

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G807297

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| JANA L. MANKIN, EMPLOYEE | CLAIMANT |
| FORT SMITH SCHOOL DISTRICT, EMPLOYER | RESPONDENT NO. 1 |
| ARKANSAS SCHOOL BOARDS ASSOCIATION, INSURANCE CARRIER/TPA | RESPONDENT NO. 1 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 2 |

OPINION FILED JULY 29, 2021

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

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

Respondents. No.1 represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed February 8, 2021. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 8, 2020 and contained in a Pre-hearing Order filed that same date, are hereby accepted as fact.
2. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss disability in an amount equal to a 45% anatomical impairment rating to the body as a whole.
3. The claimant has proven that her attorney is entitled to an attorney's fee in this matter in the form of a lump sum.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's February 8, 2021 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. As a result of my *de novo* review of the claim in its entirety, I find that Claimant has not proven by a preponderance of the evidence that she is permanently disabled due to her compensable injury while working on September 26, 2018 and is not entitled to an increased impairment rating of 45% for the wage loss factor.

As a threshold matter, I note that although the ALJ determined that Claimant was entitled to a 45% increase, the ALJ did not make a specific finding that Claimant’s compensable injury was the major cause of her impairment or disability or that Claimant was entitled to permanent benefits. According to the Opinion, the parties stipulated that “Claimant was assessed a 5% impairment rating to the body as a whole regarding her right shoulder.” In *St. Edward Mercy Med. Ctr. v. Gilstrap*, 2014 Ark. App. 306, at 3, the court held that an employer’s acceptance of an impairment rating satisfied the major-cause requirement and made it unnecessary for the ALJ to make a separate, specific major-cause finding. Here, Respondents have not *accepted* the impairment rating as is made clear by their contention at the hearing and in their brief that “Claimant is not permanently or totally disabled or entitled to wage loss over and above the impairment rating.” Assuming the ALJ was not required to make these specific findings or that such findings are implied by the award of 45% increase for wage loss, I must dissent for the reasons set out below.

I. BACKGROUND

It is undisputed that Claimant sustained a compensable injury while working on September 26, 2018. It is also undisputed that Claimant has a plethora of longstanding shoulder problems that were symptomatic at the time of her workplace injury. On September 20, 2018 – just a week before

her compensable injury – Claimant was treated at Mercy Clinic in Fort Smith. The physician’s assistant who treated Claimant just before her workplace incident noted the following:

HISTORY OF PRESENT ILLNESS: Jana is a 46-year-old female seen today for a hos[t] of orthopedic maladies. We have done several operations on her including three shoulder operations for shoulder instability and ankle instability. She has a previous Jefferson fracture of the cervical spine. She has had an ulnar collateral ligament tear on her right thumb. She has facet arthropathy in her lumbar spine. She has had knee arthroscopy in the past.

She is a physical therapy assistant in the Fort Smith Public Schools. She is one of two PTAs to cover the entire Fort Smith School System and their case load has increased significantly in this current school year. **She has gone from barely being able to perform her job duties with these host of orthopedic issues to struggling with even activities of daily living due to the physical nature of her job.** (Emphasis added). She comes in today very frustrated and asking for help in managing these issues. We are going to try her on a part-time work restriction and see if she improves. I have also injected her right shoulder today with 8mL of Marcaine and 2mL of Decadron hopefully to improve her chronic right shoulder pain.

Respondent spends much of its brief discussing the extent and nature of those preexisting conditions. It is tempting to want to dismiss Respondent’s argument in favor of the “employer takes the employee as it finds her” principle¹ and conclude that Claimant’s workplace injury

¹ “Because an employer takes an employee as it finds him, employment circumstances that aggravate preexisting conditions are compensable.” *Ozark Natural Food v. Pierson*, 2012 Ark. App. 133, 389 S.W.3d 105. Thus, an aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Id.*

combined with her preexisting conditions, resulting in a new and compensable injury. But compensability is not the issue here. The issue here is whether Claimant is entitled to permanent disability benefits, and if so, whether Claimant is entitled to a 45% increase for wage loss.

II. PERMANENT BENEFITS

Under Ark. Code Ann. § 11-9-102(4)(F)(ii), permanent benefits may only be awarded upon a determination that the compensable injury was the major cause of the disability or impairment; or, when a compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits are payable for the resultant condition (a new injury) only if the new injury is the major cause of the permanent disability or need for treatment. In order for Claimant to prove she is entitled to permanent benefits she must prove by a preponderance of the evidence that her workplace injury was the major cause of her permanent disability. *See, e.g., Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008); *Wright Steel & Mach., Inc. v. Heimer*, 2017 Ark. App. 643, at 6, 535 S.W.3d 311, 315-16.

Ark. Code Ann. § 11-9-102(14) defines “major cause” as more than 50% of the cause and a finding of major cause must be established by a preponderance of the evidence.

In *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008), the Commission found, and the court affirmed, that the claimant was not entitled to permanent benefits because he had failed to prove that his compensable injury was the major cause of his knee-replacement surgery and the resulting impairment rating. Specifically, the court pointed out the plethora of preexisting conditions and surgeries that Hickman had underwent and then noted, “there is no evidence that the need for Hickman’s knee-replacement surgery and the resulting impairment would not have occurred but for the work-related injury.” *Id.*

Here, the evidence shows that Claimant’s workplace injury was not the major cause of her impairment or disability. In fact, just a week before this workplace incident she had “gone from barely being able to perform her job duties with these host of orthopedic issues to struggling with even activities of daily living.” Claimant also testified that her shoulder surgery was successful at alleviating her shoulder pain. Thus, the evidence indicates that her workplace injury was not the major cause of her disability or impairment. Accordingly, I would find that Claimant failed to prove she is entitled to permanent benefits.

III. WAGE LOSS

The wage-loss factor is the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. In considering wage-loss

disability, the Arkansas Workers' Compensation Commission evaluates such factors as: the claimant's age, education, work experience, motivation, post-injury income, and credibility. *St. Edward Mercy Med. Ctr. v. Gilstrap*, 2014 Ark. App. 306, at 1.

Section 11-9-522(b)(1) 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.

A claimant is not required to show that the new injury is the major cause of a wage-loss disability; instead, a claimant need show only that the new injury is the major cause of the impairment rating. *See St. Edward Mercy Med. Ctr. v. Gilstrap*, 2014 Ark. App. 306, at 3 (citing *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002)).

At the time of Claimant's injury, her income was already reduced because, due to a "host of orthopedic issues," she was only able to work part time. Given that the evidence indicates that she was not working fulltime, her fulltime pay should not be the baseline for calculating her pre-injury earning capacity.

IV. CONCLUSION

Because Claimant's preexisting conditions – and not the workplace

incident on September 26, 2018 – were the major cause of her disability, I would find that Claimant failed to prove that she is entitled to permanent benefits. Because Claimant was not working fulltime at the time of her workplace incident, I would find that she failed to prove she is entitled to a 45% increase for wage loss. Therefore, I must dissent.

CHRISTOPHER L. PALMER, Commissioner