

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G902535

CHERYL L. COOK, EMPLOYEE	CLAIMANT
SODEXO, INC., EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 7, 2021

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed February 9, 2021. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Commission has jurisdiction of this claim.
2. The stipulations contained in the Prehearing Order filed September 16, 2020, hereby are accepted as facts.
3. The preponderance of the evidence reveals the claimant has met her burden of proof in demonstrating she has sustained 6% wage loss disability as a result of her November 2020 compensable lower back injury.

4. When the claimant returned to work after her injury in January 2020, and when she returned to work after the UALR COVID-19 pandemic layoff, she was making exactly the same hourly wage, \$17.80 per hour, as she was at the time of her November 28, 2018, compensable lower back injury; however, she was making less total salary on a biweekly basis because she was working only 40 hours and not 40-plus hours per week, nor is she working at Simmons Arena at this time. The evidence reveals the primary reason for the decrease in the number of her available work hours, and the concomitant decrease her bi-weekly salary was and is not the result of any physical limitations or restrictions related to her compensable injury, but was and remains due to the decrease in the number of available work hours because of the COVID-19 pandemic.
5. The claimant's treating orthopedic surgeon, Dr. Baskin, assigned her a 12% BAW impairment rating, which is not insignificant. Although the claimant's FCE results were unreliable due to her demonstrated lack of effort during the examination, based on the objective medical condition of her lumbar spine as revealed by the post-surgery MRIs and July 2020 CT scan, there exists an objective basis for the claimant's continued reported complaints of pain which she testified are physically limiting.
6. While Dr. Baskin released the claimant with no work restrictions, he himself stated he believes she does in fact have some physical limitations and restrictions as a result of her November 2018 compensable injury and related surgery, although her unreliable FCE results make it difficult to quantify them. Likewise, the unreliable FCE results make it difficult to accurately determine the extent of the claimant's wage loss disability.
7. The fact the claimant's work hours have decreased since she has returned to work after her compensable injury and surgery; and the fact she is now working as a kitchen floater and not as the chief catering chef make it difficult to determine the extent of her wage loss disability attributable to the November 2018 work incident. Consequently, the preponderance of the evidence of record does not support

a wage loss disability award of more than 6% on these facts.

8. The claimant's attorney is entitled to a controverted fee on the 6% award of wage loss disability benefits.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. § 11-9-715(Repl. 2012). For prevailing 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. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

I respectfully dissent from the majority's finding that Claimant is entitled to an increased impairment rating of 6% for wage loss due to her compensable injury.

As a result of my carefully conducted *de novo* review of the claim in its entirety, I find there is nothing in the record that indicates that Claimant's ability to earn wages has been affected by her compensable injury.

Section 11-9-522(b) reads as follows:

- (1) In considering claims for permanent partial disability benefits in excess of the employee's 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.

- (2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Claimant has returned to work without restrictions and is earning the same hourly wage as before her compensable injury. Admittedly, Claimant is now earning less in weekly wages than she was before the compensable injury; however, she admits that the decreased income is because she is working only 40 hours per week and this reduction is solely and directly attributable to the COVID-19 pandemic, rather than to her compensable injury. In fact, the ALJ even found, “the preponderance of the evidence reveals the primary reason the claimant has not been working as much . . . is because of the decrease in the catering business due to the ongoing COVID-19 pandemic, and *not* because of any physical limitations or restrictions related to her November 2018 compensable injury.” (emphasis in original). Perhaps the most salient fact on this point is that in January 2020 (*i.e.*, pre-COVID), Claimant had returned to her same job and was working the same number of hours as she was before her injury until the COVID-19 pandemic set in full stride and

the catering business essentially shut down.

Claimant's functional capacity exam is unreliable because Claimant did not put forth reliable effort. Claimant's treating physician released Claimant to return to work without restrictions. Given these facts, it seems woefully unjust to require her employer to pay benefits for a decrease in Claimant's income that is solely attributable, and undisputedly so, to the COVID-19 pandemic. Accordingly, for the reasons set forth above, I must dissent from the majority finding.

CHRISTOPHER L. PALMER, Commissioner