

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G409071

RUBY MOODY,
EMPLOYEE

CLAIMANT

ARKANSAS DEPARTMENT OF COMMUNITY
CORRECTIONS, EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
CARRIER

RESPONDENT

OPINION FILED JANUARY 10, 2024

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

Claimant represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE CHARLES H. MCLEMORE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The respondents appeal and the Claimant cross-appeals an opinion and order of the Administrative Law Judge filed June 23, 2023. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.

3. The Claimant proved by a preponderance of the evidence that she sustained wage-loss disability benefits in the amount of 24% over and above her combined value rating of a 19% impairment for her neck and back injuries of July 19, 2022.
4. The Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.
5. All issues not litigated are reserved under the Arkansas Workers' Compensation Act.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's June 23, 2023 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 Mayton dissents

DISSENTING OPINION

I respectfully dissent from the majority finding that the claimant has proven by a preponderance of the credible evidence that she sustained wage loss disability benefits in the amount of 24% over and above her combined value rating of a 19% impairment for her neck and back injuries of July 19, 2022.

The parties stipulated the claimant suffered cervical and lumbar injuries while employed by the respondent employer on October 30, 2014. (Resp. Ex. 2, P. 4) Her claim was accepted as compensable, and she

underwent a cervical fusion at C6-7 and a partial corpectomy at C5 performed by Dr. Reza Shahim on October 26, 2021. (Resp. Ex. 1, Pp. 15-16). On April 11, 2022, Dr. Barry Baskin found the claimant to be at maximum medical improvement (MMI) and assigned a ten percent (10%) anatomical impairment rating to the body as a whole as the result of her cervical injury. (Resp. Ex. 1, Pp. 27-28).

The claimant underwent a right L5-S1 lumbar microdiscectomy by Dr. Shahim on September 6, 2022. She was released at MMI by Dr. Baskin as the result of her lumbar surgery on December 19, 2022. Dr. Baskin assessed a 10% rating to her lumbar spine and when combined with the 10% rating to her cervical spine entitled her to a total impairment of 19% to the body as a whole. (Resp. Ex. 1, Pp. 37-38, 47-49). The claimant performed reliably on her Functional Capacity Evaluation (FCE) on January 10, 2023. (Resp. Ex. 1, Pp. 50-69). She demonstrated the ability to perform work in the light classification at that time. *Id.* The respondents provided vocational rehabilitation for the claimant beginning in July 2022, but the claimant elected to discontinue vocational rehabilitation services and job placement assistance since she did not believe she was capable of going back to work. (Resp. Ex. 2, Pp. 9-16, 22-25).

After a March 29, 2023 hearing, an Administrative Law Judge (ALJ) awarded the claimant 24% wage-loss over and above her 19% impairment rating.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). 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 she sustained permanent physical impairment as a result of a compensable injury. *Id.* The Commission must determine disability after consideration of medical evidence and other factors affecting wage loss, such as the claimant's age, education, and work experience. *Tempworks Mgmt. Servs. v. Jaynes*, 2020 Ark. App. 70, 593 S.W.3d 519 (2020). Motivation, postinjury income, credibility, demeanor, and a multitude of other factors are matters to be considered in claims for these wage-loss disability benefits in excess of permanent physical impairment. *Id.* In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In determining wage-loss, the Commission may take into

consideration the worker's age, education, work experience, medical evidence and other matters reasonably expected to affect the worker's future earning power. A worker may be entitled to additional wage-loss disability even though his wages remain the same or increase after the injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

- a. The claimant elected to discontinue vocational rehabilitation and job placement assistance and is, therefore, barred from receiving wage-loss benefits.

The key question in this matter is what, if any, impact the claimant's refusal to enter into vocational rehabilitation has on her claim for wage-loss benefits. Our rules are clear that:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

Ark. Code Ann. § 11-9-505(b)(3).

An employer relying on this defense must show that the claimant refused to participate in a program of vocational rehabilitation or job-placement assistance or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors and that such refusal to cooperate was without any reasonable cause. *Tillery v. Alma Sch. Dist.*, 2022 Ark. App. 425.

At her initial vocational rehabilitation assessment with Keondra Hampton, MS, CRC on July 19, 2022, the claimant expressed doubts about returning to work. She informed Ms. Hampton “she was unsure if she was ready to return to work . . . She stated she is hesitant to perform job duties that require physical demand of light or greater.” (Resp. Ex. 2, P. 15). “Miss Moody declined the idea of retraining for another career and stated she is close to retirement and does not wish to retrain and deepen her financial debt.” (Resp. Ex. 2, Pp. 15-16).

Later, at a January 18, 2023 meeting with Ms. Hampton, the claimant confirmed that she had no interest in returning to the workforce. She stated she believes she is not capable of returning to work due to the constant pain and discomfort. She said, “I do not want to waste your time but if you have to search for work on my behalf, I will be compliant.” Ms. Moody reported she is not interested in obtaining employment at a reduced wage of \$22.50/hour . She also reported she does not believe she will be capable of going back to work and elects to discontinue vocational rehabilitation services at this time. (Resp. Ex. 2, P. 23).

On March 7, 2023, Ms. Hampton recommended closing the claimant’s vocational rehabilitation file, stating that “[a]lthough she is capable of working within the Light category of physical work demands,

according to her FCE, Ms. Moody has elected to discontinue vocational rehabilitation services at this time.” *Id.*

While it appears that the claimant believes it is sufficient by informing Ms. Hampton that she would cooperate with vocational rehabilitation, “if forced to do so”, it is obvious that the claimant rejected any efforts made by Ms. Hampton without reasonable cause. While the claimant contends that the pain resulting from her compensable injury rendered her unable to work in any capacity, she informed Keondra Hampton on three separate occasions that she was not ready or was not willing to take on new training, despite being released on light duty restrictions after her 2022 Functional Capacity Evaluation. For these reasons, it is clear that the claimant refused vocational rehabilitation and job placement assistance and is, therefore, not entitled to wage-loss disability benefits pursuant to Ark. Code Ann. § 11-9-505(b)(3).

- b. The claimant’s education and experience show that the claimant is capable of returning to work, but refuses to do so.

As stated above, in considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission may

also consider other permanent disability factors such as the claimant's age, education, work experience, medical evidence and other matters reasonably expected to affect the worker's future earning power. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). These factors are considered in *Beal v. Fairfield Bay Cmty. Club, Inc.*, 2011 Ark. App. 136 (2011) where the Court of Appeals stated:

Beal further testified that he had worked all of his life but that he has not returned to work because "they are not going to let him back out there, as no doctor is going to pass him on a physical and drug test and stuff." Beal is blind in his left eye, but admitted to having glaucoma before his injury. According to Beal he does not feel that there are any jobs he can perform and is now retired. The Commission disagreed and concluded that "the evidence shows that [Beal] is clearly not motivated to return to any form of gainful employment" and noted that Beal's lack of motivation is a valid consideration in its denial of Beal's wage-loss disability claim. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

In a 2010 case considering wage-loss, the Court of Appeals affirmed the Commission's decision to deny wage-loss to a claimant who was 25 years old and had not looked for any work outside of her previous job as a cake decorator or work within her restrictions. *Morrison v. Confectionately Yours, Inc.*, 2010 Ark. App. 687 (2010). This claimant received a seven percent (7%) disability rating, but the Court noted that this claimant had not attempted to look for work within her restrictions and had low motivation to return to any work other than her previous job. *Id.* The Commission found

that the claimant developed skills as a cake decorator that would serve her well in other lines of work. *Id.*

Here, it has been established through the claimant's statements to Keondra Hampton that she simply lacked the motivation to return to work. This enough is sufficient to preclude her from receiving wage-loss benefits; however, the claimant has two college degrees, obtained with honors, and years of experience working in an office environment. (Hrng. Tr., Pp. 21-22, 24-25, 55-57; Resp. Ex. 2, P. 1). The claimant testified that these office duties included using a computer eight hours per day, maintaining records, preparing documents, and presenting documents to the court system. (Hrng. Tr., Pp. 24-25, 56-59). While the claimant testified that she has difficulties using a computer due to her neck and pre-existing carpal tunnel syndrome, she never sought a prescription for a standing desk. (Hrng. Tr., Pp. 62-63).

The facts in this case do not support a finding of wage-loss disability. As has been seen in prior cases before the Commission and our Courts, a well-educated claimant such as the claimant who has two college degrees with an established history of skills that can be easily transferred to another field is not entitled to wage-loss disability. This is especially true when, in this case, the claimant who is capable of working within the light category of physical work demand pursuant to her FCE elected to discontinue vocational

rehabilitation services and job placement assistance just because she did not feel she was capable of returning to work and was not interested in obtaining employment at a reduced rate of \$22.50/ hour and would not be interested in a job that paid less than she was earning before her injury.

Since the claimant refused to participate in or cooperate with job placement assistance and elected to discontinue vocational rehabilitation services, her claim for wage-loss disability is barred by Ark. Code Ann. § 11-9-515(b)(3).

Accordingly, for the reasons set forth above, I must dissent from the majority's opinion.

MICHAEL R. MAYTON, Commissioner