

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H109437

LISA POZNER,
EMPLOYEE

CLAIMANT

UAMS,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED APRIL 4, 2024

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

Claimant represented by the HONORABLE MARK A. PEOPLES, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CHARLES H. McLEMORE, JR., 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 administrative law judge's opinion filed September 6, 2023. The administrative law judge entered the following findings of fact and conclusions of law:

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.

After reviewing the entire record *de novo*, it is our opinion that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed. Based on a preponderance of the evidence of record, we find that the administrative law judge's findings of fact are correct and should be adopted by the Full Commission.

Therefore, we affirm and adopt the September 6, 2023 decision of the administrative law judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal and cross-appeal. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part 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's opinion finding that the claimant has proven by a preponderance of the credible evidence that she is entitled to wage loss disability in the amount of 35% in addition to her 7% anatomical impairment rating.

The claimant suffered a compensable back injury when she hyper-extended her back away from an HIV positive patient after receiving an accidental needle stick. (Hrng. Tr., P. 12). Dr. Jarna Shah performed a kyphoplasty procedure on the claimant on November 2, 2021. (Cl. Ex. 1, Pp. 9, 11).

The claimant obtained a Change of Physician order through the Commission and began treating with Dr. Ali Raja, who prescribed a back brace. (Hrng. Tr, P. 64). Dr. Raja cannot state within a reasonable degree of medical certainty that the subsequent fractures found are a result of the claimant's initial injury. (Resp. Ex. 1, Pp. 88-89). The claimant currently has no additional surgeries planned. (Hrng. Tr, P. 63).

On December 19, 2022, the claimant underwent a functional capacity evaluation (FCE) and was assigned a seven percent (7%) whole-body impairment rating and received a sedentary work restriction. (See

Resp. Ex. 1, Pp. 94-113). Respondents have accepted and are paying the impairment rating.

The claimant has undergone and refused vocational rehabilitation, requested that her vocational rehabilitation file be closed and, to date, has not returned to work. (Resp. Ex. 2, Pp. 35-46).

A hearing was held on August 22, 2022, and the claimant contended that she is entitled to permanent total disability or, alternatively, wage-loss disability in excess of her impairment rating. An administrative law judge (ALJ) ruled that the claimant is not permanently and totally disabled, but that she is entitled to thirty five percent (35%) wage-loss disability in excess of her impairment rating.

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission may increase the disability rating and find a claimant permanently disabled based on the wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Enterprise Products Company v. Leach*, 2009 Ark. App. 148, 316 S.W.3d 253 (2009). When determining wage-loss disability, the 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. Ark. Code Ann. § 11-9-522(b)(1); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Other factors may include—but are not limited to—motivation to return to work, post-injury earnings, credibility, and demeanor. *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

Our courts also consider the claimant's motivation to return to work since a lack of interest or negative attitude in pursuing employment impedes the assessment of the claimant's loss of earning capacity. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643 (2009).

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 (2022).

Here, the claimant was provided vocational rehabilitation counseling on February 22, 2023. After her initial evaluation, Keondra Hampton, the claimant's vocational rehabilitation consultant, issued an opinion on March 2, 2023, concluding that "[b]ased on her past work history, education, skills, and functional abilities, it is my opinion [claimant] will be able to return to the workforce in the future to a position that is consistent with her physical abilities and her skill set." (Resp. Ex. 2, P. 35). Ms. Hampton opined that the claimant "is capable of working within the Sedentary category of physical work demands," and recommended services for drafting a resume, providing interview skills training, seeking training for computer skills,

assisting with online job applications, and completing job market research. (Resp. Ex. 2, P. 43).

Ms. Hampton provided the claimant with nine remote-work positions by April 6, 2023, but alleging that she was “unable to complete the job applications on the computer due to her pain” and that she was “unable to work at a computer for an eight-hour workday,” the claimant voluntarily discontinued vocational rehabilitation at that time. (Resp. Ex. 2, Pp. 44-45).

The claimant provided various excuses for discontinuing vocational rehabilitation; however, none provided reasonable cause as required by our rules. First, the claimant contends that she informed Ms. Hampton that she was applying for jobs on her own, informing her:

“I don’t think I can work,” because I had already had a lot of rejection.

A lot of these jobs they said I was overqualified for. They wanted one year of nursing, two years of nursing, but I applied for them anyways. I told her, “At this time, I cannot work.” (Hrng. Tr., Pp. 68-69).

The claimant also asserts at many points that she simply cannot work. (See Hrng. Tr., P. 69). This, of course, is contrary to the medical evidence, the claimant’s FCE, and Ms. Hampton’s findings. There is no evidence, beyond the claimant’s own self-limiting behaviors, that she is unable to reliably work from her own home full-time.

The claimant has been assigned a sedentary work restriction, and Ms. Hampton believes that the claimant can return to work, providing her numerous opportunities to do so. It is clear that the claimant does not wish to work despite having the documented physical ability to do so. She has rejected any offer of assistance working on a phone or computer despite admittedly being able to work at home on her laptop. (See Hrng. Tr, p. 52). There are no plans for any surgery that would improve or change her condition and the claimant acknowledges that she is at maximum improvement. (Hrng. Tr., Pp. 75-76). These behaviors are a clear indication that the claimant has refused vocational rehabilitation without good cause and is not entitled to wage-loss disability.

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 Cnty. 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.*

In the present case, the claimant has a bachelor's degree in English Literature and Psychology; a Bachelor of Arts in Social Work; a Master of Arts in Counseling Psychology; a Bachelor of Science in Nursing; and a Master of Science in Nursing. (Hrng. Tr., Pp. 34-38; Resp. Ex. 2, P. 39). Throughout her career, the claimant has been certified as a registered nurse, an advanced practice registered nurse, and an adult-gerontology primary care nurse practitioner. *Id.* The claimant has been educated in Canada, Israel, and the United States and speaks some Hebrew, French, and Yiddish. (Hrng. Tr., Pp. 36-40; Resp. Ex. 2, P. 39). Her work history includes work as a counselor, at one point owning her own practice; working in a call-in crisis center; working as a nurse supervisor; and acting as a nursing contact tracer over the phone during COVID. (Hrng. Tr., Pp. 61, 67; Resp. Ex. 2, P. 40). She has earned a significant income throughout her career. (Resp. Ex. 2, P. 70).

Although the claimant contends that she is unable to find work, in part due to her medications, she has shown that she is capable of functioning without them. (Hrng. Tr., P. 45, 80-84). At the hearing, she testified that she had not taken her medications that day, nor had she taken them the day that she underwent her FCE and performed reliably. (Hrng.

Tr., Pp. 56, 64-65; Resp. Ex. 1, P. 95). It is clear that these medications are another self-limiting excuse by the claimant.

As discussed above, the claimant is limited to sedentary work; however, work opportunities fitting within her qualifications and restrictions has been offered to her and rejected. The claimant has the education and skills necessary to continue her career in a range of professions, either over the telephone or by computer, as she has done in the past, she simply chooses not to do so. Under our rules, the standard requires that a claimant show at least some motivation to return to the workforce in any capacity to be entitled to wage loss disability and the claimant here has refused to do so in any capacity.

The claimant's refusal to participate in vocational rehabilitation and job placement assistance renders her ineligible for wage-loss benefits and, as a result, she is limited to seven percent (7%) anatomical impairment rating.

Accordingly, for the reasons set forth above, I must dissent.

MICHAEL R. MAYTON, Commissioner