

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G001384

MATTIE PIGGEE,
EMPLOYEE

CLAIMANT

ILPEA, INC.,
EMPLOYER

RESPONDENT

CHARTIS CLAIMS, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 29, 2011

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

Claimant represented by the HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JARROD PARRISH,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 25, 2010. The administrative law
judge found that the claimant proved she was entitled to
wage-loss disability in the amount of 8%. The
administrative law judge found that the claimant proved she
was entitled to temporary total disability benefits from
November 14, 2008 to February 2, 2009. The administrative

law judge found that the respondents did not prove they were entitled to a credit pursuant to Ark. Code Ann. §11-9-807(b). After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

Mattie Colleen Piggee, now age 61, testified that she was a high school graduate. Ms. Piggee's testimony indicated that her employment history primarily involved factory work and manual labor. The record indicates that the claimant became employed with the respondent-employer, ILPEA, in January 1987. The claimant testified that she worked for the respondents as a quality control inspector. The parties stipulated that the claimant sustained a compensable injury to her right shoulder on September 5, 2008. The claimant testified that she twisted in the workplace and fell.

A physician's report on September 29, 2008 indicated that the claimant was assessed with a right shoulder contusion. The claimant was diagnosed with right shoulder strain and impingement on October 9, 2008. Following an MRI of the claimant's right shoulder, Dr. Keith Holder's

impression on November 11, 2008 was "Right rotator cuff tear."

The record includes an Enhanced Employment Separation Agreement, dated November 14, 2008. The Separation Agreement provided in part:

1. Identifying Information

Mattie Piggee is currently employed as a Quality Auditor for ILPEA Inc, Fort Smith Arkansas....her service date 01/11/1987.

2. Termination of Employment

For all purposes, Mattie Piggee's employment with ILPEA will terminate as of the close of business on the date designated by ILPEA, which ILPEA in its sole discretion may accelerate or extend depending upon business needs. Any discontinuation of employment by Mattie Piggee before the final designated termination date, through voluntary quit or otherwise, will result in Mattie Piggee becoming ineligible for all pay and benefits set forth herein.

3. Involuntary Separation Program

Under the ILPEA Involuntary Separation Program, Mattie Piggee is eligible to receive pay in an amount equal to one (1) weeks pay for each full year of service. Mattie Piggee recognizes that [she] is responsible for payment of any and all applicable FICA/Social Security Contributions, Federal Taxes, State Taxes, and/or Local Taxes on [her] separation pay....

4. Enhanced Separation Pay and Benefits

In consideration of the agreements and promises made by Mattie Piggee in this Agreement, and in

addition to the foregoing pay and benefits available under the ILPEA Involuntary Separation Program, ILPEA will provide Mattie Piggee with the following enhanced separation pay.

A. Enhanced Separation Pay

ILPEA will pay Mattie Piggee an amount equal to two (2) weeks pay or \$983.44. ILPEA will pay this amount in a lump-sum, fourteen (14) days after Mattie Piggee signs and returns this Agreement to ILPEA. Mattie Piggee agrees that this Enhanced Separation Pay is in addition to anything else [she] is already entitled to and also recognizes that [she] is responsible for payment of any and all applicable Federal Taxes, State Taxes, and/or Local Taxes....

An accompanying Payment Summary Form indicated that the claimant was provided Separation Pay, Enhanced Pay, and Vacation Pay, for a total of \$12,333.73.

The claimant testified on direct examination:

Q. What is your understanding of what that document did? Were you entitled to receive any money under that severance package?

A. Yeah, I was entitled to receive a - for each year of my service that I had given to the company, I got a week of pay, and all of the rest of my sick days and the rest of my vacation pay....

Q. Was anybody else laid off the same day you were?

A. Yes....Two supervisors and another inspector....

Q. Was it your understanding that your receipt of those payments had anything whatsoever to do with your injury?

A. No....

The respondents' attorney cross-examined the claimant:

Q. Once you were laid off, you have testified that you received 21 more weeks of paychecks, correct?

A. Yes.

Q. And these checks were at your full pay rate?

A. Yes.

Q. Same as you had been getting all along while you were working there, right?

A. Yes.

Q. And they continued the whole time. You didn't have a gap where you didn't get a check?

A. No....

Q. The only reason you continued to get paid was because they had to lay you off, right?

A. Yes.

In any event, Dr. John H. Harp began treating the claimant on November 17, 2008 and assessed "Symptomatic rotator cuff tear....My recommendation is shoulder arthroscopy and repair." Dr. Harp performed surgery on December 2, 2008: "1. Right shoulder arthroscopy with limited debridement. 2. Arthroscopic subacromial

decompression. 3. Arthroscopic distal clavicle excision.
4. Mini open rotator cuff repair." The pre- and post-operative diagnosis was "Rotator cuff tear, right shoulder."

Dr. Harp released the claimant to one-handed work duty on December 15, 2008. The claimant followed up with Dr. Harp on February 2, 2009: "I encouraged her to be very aggressive with her therapy. A prescription was written for full strengthening to be started at this time. She will return to see me on 03/16/2009. Initially, she was released to 1-handed duty, but at her request, she was released to full duty. I think that for her job duties as an inspector, she could indeed return to full-duty if this job was available."

The record indicates that the claimant fully participated in physical therapy for her shoulder. The claimant followed up with Dr. Harp on March 2, 2009: "Her wounds are dry without swelling, erythema, or drainage. Her range of motion is about 80% of normal. She has met her therapy goals and she has been taught a home exercise program. She can reach behind her head. She is still having some pain, but this should decrease as she gains strength and improves her mobility. ASSESSMENT AND PLAN: I

encouraged her to continue with her home therapy program. She will return to see me on a p.r.n. basis at this point. She is released without restrictions."

Dr. Harp corresponded with a case manager on April 15, 2009:

Ms. Piggee underwent surgery on December 2, 2008 for a rotator cuff tear sustained as a result of a work related injury. At this procedure, she underwent a shoulder arthroscopy with subacromial decompression, a distal clavicle excision, and a mini open rotator cuff repair. She participated in physical therapy. She was last seen in the clinic on March 16, 2009 after the completion of her physical therapy....

Mattie Piggee has reached her point of maximal medical improvement. She still has abnormal motion in her shoulder as noted above. This results in a 13% impairment of the upper extremity, which is equivalent to an 8% impairment of the whole person due to her work related injury.

Dr. Harp stated that the claimant's anatomical impairment was measured according to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 5th Edition. In a July 27, 2009 letter, Dr. Harp stated that he had re-calculated the claimant's anatomical impairment in accordance with the 4th Edition of the *Guides*. The claimant's anatomical rating remained 8% to the whole person.

Dr. Harp reported on December 14, 2009:

The patient returns for follow up today at the request [of] her workman's compensation, requesting an evaluation of the right shoulder. She is complaining of some ill-defined pain at the anterior portion of her shoulder and she states that she has difficulty wearing her bra strap. She points to the area of the anterior portal as the site of her pain.

OBJECTIVE: On exam today, her wounds are well-healed. She does have some keloid formation with some widening of the scars, but these do not appear to be prominent or inflamed. Her shoulder range of motion bilaterally is approximately 100% of normal. Her rotator cuff strength is 4/5 on the right and left side. Her infraspinatus and subscapularis strength are normal. The impingement and Hawkins tests are only mildly positive.

X-rays were ordered and performed today, which show distal clavicle excision changes and an anterior acromioplasty. All of these appear to be adequate. No calcification is noted.

ASSESSMENT: Occasional shoulder pain, etiology unknown. She has a normal exam today.

PLAN: I told her that we will continue with observation. She is currently laid off so there are no work duties. If her symptoms continue and are a problem for her, an MRI would be the next step on evaluation. She is released back to full-duty if and when work is available.

A pre-hearing order was filed on May 6, 2010. The claimant contended that she was entitled to temporary total disability benefits "from the date of the injury through the end of her healing period less and except those dates upon

which she was returned to work under restrictions." The claimant contended that she was entitled to "permanent partial disability."

The respondents contended that all appropriate benefits had been paid. The respondents contended, "the medical documentation does not support entitlement to additional indemnity benefits, whether temporary or permanent. The claimant has been released to return to work in a full duty capacity with no limitations or restrictions in her activities. In light of this, wage-loss disability is not a factor in this claim."

The parties eventually agreed to litigate the following issues:

1. Wage loss.
2. Temporary total disability from November 14, 2008 to April 15, 2009.
3. Attorney's fees.
4. The respondents' entitlement to a credit under Ark. Code Ann. §11-9-807(b).

A hearing was held on July 27, 2010. The claimant testified that she had unsuccessfully tried to find work with other employers. The claimant testified that she was taking adult education classes because she needed help in mathematics and computer skills. The claimant testified that she still felt pain in her shoulder and that she was

limited in use of her right arm. The claimant testified that she was unable to lift objects over an extended period of time.

An administrative law judge filed an opinion on October 25, 2010. The administrative law judge found that the claimant proved she was entitled to temporary total disability benefits from November 14, 2008 until February 2, 2009. The administrative law judge found that the claimant proved she sustained wage-loss disability in the amount of 8%. The administrative law judge found that the respondents did not prove "their entitlement to a credit under Ark. Code Ann. §11-9-807(B)."

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the

employee is as far restored as the permanent character of her injury will permit, and if the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

In the present matter, an administrative law judge found that the claimant proved she was entitled to temporary total disability benefits from November 14, 2008 until February 2, 2009. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury to her shoulder on September 5, 2008. The claimant was subsequently assessed as having a contusion, strain, impingement, and right rotator cuff tear. The claimant was separated from her employment with the respondents effective November 14, 2008. The record indicates that the instant claimant remained within a healing period and was totally incapacitated from earning wages beginning November 14, 2008.

Dr. Harp performed surgery on the claimant's right shoulder on December 2, 2008. Dr. Harp released the claimant to one-handed duty on February 2, 2009. The

claimant does not contend that she is entitled to temporary total disability benefits beyond February 2, 2009, and the claimant requests that the Full Commission affirm the administrative law judge's award. Because the record indicates that the claimant was not totally incapacitated from earning wages after February 2, 2009, the Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability benefits from November 14, 2008 until February 2, 2009.

B. Wage Loss

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 Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Ark. Code Ann. §11-9-522(b) (Repl. 2002) provides:

(1) In considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Workers' Compensation 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 his or her future earning capacity.

An administrative law judge found in the present matter, "2. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss in an amount equal to an 8 percent impairment to the body as a whole." The Full Commission affirms the administrative law judge's finding that the claimant proved she sustained wage-loss disability in the amount of 8%. The claimant is age 61 with only a high school education. The claimant's work history has included mostly manual, unskilled labor. The claimant began working for the respondent-employer in January 1987. The claimant was a quality control inspector for the respondents.

The parties stipulated that the claimant sustained a compensable injury to her right shoulder on September 5, 2008. The claimant's employment with the respondents was terminated effective November 14, 2008. Dr. Harp performed a right shoulder arthroscopy, decompression, and clavicle excision on December 2, 2008. Dr. Harp released the claimant to work without restrictions on February 2, 2009. However, the record does not indicate that the respondents were willing to re-hire the claimant following Dr. Harp's release. Dr. Harp pronounced maximum medical improvement on

April 15, 2009 and assigned the claimant an 8% permanent impairment rating due to the claimant's compensable injury. Neither party contests the claimant's entitlement to an 8% permanent anatomical impairment rating as a result of the claimant's compensable injury.

Although he had released the claimant to work with no restrictions, Dr. Harp noted on April 15, 2009 that the claimant had abnormal motion in her right shoulder. The claimant testified that she still suffered pain in her right shoulder and that she had limited use of her right arm. The claimant testified that she was unable to lift objects over an extended period of time. The claimant testified that she had not been able to find a job since being separated by the respondents. We do not find that the instant claimant's participation in adult education classes signals a lack of motivation or is otherwise a bar to the claimant receiving wage-loss benefits. Based on the claimant's age of 61, her lack of a college degree, her employment history of unskilled labor, and the compensable injury to her right shoulder resulting in 8% permanent anatomical impairment, the Full Commission affirms the administrative law judge's

finding that the claimant proved she sustained wage-loss disability in the amount of 8%.

C. Credit for compensation or wages paid

Ark. Code Ann. §11-9-807(Repl. 2002) provides:

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

An administrative law judge found in the present matter, "4. The respondents have failed to prove their entitlement to a credit under Ark. Code Ann. §11-9-807(B)." The Full Commission affirms this finding, although we do not affirm the administrative law judge's determination that the pay the claimant received pursuant to the Enhanced Employment Separation Agreement did not constitute "wages" in accordance with Ark. Code Ann. §11-9-102(19). A Payment Summary Form accompanying the Separation Agreement indicated that the claimant was to receive Separation Pay, Enhanced Pay, and Vacation Pay, for a total of \$12,333.73. The claimant testified that she understood the Separation Agreement to constitute "pay" given her "for each year of service that I had given to the company." Thelma Turpin,

the respondent-employer's human resources manager, testified that the claimant was paid "full wages" in accordance with the Separation Agreement: "She received her full pay for 21 weeks and nine days."

The respondents on appeal contend that the claimant "continued to receive her full salary up through late April of 2009." When an employer continues to pay salary or wages to an injured employee during any time of injury, and such payments are in excess of workers' compensation benefits, then when a workers' compensation award is subsequently made, the excess of the wages paid over the weekly compensation award cannot be deducted from the award. *Looney v. Sears Roebuck*, 236 Ark. 868, 371 S.W.2d 6 (1963). An employer cannot pay wages and later claim credit for the excess against an award made. *Id.*

Case law distinguishes between "advance payments of compensation" and "payment of benefits, wages and gratuities." *Main v. Metals*, 2010 Ark. App. 585, citing *Southwestern Bell Tel. Co. v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966). The amount in excess of wages paid over the weekly compensation rate cannot be credited against an award of future benefits unless both parties intended that

the payments be compensation in advance. *Looney v. Sears Roebuck*, 236 Ark. 868, 371 S.W.2d 6 (1963); *Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 542 (1989). The evidence does not demonstrate in the present matter that both parties intended that the money the claimant received in accordance with the Enhanced Employment Separation Agreement was to be characterized as "compensation in advance." The evidence in the present matter instead demonstrates that the pay the claimant received through the separation agreement was more in the nature of "payment of benefits, wages and gratuities." Therefore, the Full Commission finds that the respondents are not entitled to a credit for the amount in excess of wages paid over the claimant's weekly compensation rate.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability benefits from November 14, 2008 until February 2, 2009. The Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to wage-loss disability of 8% in excess of the claimant's 8% permanent anatomical impairment. The

claimant proved that she compensable injury was the major cause of her 8% permanent anatomical impairment and additional 8% wage-loss disability. We affirm the administrative law judge's finding that the respondents are not entitled to "credit" pursuant to Ark. Code Ann. §11-9-807(b). The Full Commission finds that the respondents cannot deduct wages paid to the claimant in excess of the claimant's workers' compensation award. *Looney, supra*.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal, 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of that she was entitled to wage loss disability benefits in the amount of 8% in addition to her permanent anatomical impairment and a finding that the claimant was entitled to temporary total disability benefits from November 14, 2008 to February 2, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

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 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, 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.

My review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits. The medical evidence demonstrates that the claimant was released for full-duty work by her treating physician. Therefore, there is nothing medically wrong with the claimant to prevent her from returning to work. In my opinion, the claimant remains out of the workforce because of her decision not to pursue any employment. The claimant has been going to the adult education center and taking adult education classes. The claimant is also collecting unemployment and was told by a friend as long as she was

taking classes that she would still receive her unemployment benefits. She would also not be required to make the two potential employer contacts per week.

The claimant is attending GED prep classes at the adult education center. However, the claimant already has a high school diploma. The claimant has attended 629 hours of instruction connected with the GED prep classes. The claimant's transcript also reveals that she has taken some classes multiple times. The claimant has been drawing unemployment and has never once filled out a job application.

In my opinion, the claimant lacks motivation to return to work. Her continuous taking of education classes multiple times is indicative of her not wanting to look for a job. While it is admirable that the claimant is wanting to further her education, she already has a high school diploma and does not have to get a GED. It appears that the claimant lacks any motivation whatsoever to return to the job market, but is content to draw unemployment while taking these classes. When the claimant was questioned regarding what she wanted to do, she stated that she wanted to be in medical technology but lacked the requisite abilities to pursue that

field. She testified that someone had told her it was hard. It appears the claimant has chosen to remove herself from the job market altogether and should not be rewarded with wage loss disability benefits.

The majority has not awarded the respondents a credit for continuation of the claimant's weekly pay subsequent to her layoff under § 11-9-807(b). The record clearly indicates that the claimant continued to receive her full salary up through late April of 2009. Section 11-9-807(b) of the Arkansas Code Annotated states:

If the injured employee receives full wages during disability, he shall not be entitled to compensation during that period. Ark Code Ann. § 11-9-807(b).

The claimant continued to receive her full salary up through the end of April. Therefore, an award of temporary total disability for the period November 14, 2008 through April 15, 2009, is clearly precluded by the plain language of the statute. The Administrative Law Judge awarded benefits through February 2, 2009, when the claimant was released to return to work.

At the hearing, the claimant provided argument dealing with whether or not the payments made to the claimant were agreed by both parties to be advance payment

of compensation. However, the language dealing with advance payments for compensation falls under subsection (a) of 11-9-807. Subsection (b) is a wholly independent provision which allows the respondents to take a direct setoff for indemnity benefits in the event they continue to pay the claimant's full salary. Obviously, if the respondents had to pay "full wages" and designate those full wages as "advance payments for compensation", then there would be no need for two separate sections in the statute. A simple statement by the legislators that all payments have to be designated as advance payment of compensation would be sufficient. Clearly, the legislature intended that a separate provision allow for a credit and/or setoff whenever the respondents pay full wages to the claimant. There is no qualification in the statute dealing with the reasons full wages are paid. The statute simply establishes that payment of full wages cancels out a claim for indemnity benefits during the same period of time. The claimant and the Human Resources Manager, Thelma Turpin, both testified unequivocally that full wages were paid during the period of disability for which the claimant is requesting temporary total disability benefits. Therefore, pursuant to § 11-9-807(b), I find that

the claimant's claim for temporary total disability benefits is barred. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER