BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H101867

THURN K. APPLE, EMPLOYEE **CLAIMANT**

v.

WHITE RIVER AREA AGENCY ON AGING, EMPLOYER **RESPONDENT**

RISK MANAGEMENT RESOURCES, CARRIER/TPA **RESPONDENT**

OPINION FILED MAY 2, 2023

Hearing before Administrative Law Judge, James D. Kennedy, on March 15, 2023, in Mountain Home, Baxter County, Arkansas.

Claimant is represented by Laura Beth York, Attorney-at-Law, of Little Rock, Arkansas.

Respondents are represented by Melissa Wood, Attorney-at-Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on March 15, 2023, to determine the issue of permanent and total disability or, in the alternative, an Award of wage-loss, plus attorney fees in regard to the claimant's compensable injury of a fractured sacrum. A copy of the Prehearing Order dated December 20, 2022, was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided the parties stipulated as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. An employer / employee relationship existed on or about February 8, 2021, and at all relevant times, when the claimant sustained a compensable injury in the form of a fractured sacrum.

3. The claimant earned an average weekly wage of $398.40 with a temporary total disability / permanent partial disability rate of $216.00 / $200.00, respectively.

4. The Claimant had been assigned a five percent (5%) impairment rating to the body as a whole, which has been accepted by the respondents.

The claimant's and respondent's contentions are set out in their respective responses to the prehearing questionnaire and made a part of the record without objection. At the time of the hearing, the parties agreed that the issue was the claimant's entitlement to permanent total disability or, in the alternative, wage-loss benefits plus attorney's fees.

Three (3) witnesses testified, Thurn Apple, the claimant; Misty Glenn, the office coordinator; and Don Gregory, the Director of HR for White River Area Agency on Aging. The claimant's exhibit one consisted of eight (8) pages of a Vocational Rehabilitation Report that was admitted into the record without objection. The claimant's exhibit two consisted of seventy-seven (77) pages of medical reports that was admitted into the record without objection. Respondents exhibit one consisted of fifty-four (54) pages of medical records that was admitted into the record without objection. Respondents exhibit two consisted of seven (7) pages of a Vocational Rehabilitation Preliminary Report that was also admitted into the record without objection. In addition, both parties requested that due to the fact the matter had been tried before, the previous transcript and briefs be retained in the Commission's file as part of the record in regard to this matter. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704.

FINDINGS OF FACT AND CONCLUSSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. An employer / employee relationship existed on or about February 8, 2021, and at all relevant times, when the claimant sustained a compensable injury in the form of a fractured sacrum.

3. The claimant earned an average weekly wage of $398.40 with a temporary total disability / permanent partial disability rates of $216.00 / $200.00, respectively.

4. That the claimant has been assigned a five percent (5%) rating to the body as a whole, which has been accepted by the respondents.

5. That the claimant has failed to satisfy the required burden of proof that she is entitled to permanent and total disability but, in the alternative, has satisfied the required burden of proof, by a preponderance of the evidence, that she is entitled to an Award of wage-loss in the amount of five percent (5%).

6. The claimant is entitled to attorney's fees pursuant to Ark. Code Ann. §11-9-715. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.

7. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

REVIEW OF TESTIMONY AND EVIDENCE

The claimant, Thurn K. Apple, was the first witness to testify. She was born on October 6, 1954, and was sixty-eight (68) years old at the time of the hearing. In regard to education, she made it halfway through the eleventh grade and then obtained her GED. After that, her education consisted of on-the-job training, where she initially worked in an assembly-line shirt factory in Mountain Home, Arkansas. After the shirt factory, she and her husband owned and operated a grocery store which they eventually sold and she then returned to the shirt factory where she worked a total of about twenty (20) years. She also worked at an apartment complex, a convenience store, and was the manager of the kitchen in a retirement home. In the apartment complex job, she worked in

housekeeping and cleaned the apartments allowing people to move back in. She also worked part-time in the evenings during this time in a restaurant cooking and waiting tables. During this period, she also worked a third job at a convenience store as a cashier. (Tr. 6-10) When she went to work at the retirement home, she was the manager in the kitchen and slipped on some spilled water, injured her back, and ended up having surgery. She then moved back to Arkansas. (Tr. 11)

Upon returning to Arkansas, she initially worked at the Sonic in Melbourne, Arkansas, as the breakfast manager, and later at a Pizza Inn where she again cooked and waited tables. She was then hired by the respondent, White River, in or around 2013, where she worked as a caregiver and was injured, fracturing her sacrum. (Tr. 12-14) She admitted giving a recorded statement to an adjuster about her prior medical problems. She admitted injuring her neck at the shirt factory, but stated she did not receive surgery and returned to work with no restrictions. She also admitted falling in 2005, while working at a retirement center where she injured her back which required surgery. She also admitted she was in the early stages of kidney failure, but it did not prevent her from working. She went on to state, “I don’t know if the kidney failure has gotten worse, but since I hurt my back, I have trouble controlling my bowels and kidneys.” She also agreed she told the adjuster she had been diagnosed with fibromyalgia in the 80’s, and also told her about her arthritis and diabetes, but that none of these conditions prevented her from working for the respondent. (Tr. 15-16)

In regard to the difference in her pain between 2005 after her first back injury and surgery and the 2021 injury, the following testimony occurred:

A: Well, with the first injury I didn't have any trouble with my legs or anything, it was just my back. After surgery, I've never had any problems with my back or anything at all as far as from the accident in 2001 (sic) since I've hurt it.

Q: 2001 or 2021?

A: 21. I'm sorry.

Q: That's okay

A: In 2021 when I got hurt, this accident has caused me to be numb from my sacrum area all the way down my left leg. And the reason I'm not saying anything about my right leg was because it was already numb from the knee down from a car wreck in 73.

Q: Okay.

A: And to this day I'm still having a lot of trouble with being able to balance myself if I have to sit too long or stand too long, and I'll have muscle cramps in the left side of my leg, my left leg, and still have the numbness around my sacrum. And it's embarrassing, but if I have to go to the bathroom, I'd better go or I'm liable to mess myself up. (Tr. 17)

The claimant went on to state that a car accident affected her right leg and the accident in 2021 did not affect her right leg, but only her left leg. The injury in the 70's did not prevent her from working, or create balance, bladder, or bowel problems like the injury in 2021. (Tr. 18)

The claimant initially saw Dr. Spann, her primary care physician, who ordered an MRI and referred her to Dr. Seale who did not recommend surgery. She stated she was not eligible for epidural steroid injections because she was allergic to them, which she learned back in 2005. She was referred to Dr. Varela for an independent medical exam and he did not examine her *per se*, but talked to her and told her nothing was wrong with her and released her to return to work. (Tr. 19-21) Initially, she was not offered light-duty, but it was later offered to her and she answered phones and cleaned up and straightened the offices for three (3) hours a day. She thought this lasted about three (3) weeks but

was not sure. She felt terrible at the end of the day and after about two (2) or three (3) weeks she was sent home and was told she was not needed at that time. Then approximately six (6) or so weeks later, she was asked to return to light-duty where she again worked three (3) hours a day and again felt the same after work as before. This again lasted about two (2) or three (3) weeks and she was then told they did not have anything for her and was never called back. She thought she then received a phone call telling her she had been let go and there was no work available. (Tr. 22-24)

There was a change of physician to Dr. Knox and he assessed her with a five percent (5%) impairment rating which was accepted by the respondents. She has since returned to Dr. Spann, her primary care physician, and has been placed on work restrictions of light-duty with no lifting, bending, or twisting. She agreed that Dr. Spann had provided that, "She is unable to work with gainful employment due to pain, leg weakness, and a tendency to fall". She went on to state she has not worked since her termination. (Tr. 25-26)

She also agreed the respondents hired someone named Keondra Hampton to perform a vocational rehabilitation preliminary report but that she never met her and never had any discussions with her. She did admit that Ms. Hampton identified jobs for her, and one was with Chartwell and one with Sonic. The claimant was allowed to answer if jobs were available over the objection of the respondent and the claimant stated she contacted them, but none were available. (Tr. 27-31)

The claimant admitted she could pick up a gallon of milk but that it does bother her unless she's just moving it to set it down. She can no longer work in her flower garden. She also admitted she could drive and could generally hold out for about thirty (30)

minutes or a bit more. However, the trip to the courthouse for the hearing was fifty (50) something miles and her friend drove her. In regard to her housework, her daughters now have to help her, and she is not supposed to mop or vacuum. (Tr. 32-33) On a typical day, she gets up and fries an egg which is hard to do because before getting it fried she is hurting, and then goes and sits in her recliner for fifteen (15) to twenty (20) minutes and then goes to the bathroom. She watches TV and can make it to the mailbox which is about fifty (50) feet or so away. In regard to grocery shopping, she admitted she sometimes does it and part of the time her daughter does it. After shopping, she takes the things that need to be refrigerated into the house and sometimes has to wait an hour or two before bringing the remainder into the house. She again stated her left leg was numb, but she has not yet fallen because there was always something to hang on to or lean against like a hallway. (Tr. 34-36)

Under cross-examination, the claimant admitted that while working for the shirt factory for twenty (20) years, she held many positions all involving sewing. In regard to working in the grocery store, the claimant admitted she ran the store while her husband worked in the garage and she checked people out, made sandwiches, stocked, ordered products and handled the paperwork. She also admitted her previous surgery back in or around 2005 involved the placement of bolts, screws, and plates, and they were still in place. (Tr. 37-38) She settled that claim for $30,000.00.

She had gone to work part-time for the respondent about five (5) years ago due to the fact she did not want to work as much, and had been told she, “might be starting with the first kidney failure,” and consequently, she decided to cut back because she started taking her social security. She was working about thirty (30) hours a week. She also

admitted applying for social security disability at the age of sixty-four (64) due to her fibromyalgia, but it was not approved. She also agreed Dr. Spann had previously diagnosed her with left hip pain and osteoarthritis, along with fibromyalgia. She also did not dispute a diagnosis of chronic pain syndrome, cervical degenerative disc disease, problems with the right shoulder, and fatigue. She also remembered a complaint of left knee pain. She went on to provide that with fibromyalgia, you just hurt everywhere. She also admitted that if Dr. Spann stated that she had left hip pain and pain in both knees in November of 2020, she agreed. She would not agree with the report providing for lower back pain, however. In regard to Dr. Luke Knox, who she saw once, she agreed that the only thing he did was to provide a disability rating and he did not assign any restrictions. (Tr. 39-42) In regard to Dr. Varela, she stated, "He didn't tell me anything other that there wasn't anything wrong with me, that I wouldn't work." (Tr. 43) She also agreed that with the exception of Sonic and KFC, she had contacted the employers the month of the hearing which was mentioned under direct-examination. (Tr. 44)

At the conclusion of the claimant's testimony, Misty Glenn, the office coordinator for White River Area Agency on Aging, was called by the respondents. She testified the respondents offered the claimant light-duty and she was in the office when the claimant was straightening and cleaning up. At that time, the claimant was under the restrictions of Dr. Spann and the work offered was within those restrictions. "After she came to the office and started working, she couldn't sweep, she couldn't push the vacuum, and she couldn't take out the trash because she wasn't supposed to lift she said, and she wasn't supposed to bend." Ms. Glenn stated the claimant didn't do any of these and she, "pretty much dusted and answered the phone and –. I don't even know that she answered the

phone, because we are fully staffed in the office, but that was something she could do if that came up." Ms. Glenn further stated that eventually the claimant was moved to a desk out front, but there was a bit of a conflict because she heard the claimant and another aide talking and the claimant mentioned she was basically getting paid to do nothing. The claimant was then moved to the back office. She also testified the claimant was moving "fine." (Tr. 47-49)

Under cross-examination, Ms. Glenn admitted she had testified in the previous hearing that there was no light-duty available at White River, and had further stated, "There was, to my knowledge, since I've worked there, there were no light duty jobs. There was a minimum qualifications, minimum, you know, lifting restrictions, that there was none available." She went on to state the job was created specifically for the claimant. The claimant accepted light-duty and came to work, and she lasted a few weeks. Ms. Glenn stated it was her understanding that the claimant was released because there were no restrictions on what she could do and she could therefore go back into the homes. "I don't think that she was terminated at that time, we just didn't have anything to offer her at that time since she could not take the clients that was available due to her being unable to work, per her." Ms. Glenn admitted the claimant came and performed light-duty twice. She was not aware of any long-term, light-duty jobs available and agreed that the claimant worked three (3) hours a day when she worked. (Tr. 50-52)

Donald Gregory, the HR Director, was also called by the respondents and had been in that position for almost a year. He had one assistant that worked with him, so they were the "customer service portion of the company to an extent." He testified he was familiar with the claimant and was the one that terminated the claimant by sending

her a letter. The reason for her termination was, "the second opinion that we got from the physician indicated that the issues were not related to the workers' compensation injury, and that the restrictions did not meet the job requirements, so the release was based on that." He stated he was referring to the opinion of Dr. Varela and that the claimant did not have any restrictions due to her work injury. (Tr. 53-54)

Mr. Gregory stated that there was a huge box of heavy-duty binder clips that needed to be separated and the claimant was assigned that job. The following questioning then occurred:

Q: So the restrictions that she had unrelated to the work injury, could she have done her job as an aide with those restrictions?

A: With the restrictions that Doctor Varela put in place?

Q: Correct.

A: No. (Tr. 55)

Under cross-examination, Mr. Gregory testified he was not familiar with the claimant prior to her date of injury, stating her injuries occurred before he started, if his memory served him correctly. He could not testify to her restrictions prior to the injury, and that all he knew was about her restrictions after her injury. (Tr. 56)

Mr. Gregory was also asked about Ms. Glenn and he admitted he was familiar with her. He stated light-duty was offered to the claimant and he had never had an opportunity to work with the claimant due to his office being in Batesville. He was not sure if there was any long-term disability available at White River since he had not had that situation. He was also questioned about the vocational assessment and stated he was not familiar with it. He was then handed the report and responded that there were no light-duty jobs identified at White River in the report. (Tr. 57-60)

The entirety of the medical and documentary evidence submitted have been reviewed. The claimant's medical reports consisting of seventy-seven (77) pages were admitted without objection. Claimant presented to the Stone County Medical Center ER on February 8, 2021, after she reported she fell on her bottom and then onto her back hitting both the back of her head and both elbows and neck and reported pain in her elbows, sacral area, head, neck, and elbows with a small bruise reported on her left forearm and reported, "soreness all over." A CT of the pelvis provided the bony structures were intact with bilateral arthritic change and with a bilateral transverse fracture through the 4th sacral segment, which was of indiscriminate age, but could be acute. A CT of the head showed no hemorrhage, mass effect, or midline shift, with no acute skeletal abnormality. (Cl. Ex. 1, P. 1-16) A medical report by Dr. Eric Spann dated February 22, 2021, provided for a finding of a closed fracture of the coccyx with routine healing, along with other chronic pain. (Cl. Ex. 1, P. 17-20) The claimant returned to Dr. Spann on March 1, 2021, and the report provided for paraspinal muscle spasm, with a closed fracture of the coccyx, with routine healing. (Cl. Ex. 1, P. 21-24) The claimant returned to Dr. Spann on March 5, 2021, and March 15, 2021. (Cl. Ex. 1, P. 25-32)

The claimant then presented to the Stone County Medical Center for an MRI of the pelvis on March 26, 2021. The MRI report provided for a bone marrow signal abnormality in the sacrum at the S3-4 level to the right of the midline which might represent a subtle fracture, although not classic for an insufficiency fracture. Sacroiliac joints appeared intact with minimal fluid in the left sacroiliac joint. No fracture or dislocation was seen at the hips and the coccygeal segments appeared intact with no definite impingement of the sacral nerve roots identified. (Cl. Ex. 1, P. 33)

Approximately five (5) months later, the claimant presented to Payton Ransom, P.A., on August 11, 2021, and the notes provided the claimant presented to discuss concerns about her sacrum and left leg. The report provided the claimant had suffered pain off and on throughout the years with a history of a sacral fracture when she was 18, due to a motor vehicle accident, but that the pain had been greatly exacerbated since her fall on February of 2021. (Cl. Ex. 1, P. 34-38) The claimant presented to OrthoArkansas on September 20, 2021, for an MRI of the lumbar spine. The report provided there was a possible small left foraminal to extraforaminal protrusion type disc herniation, although there was no definite mass on the adjacent exiting left L5 nerve root. Left foraminal stenosis was moderate and right foraminal stenosis was mild. There was mild foraminal stenosis on the right at L2-L3 and L3-L4, bilaterally at L4-L5, and on the right at L5-S1. (Cl. Ex. 1, P. 39)

The claimant then returned to Payton Ransome, P.A., on September 21, 2021, who opined that the claimant's MRI did reveal a disc protrusion that was an objective finding of injury that matched the patient's subjective complaints and symptoms. The patient's symptoms began on and after the work injury. Therefore, it was within a degree of medical certainty that at least fifty-one percent (51%) of the patient's current symptoms are directly related to her work injury. The patient does have an extraforaminal disc protrusion on the left at L5-S1 that was creating her left leg radiculopathy. The report also provided the claimant couldn't have epidural steroid injections. (Cl. Ex. 1, P. 40-44)

The claimant returned to Dr. Spann on November 15, 2021, who stated she could not return to work until April 22, 2022. The claimant returned to Dr. Spann on December 13, 2021, to discuss disability paperwork. The claimant then again returned to Dr. Spann

three (3) months later, on March 21, 2022, for a follow-up where she stated her legs got tingly and the neurosurgeon had suggested surgery. She then returned to Dr. Spann again on April 7, 2022, and he issued another off-work note which provided that she could work two (2) to three (3) hours per day. (Cl. Ex. 1, P. 45-54.)

The claimant was seen by Dr. Charles Varela on June 27, 2022, for an IME. The report provided that no patient/physician relationship was established. The claimant was then referred by Dr. Spann to Dr. Seale, a spinal surgeon at OrthoArkansas in Little Rock. An MRI scan was performed and the patient was noted to have evidence of possible small left disc protrusion at L5-S1 without compression of the nerve root. Mild foraminal stenosis was noted in the remainder of the spine. There was no mention of a coccyx fracture on the MRI scan or on the evaluation by Dr. Seale. He did however recommend a possible foraminal microdiscectomy on the left L5-S1 in the future. Under impression, the report provided for a post probable S3 sacral fracture, acute, work-related, resolved and chronic mechanical low back pain with symptoms not justified by objective findings, not related to work injury. The report went on to provide that the claimant should be placed on work restrictions due to her chronic low back pain, age, and general physical condition, and that she could return to work with a twenty-five (25) pound weight restriction. (Cl. Ex. 1, P. 55-57)

Disability papers were filled out by Dr. Spann's office on July 19, 2022. (Cl. Ex. 1, P. 58-60) The claimant then presented to Dr. Luke Knox on September 15, 2022. His report provided that the claimant had been seen in the neurosurgery clinic on the above date and referred to both the MRI and CT scans. Under plan, the report provided there were no further medical treatments and/or additional diagnostic tests currently

recommended and/or necessary that was associated with the sacral fracture and/or lower back injury and complaints. Additionally, Dr. Knox opined that he agreed with Dr. Varela that the claimant had reached maximum medical improvement and he believed no other treatment options were available. The claimant qualified for a five percent (5%) permanent partial disability to the body as a whole. (Cl. Ex. 1, P. 61-73) The claimant then returned to Dr. Spann who issued another off-work note that provided the claimant was unable to work a job with gainful employment due to her pain, leg weakness, and tendency to fall and opined that the claimant could only work two (2) to three (3) hours a day. (Cl. Ex. 1, P.74)

The respondents also submitted medical records of fifty-four (54) pages. The respondents submitted Walmart Pharmacy records from December 5, 2007, through January 23, 2022. The records provided the claimant was on various medications during that time period which included various medications for pain to take as needed well before the work-related incident of February 8, 2021. The claimant was prescribed Hydrocodone, Ultram, and Darvocet combined with prescription Tylenol as far back as 2008, along with various additional pain medications and muscle relaxers over the years prior to the work-related incident. (Resp. Ex. 1, P 1-22)

The respondents also provided claimant's patient summaries from Dr. Spann for the time period of July 26, 2016, through July 7, 2020. The reports provided she suffered from a variety of health issues as far back as July 26, 2016, which included chronic pain, degenerative disc disease, and pain in the right and left shoulder. Osteoarthritis of the hip and arthritis and degenerative arthritis of the knee were also diagnosed. Besides pain, the claimant was also diagnosed with hypertension, a right rotator cuff tear, and

chronic severe right shoulder dysfunction. (Resp. Ex. 1, P. 23-28) Dr. Spann's chart notes from June 9, 2020, through July 20, 2020, provided the claimant suffered from chronic pain syndrome, hip osteoarthritis, palindromic rheumatisms, as well as hypertension, and controlled type 2 diabetes with diabetic polyneuropathy. (Resp. Ex. 1, P. 29-34)

A chart note from Fletcher Chiropractic dated July 7, 2020, provided the claimant presented with low back pain on the left and that the claimant should respond well to care. (Resp. Ex. 1, P. 35)

Additional chart notes from Dr. Spann dated September 21, 2020, and November 4, 2020, provided the claimant was suffering from piriformis syndrome of the left side with left hip pain, plus bilateral knee pain on the November visit along with various chronic diseases. (Resp. Ex. 1, P. 36-42)

The respondents also submitted the IME report from Dr. Varela and additional pages in regard to the Disability Physicians Statement and Claimant's Accommodation request by Dr. Spann. (Resp. Ex. 1, P. 46-52) Dr. Spann opined that the claimant was unable to twist or turn, shouldn't lift over twenty (20) pounds, and should work less than four (4) hours a day. The respondents also submitted the rating report from Dr. Luke Knox. (Resp. Ex. 1, P. 53) The respondents also submitted six (6) pages of the Vocational Rehabilitation Preliminary Report dated November 11, 2022, which provided that the reports from Washington Regional Neuroscience and Dr. Knox, along with reports from the Ozark Orthopedic and Hand Surgery Center, the White River Orthopedic and Hand Surgery Center, the White River Health System Stone County Medical Center, and the deposition of the claimant dated June 9, 2021, all had been reviewed and there were a

variety of jobs available that the claimant could perform which included a cashier, checker, waitress, and kitchen helper among others. (Resp. Ex. 2, P. 1-6)

DISCUSSION AND ADJUDICATION OF ISSUES

In the present matter, the parties stipulated the claimant sustained a compensable injury in the form of a fractured sacrum, on February 8, 2021. The claimant is therefore not required to establish "objective medical findings" in order to prove that she is entitled to additional benefits. *Chamber Door Indus., Inc. v Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

In determining whether the claimant has sustained her required burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704; *Wade v. Mr. Cavananugh's,* 298 Ark. 364, 768 S.W. 2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. *Weldon v. Pierce Brothers Construction Co.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant bears the burden of proof in establishing entitlement to benefits under the Arkansas Workers' Compensation Act and must sustain that burden, by a preponderance of the evidence. *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 635 S.W. 2d 823 (1982). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co*., 81 Ark App. 263, 101 S.W.3d 252 (2003).

It is noted that a claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness's credibility and how much weight to accord the person's testimony are solely up

to the Commission. *White v. Gregg Agriculture Ent*. 72 Ark. App. 309, 37 S.W.3d 549 (2001). Additionally, the employer takes an employee as he finds him and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robinson*, 82 Ark. App. 460. 120 S.W.3d 150 (2003).

Where there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Cedar Chem. Co. v. Knight*, 99 Ark. App. 162, 258 S.W.3d 394 (2007). The Commission has authority to accept or reject medical opinion and to determine its medical soundness and probative force. *Oak Grove Lumber Co. v. Highfill,* 62 Ark. App. 42, 968 S.W.2d 637 (1998). However, the Commission may not arbitrarily disregard the testimony of any witness. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

It is noted that the claimant was allowed to testify as to contacting employers in the area in regard to the list of jobs available as listed in the Vocational Rehabilitation Preliminary Report, over a standing objection as to admissibility made by the respondents. The law is clear that the Commission has broad discretion with reference to the admission of evidence, and its decision will not be reversed absent a showing of abuse of discretion. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998). The Commission is given a great deal of latitude in evidentiary matters, as specifically spelled out in Ark. Code Ann. §11-9-705. The Commission is directed to "conduct the hearing in a manner that will best ascertain the rights of the parties." *Clark v. Peabody Testing Service*, 265 Ark.489, 579 S.W. 2d. 360 (1979). Hearsay is an out of court statement offered to the truth of the matter asserted. In determining whether the statement is hearsay, the first question that needs to be reviewed is who is the proponent

of the statement and why are they offering it. Are they offering it to prove that the contents are true or are they offering it for some other reason. Here, the claimant's statements were not sufficient to necessarily show that no jobs were available in the area but were sufficient to show that she had at least looked for available work.

In the present matter there are no future treatment or procedures proposed in regard to the claimant's injury. Dr. Knox and Dr. Varela both opined the claimant had reached maximum medical improvement and Dr. Knox additionally opined on September 15, 2022, that the claimant had reached maximum medical improvement with a five percent (5%) partial impairment rating to the body as a whole and the respondents accepted this rating. Dr. Varela provided that the claimant could return to work with a twenty-five (25) pound weight restriction and Dr. Spann provided for a twenty (20) pound weight restriction. The Vocational Rehabilitation Report provided that appropriate jobs were available in the area.

In regard to the issue of permanent and total disability or, in the alternative, wage-loss, permanent and total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(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. §11-9-519(e)(2). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann.§ 11-9-102(4)(F)(ii)(a). Here the only evidence produced at the hearing was that the claimant was unable to earn any meaningful wages as a result of the compensable injury was the testimony of the claimant. Dr. Spann opined that although the claimant could not twist or bend, she could

in fact return to lifting up to twenty (20) pounds while Dr. Varela opined that the claimant could return to work and was restricted to lifting up to twenty-five (25) pounds. It is also noted that no medical provider specifically indicated that the claimant was unable to work. Dr. Spann did limit her to two (2), three (3), or four (4) hours of work depending on the date of the report, Dr. Seale opined that the symptoms were not justified by objective findings, Dr. Knox assigned no restrictions, and Dr. Varela felt that basically nothing was wrong with her per the claimant's own testimony. Based upon the available evidence, the claimant has failed to prove, by a preponderance of the evidence, that she is unable to earn meaningful wages as the result of the compensable injury, and consequently has failed to satisfy the required burden of proof for permanent and total disability. *See, Greenfield v. Conagra Foods*, 210 Ark. App. 292 (2010)

In regard to the issue of wage-loss, it is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Rutherford v. Mid-Delta Cmty. Servs., Inc.* 102 Ark. App. 317, 285 S.W.3d 248 (2008). The Commission is charged with assessing wage-loss on a case-by-case basis. Factors to be considered in accessing wage-loss include the employee's age, education, post-injury income, work experience, medical evidence, and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post injury income, *bona fide* job offers, credibility or voluntary termination. *Glass v. Edens*, 232 Ark. 786, 346 S.W.2d 685 (1961); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W. 276 (1982); *Hope School District v. Charles Watson*, 2011 Ark App 219, 382 S.W. 3d 782 (2011). The Award of wage-loss is not a mathematical formula but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements. *Henson*

v. General Electric, 99 Ark. App. 129, 257 S.W. 3d 908 (2008). Pursuant to Ark. Code Ann. §11-9-522(b)(1), when a claimant has an impairment rating to the body as a whole, like in the current matter, the Commission has the authority to increase the disability rating based upon wage-loss factors. 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). Objective and measurable physical findings which are necessary to support a determination of "physical impairment" or anatomical disability are not necessary to support a determination of wage-loss. *Arkansas Methodist v. Adams*, 43 Ark. App. 1, 858 S.W. 2d (1993)

Here, it is clear the claimant suffered from a variety of pre-existing matters and chronic health issues, such as fibromyalgia, osteoarthritis, chronic pain, previous back surgeries, kidney issues, hypertension, and diabetes. Evidence provided the claimant was born October 6, 1954, and was sixty-eight (68) years old at the time of the hearing. She previously had worked at a shirt factory as a line worker sewing, ran a grocery store where she ran the cash register, ordered product, stocked, and additionally had worked as a cook, waitress, and as a care-taker for the elderly or impaired. Some of these jobs listed in the area could be performed by a person who is limited to lifting twenty (20) to twenty-five (25) pounds. To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent, physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000) In the present matter, Payton Ransome P.A. on September 21, 2021, opined that the claimant's MRI did reveal a disc protrusion that is an objective finding of injury that

matched the patient's subjective complaints and symptoms. The claimant's symptoms began on and after the work duty. Therefore, it was within a degree of medical certainty that at least fifty-one percent (51%) of the claimant's current symptoms are directly related to her work injury. Based upon a review of all the above, it is determined that the claimant is entitled to a five percent (5%) wage-loss determination.

After reviewing and weighing the evidence impartially, without giving the benefit of the doubt to either party, the claimant has failed to satisfy the required burden of proof that she is entitled to permanent total disability, but, in the alternative, has satisfied the required burden of proof that she is entitled to wage-loss in the amount of five percent (5%).

The claimant and her attorney are entitled to the appropriate legal fees as spelled out in Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

IT IS SO ORDERED.

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JAMES D. KENNEDY
Administrative Law Judge