "reached the end of her healing period and maximum medical improvement on June 16, 2010."

Dr. Ricca signed a Form AR-3, Physician's Report on August 16, 2010, indicating that he had released the claimant from treatment on June 16, 2010. Dr. Ricca did not assign any work restrictions and wrote that the claimant "Needs an FCE." Dr. Ricca assigned the claimant a 10% permanent impairment rating. The parties stipulated that the respondents accepted a 10% whole-body impairment.

A Functional Capacity Evaluation was done on September 17, 2010:

Ms. Marsha Montgomery is referred to Functional Testing Centers, Inc. for the purpose of undergoing a comprehensive functional capacity evaluation to determine her current functional status. Ms. Montgomery is referred with complaints of on-going pain in her neck which she attributed to injuries she sustained while employed by the Arkansas Highway Department....

The results of this evaluation indicate that Ms. Montgomery gave an unreliable effort, with 30 of 48 consistency measures within expected limits. Analysis of the data collected during Ms.

Montgomery's evaluation indicates that she did not put forth consistent effort during her evaluation....

Ms. Montgomery demonstrated functional limitations during her evaluation in the area of material handling as she exhibited the ability to perform an Occasional bi-manual lift of up to 5 lbs. Ms. Montgomery did not demonstrate the ability to perform the following activities: kneeling, crouching, reach with a 5 lb. weight in either UE or carry any amount of weight....

Ms. Montgomery completed functional testing on this date with unreliable results.

Overall, Ms. Montgomery demonstrated the ability to perform work at least in the Sedentary classification of work as defined by the US Dept. of Labor's guidelines.

A pre-hearing order was filed on November 1, 2010. The claimant contended that she was permanently and totally disabled as a result of her compensable injury. The respondents contended that the claimant could not prove she was permanently totally disabled, and contended that the claimant could not prove she was entitled to a percentage of wage-loss disability over and above the claimant's percentage of anatomical impairment. The parties agreed to litigate the issues of "permanent total disability/wage loss benefits and controverted attorney fees."

A hearing was held on February 18, 2011. The claimant described her physical condition: "I still have screaming

hot pains in the back of my neck....My neck is like a ball of fire burning in the back." The claimant testified that she had difficulty swallowing and that she experienced numbness in her arms. The claimant testified, "I drop stuff. I can't lift anything. I can't mop. I can't take a bath because I can't get out of the bathtub....I can't do anything to stretch my arms." The claimant testified that she took Percocet for pain, Soma as a muscle relaxer, and Xanax for muscle spasms caused by surgery. The claimant introduced into the record a purported list of approximately 38 potential employers, for which the claimant testified she had applied for work.

An administrative law judge filed an opinion on April 13, 2011. The administrative law judge found that the claimant proved she was permanently totally disabled. The respondents appeal to the Full Commission.

II. ADJUDICATION

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In considering claims for permanent partial disability benefits in excess of the

employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect her future earning capacity. Ark. Code Ann. §11-9-522(b)(1) (Repl. 2002).

Ark. Code Ann. §11-9-519(e) (Repl. 2002) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

An administrative law judge found in the present matter, "5. When the claimant's age, education, work experience, and other matters reasonably expected to affect her future earning capacity are considered (sic), the claimant has been rendered permanently totally disabled, and unable because of the July 27, 2009, compensable injury, to earn any meaningful wages in the same or other employment."

The Full Commission does not affirm the administrative law judge's finding that the claimant proved she was permanently and totally disabled. The claimant is age 61 with only a high school education and an employment history

of unskilled manual labor. The parties stipulated that the claimant sustained a compensable injury to her neck and cervical spine on July 27, 2009. Dr. Thompson noted in August 2009, "it will be up to Dr. Ricca when the patient will be able to return to work." On October 27, 2009, Dr. Ricca performed a diskectomy, fusion, and anterior instrumentation at C6-7. Dr. Ricca noted in December 2009 that the claimant was doing well following surgery.

The record indicates that the claimant voluntarily resigned her employment with the respondent-employer in about January 2010. Dr. Ricca noted in March 2010 that the claimant had "officially retired." Dr. Ricca subsequently noted, though, that the claimant did not appear to be in pain. Dr. Ricca opined in June 2010, "Based on the information I have, I believe that Ms. Montgomery can work. I have not been able to identify an organic reason for her complaints of pain." The parties stipulated that the claimant reached the end of her healing period and maximum medical improvement on June 16, 2010. Dr. Ricca assigned the claimant a 10% anatomical impairment rating, which the respondents accepted and paid. The claimant gave an unreliable effort during a Functional Capacity Evaluation

(FCE) carried out on September 17, 2010. The FCE indicated that the claimant could perform at least sedentary labor.

The Full Commission does not affirm the administrative law judge's finding that the claimant proved she was permanently and totally disabled as a result of the claimant's compensable injury. We recognize that the claimant is an unskilled manual laborer, age 61, with chronic pain which the claimant attributes to the compensable injury. Nevertheless, Dr. Ricca, the primary treating physician, assigned the claimant a 10% anatomical impairment and opined that the claimant could return to work. The evidence before the Commission demonstrates that the claimant is physically able to perform at least sedentary work. The Full Commission does not find that the claimant's usage of medications such as Percocet and Soma are impediments to the claimant returning to at least sedentary employment. Nor did Dr. Ricca or any other treating physician opine that the claimant was unable to return to work because of prescription medication.

Based on our *de novo* review of the entire record, the Full Commission does not affirm the administrative law judge's finding that the claimant proved she was permanently

and totally disabled. The claimant did not prove that she was unable to earn any meaningful wage in the same or other employment. Based on the claimant's age, education, work experience, and 10% anatomical impairment, the Full Commission finds that the claimant proved she sustained wage-loss disability in the amount of 25%. The claimant proved that the July 27, 2009 compensable injury was the major cause of her 10% anatomical impairment and additional 25% wage-loss disability. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority opinion. After a de novo review of the record, I specifically concur on the finding that the claimant is entitled to 25% wage-loss disability. However, as I would award the claimant permanent and total disability benefits, I must respectfully dissent from the majority's failure to award benefits above the finding of 25% wage-loss disability.

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., 102 Ark. App. 317, 385 S.W.3d 248 (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 was 59 years old at the time of the July 27, 2009 compensable injury. The claimant is a high school graduate whose work history has consisted of heavy manual labor, to include operating heavy farming equipment and land-leveling equipment. The claimant possessed a CDL and operated mower equipment in the discharge of her employment duties with the Highway Department. The claimant was required to lift, walk, and operate a spray apparatus as a routine part of her employment duties.

The claimant has not worked since sustaining her July 27, 2009 compensable injury. The evidence of record shows that the claimant remains symptomatic since undergoing the extensive cervical surgical procedure performed by Dr.

Ricca on October 27, 2009. The claimant has undergone additional diagnostic testing to address her complaints of significant neck pain and upper extremity tingling and numbness. The claimant continues to take prescription medications on a daily basis. She takes Percocet for pain, Dolobid as an anti-inflammatory, Soma as a muscle relaxer, and Xanax for muscle spasm brought on by the surgery. The claimant has difficulty sleeping, and during an average day spends four to five hours lying down to take pressure off her neck and shoulders.

The claimant is not computer literate. Furthermore, even if she was capable of working on a computer, the claimant is unable to sit for a prolonged period of time. The claimant experiences tingling and numbness in the upper extremities, as well as occasional numbness in the digits of her hand. The claimant also has diminished grip strength in her upper extremities.

The claimant does not possess any clerical skills, nor does her work history include any sales experience.

The evidence of record shows that the claimant is unable, because of the July 27, 2009 compensable injury, to earn any meaningful wages in the same or other employment.

The claimant is unable to operate farming equipment, land-leveling equipment, or mowing equipment. The claimant has sought employment within the sedentary job classification without success. Based on the above, I find that the claimant has sustained her burden of proof by a preponderance of the credible evidence that she has been rendered permanently and totally disabled.

For the aforementioned reasons, I must respectfully concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner