

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H109437**

LISA POZNER, EMPLOYEE

CLAIMANT

**UNIVERSITY OF ARKANSAS FOR
MEDICAL SCIENCE, EMPLOYER**

RESPONDENT

**STATE OF ARKANSAS,
CARRIER**

RESPONDENT

**PUBLIC EMPLOYEE CLAIMS DIVISION,
THIRD PARTY ADMINISTRATOR**

RESPONDENT

OPINION FILED SEPTEMBER 6, 2023

Hearing before Administrative Law Judge Steven Porch on August 22, 2023, in Little Rock, Arkansas.

Claimant is represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas.

Respondents are represented by Mr. Charles H. McLemore, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on this claim on August 22, 2023. Claimant was represented by Mr. Mark Alan Peoples, Attorney at Law of Little Rock, Arkansas; Respondents were represented by Mr. Charles H. McLemore, Attorney at Law of Little Rock, Arkansas.

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer/employee relationship existed on September 9, 2021, when Claimant sustained a compensable acute L1 spinal fracture injury.

3. Respondents accepted this claim as compensable and paid medical benefits and permanent partial disability (PPD) based on 7% whole body impairment.
4. The parties will stipulate to Claimant's average weekly wage and compensation rates on or before the hearing date.

ISSUES

The parties have identified the following issues to be adjudicated:

1. Whether the Claimant is entitled to permanent total disability benefits (PTD).
2. Alternatively, whether Claimant is entitled to additional permanent partial disability (PPD) based on wage loss in an amount to be determined.
3. Attorney's fees with respect to controverted indemnity benefits.

All other issues are reserved.

CONTENTIONS

Claimant's and Respondents' contentions are set out in their responses to the Prehearing Questionnaire. Said contentions are hereby incorporated by reference.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, Claimant and Respondents' post hearing briefs that are blue-backed and made a part of this record and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant, the sole witness, and observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. The Claimant is not entitled to permanent total disability benefits but is entitled to wage-loss disability in the amount of 35% in addition to Claimant's 7% permanent anatomical impairment.
4. Claimant is entitled to controverted attorney fees.

CASE IN CHIEF

Summary of Evidence

The Claimant was the sole witness during the hearing. In addition to admitting the Commission's file by reference, I also admitted into evidence Claimant's and Respondent's exhibits that were properly admitted before the Commission. Claimant suffered a compensable back injury, during the course and scope of her employment with the University of Arkansas for Medical Sciences ("UAMS"), as a Nurse Practitioner, when she hyper-extended her back when she jerked backwards after accidentally pricking herself with a used needle from an HIV infected patient. Claimant sustained an acute compression fracture to her L-1 spine. The Claimant underwent Kyphoplasty, a medical procedure, that was performed by Dr. Jarna Shah, on November 2, 2021, that resulted in two additional fractures to her spine located at T-12 and L-2. Dr. Michael Cassatt, the workers' compensation medical provider, ordered that procedure. Claimant did not have Osteoporosis when these fractures occurred.

The Claimant was prescribed a back brace, Tramadol and Flexeril. Claimant stated during the hearing that her back pain has been so debilitating that it has prevented her from gaining meaningful employment. Claimant's back pain even resulted in the ultimate loss of her job with UAMS where she was placed on restricted duty. Since then, Claimant has been seeking other meaningful employment but due to her high level of pain whenever she sits or stands for any appreciable time the search has been difficult.

Claimant was offered one job opportunity that she declined due to the amount of sitting the job required.

Adjudication

A. Whether Claimant is entitled to permanent total disability benefits (PTD).

As the parties stipulated and the record reflects, the work incident of September 9, 2021, resulted in a compensable injury to Claimant's back. This injury is an unscheduled one. *Cf.* Ark. Code Ann. § 11-9-521 (Repl. 2012). The term "permanent total disability" is defined in the statute as "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) (Repl. 2012).

Claimant's entitlement to wage loss disability benefits is controlled by § 11-9-522(b)(1) (Repl. 2012), which states:

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.

See Curry v. Franklin Elec., 32 Ark. App. 168, 798 S.W.2d 130 (1990). Such "other matters" include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.*; *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). As the Arkansas Court of Appeals noted in *Hixon v. Baptist Health*, 2010 Ark. App. 413, 375 S.W.3d 690, "there is no exact formula for determining wage loss" Pursuant to § 11-9-522(b)(1), when a claimant has been assigned an impairment rating to the body as a whole, the Commission possesses the authority to increase the rating, and it can find a claimant

totally and permanently disabled based upon wage-loss factors. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

To be entitled to any wage-loss disability in excess of an impairment rating, the claimant must prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). The standard “preponderance of the evidence” means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415 (citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)). The wage loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering factors that may impact a claimant’s future earning capacity, the Commission considers her motivation to return to work, because a lack of interest or a negative attitude impedes the assessment of her loss of earning capacity. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2012) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any 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 shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is more than fifty percent (50%) of the cause and has to be established by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(14) (Repl. 2012).

“Disability” is the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” *Id.* § 11-9-102(8).

The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Claimant has suffered a compensable injury, by specific incident, to her back on September 9, 2021, when she hyper extended her back as a result from being accidentally pricked by a needle from an HIV infected patient. The injury occurred during the course and scope of her employment with Respondents. The essential issue in this matter is whether the Claimant is entitled to only the 7% impairment rating or benefits beyond the impairment rating.

The Claimant is 64 years old with a bachelor’s degree in english, psychology, social work, and nursing. The Claimant also has a master’s in counseling psychology and nursing. The Claimant is a licensed nurse practitioner. Claimant has worked as a distress counselor, registered nurse and nurse practitioner. Claimant is having difficulty sitting or standing for any reasonable period which was evident with her constant standing and sitting during her testimony. I don’t believe this was staged behavior. Claimant has professed a strong desire to continue working. The Claimant has manifested this desire by maintaining her nurse practitioner’s license from her home - online computer

recertification courses - while lying in bed due to severe back pain. Claimant has applied for multiple jobs and was offered full-time work but declined due to the long-term sitting requirement. Though her application for jobs appears to be an act of futility, given her struggles with intense pain from sitting or standing too long, she testifies that she applies for these jobs in the event she feels better and can accept a suitable position. She admits there currently are no jobs that she can take due to her intense pain from her compensable work injury. I do agree that intense back pain can create great difficulties for finding suitable employment. Thus, I find the Claimant's testimony credible. I further find the Claimant can obtain suitable part-time work with her credentials.

Nevertheless, no credible evidence has been presented to me justifying an increase in the 7% anatomical impairment rating. Thus, I find by the preponderance of the evidence that Claimant did not prove she was permanently and totally disabled. However, I do find by the preponderance of the evidence that Claimant proved she sustained wage-loss disability in the amount of 35% in addition to the Claimant's 7% anatomical impairment. I further find by the preponderance of the evidence that Claimant's September 9, 2021, compensable work injury was the major cause of her 7% anatomical impairment and 35% wage-loss disability.

ATTORNEY FEES

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). Under Ark. Code Ann. § 11-9-715 (Repl. 2012):

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee . . . In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall

direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (1/2) by the employer or carrier in addition to compensation awarded; and one-half (1/2) by the injured employee or dependents of a deceased employee out of compensation payable to them.

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that her counsel, the Hon. Andy Caldwell, is entitled to the fee as set out above for all indemnity benefits that should have been paid consistent with this opinion and in compliance with the Arkansas Workers' Compensation Act.

CONCLUSION

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

Hon. Steven Porch
Administrative Law Judge