

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G504512

JAMEE YANCHUNAS-COOPER, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, EMPLOYER	RESPONDENT NO. 1
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED MARCH 18, 2021

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on November 9, 2020. The Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that she is permanently and totally disabled, and that the claimant failed to prove by a preponderance of the evidence that she is entitled to any wage loss

disability. After our *de novo* review of the entire record, the Full Commission finds that the claimant has proven by a preponderance of the evidence that she is entitled to a ten percent (10%) wage-loss benefit in excess of her 10% impairment rating.

#### I. HISTORY

The claimant, now 60 years old, suffered a compensable injury to her low back on May 14, 2015. The claimant offered the following testimony as to how the accident occurred:

Q So you were physically remodeling some of these Walmart stores?

A Yes.

Q Tell us what happened to you and how you got injured there.

A I was adjusting some shelves, and I felt something, and I want to say I heard it, but I don't know if it's actually that you hear it but – it's hard to explain but anyway I thought I had pulled a muscle, and it turned out that's what it was. It kept getting worse and worse, and so I, you know, I took care of getting everything filled out and talked to the personnel lady and asked her where to go which – because I was in an area that I wasn't familiar with, and she sent me up to the clinic that they use for their – when they're taking on new hires for urine tests and that type of thing, so she sent me there. That was in West Memphis.

The claimant was initially treated on May 18, 2015 at the Coast To Coast Medical Occupational Health Clinic. The claimant presented with complaints of lower back pain on the right side, radiating down her leg. The claimant was diagnosed as having “lumbago/sciatica” and prescribed Naproxen, Ultracet, and Tizanidine.

The claimant underwent a lumbar spine MRI on June 15, 2015 that revealed the following:

Findings: Lumbarization of the S1 segment is noted. Purposes of this dictation; the last fully formed disc space will be referred to as S1-2. The normal lordotic curvature of the lumbar spine is maintained. Vertebral body heights are intact. No evidence for compression abnormality. The aorta is non-aneurysmal. No signal abnormality noted in the paraspinous musculature. Marked fatty infiltration of the paraspinous musculature is noted consistent with deconditioning. The conus terminates normally at L1-2.

L2-3: Mild bilateral facet hypertrophy. No canal stenosis or neural foraminal narrowing.

L3-4: Disc desiccation. Mild bilateral facet hypertrophy. No canal stenosis or neural foraminal narrowing.

L4-5: Mild broad-based posterior annular disc bulge. Mild bilateral facet hypertrophy. No canal stenosis or neural foraminal narrowing.

L5-S1: An 8 x 14 mm well-circumscribed area of increased T1 and T2 signal in the posterior superior aspect of the L5 vertebral body without expansile cortical margins, consistent with a hemangioma. Mild disc desiccation. Moderate

broad-based posterior annular disc bulge which flattens the ventral aspect of the thecal sac and contacts both L5 nerve roots as they exit the thecal sac. Moderate bilateral facet hypertrophy. No canal stenosis.

Epidural left proptosis is noted throughout the lumbar spine.

Impression:

Segmentation anomaly. Lumbarization of S1. For this dictation, last fully formed disc space will be referred to as S1-2. 6 non-rib-bearing lumbar vertebral bodies are present.

Mild degenerative changes as described above with findings most prominent at L5-S1.

The claimant presented to the VA Hospital for a neurosurgery consult on June 19, 2015. In his notes from that visit, Dr. Archimedes Ramirez noted the following:

**ASSESSMENT AND DIAGNOSIS:** The patient has an acute right L4-5 herniated disk that is causing her severe radicular symptoms. She has had a trial of nonoperative treatment and she is being admitted for pain control. Her pain control is not controlled. With this admission, she will need to have surgery as soon as it can be scheduled. The patient is being admitted for pain control. If she fails, she will need to consider surgery as an option.

On June 24, 2015, the claimant underwent a right L5-S1 interlaminar laminotomy/foraminotomy and a discectomy.

On January 14, 2016, Dr. Allan Gocio noted that the claimant could return to work with the following restrictions:

No lifting more than 10 lbs, no sitting, walking, standing more that [sic] 2 hrs continuous, patient will need frequent changes in position as needed due to back pain, no climbing ladders scaffolds or catwalks, no work at heights above floor level or reaching above chest level, limit stooping bending twisting, no crawling, no driving equipment [sic] over rough or dangerous, may operate light vehicle over improved surfaces, may return to this duty 1/18/2016.

The claimant completed a Functional Capacity Evaluation (hereinafter, FCE) on February 14, 2018. The evaluator deemed the FCE results to be “unreliable” and placed the claimant in at least the SEDENTARY work classification.

Dr. Michael Morse released the claimant to return to full duty work without restrictions based on his examination and an unreliable FCE.

Dr. Morse also noted:

She has a 10% impairment as a whole person based upon the AMA [G]uidelines to [E]valuation of [P]ermanent [I]mpairment, [F]ourth [E]dition, page 13, table 75, II, subsection E. She has a surgically treated disc lesion with a residual, medically documented pain and rigidity.

A pre-hearing order was filed on March 18, 2020. The claimant contends that “On March 14, 2015, claimant sustained a compensable injury to her back. The issue of compensability was litigated and determined that she did in fact have a compensable lumbar injury. Medical, TTD and attorney fees were paid to the best of claimant attorney’s

knowledge. Claimant was sent for an IME with Dr. Morse, who opined that the claimant had a 10% impairment rating, but no restrictions. Claimant has been unable to return to any work. Claimant contends that she is permanently and totally disabled or in the alternative, that she has wage loss and that her attorney is entitled to an attorney fee. All other issues are reserved.”

Respondents No. 1 contend that “The respondents contend the claimant is not entitled to permanent and total disability benefits or any wage loss benefits over and above the 10% permanent anatomical rating.”

Respondent No. 2 contends, “If the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant’s entitlement to benefits.”

“The Death and Permanent Disability Trust Fund will state its remaining contentions upon completion of discovery.”

The parties agreed to litigate the following issues:

1. Whether claimant is permanently and totally disabled, or in the alternative, entitled to wage loss disability.
2. Whether the claimant’s attorney is entitled to an attorney’s fee.

After a hearing, an Administrative Law Judge filed an opinion on February 9, 2020. The Administrative Law Judge found that, *inter alia*, (1) the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled; (2) the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability; and (3) the claimant has failed to prove by a preponderance of the evidence that her attorney is entitled to an attorney's fee in this matter. The claimant appeals these findings to the Full Commission.

## II. ADJUDICATION

### A. Permanent and Total Disability Benefits

Pursuant to Ark. Code Ann. §11-9-519(e)(1) (Repl. 2012), "permanent total disability' means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." The burden of proof is on the employee to prove inability to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e)(2). Permanent total disability shall be determined in accordance with the facts. Ark. Code Ann. §11-9-519(c).

The claimant has failed to establish by a preponderance of the evidence that she is entitled to permanent total disability benefits. The claimant, now 60 years old, suffered a compensable low back injury on May 4, 2015. On February 21, 2018, Dr. Michael Morse released the claimant to return to work without restrictions. Additionally, a Functional Capacity

Evaluation conducted on February 14, 2018 indicates that the claimant is able to perform at least sedentary work. Thus, the evidence preponderates that the claimant is able to earn meaningful wages. Therefore, the Full Commission finds that the claimant is not entitled to permanent total disability benefits.

#### B. Wage Loss

Ark. Code Ann. §11-9-522 provides in pertinent part:

(b)(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.

When a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage loss factors. *Milton v. K-Tops Plastic Mfg. Co.*, 2012 Ark. App. 175, 392 S.W.3d 364 (Ark. App. 2012). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the



claimant's age, education, and work experience. *Id.* In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Id.*

The record supports a finding that the claimant is entitled to wage-loss benefits. The claimant was given a 10% permanent impairment rating to the body as a whole by Dr. Morse for her lumbar spine injury. At the time of the hearing, the claimant was fifty-nine years old. The claimant's education consists of a GED and an associate's degree in history and literature. The claimant also served in the military and received an honorable discharge after completing basic training because of an issue with her foot. The claimant's work experience prior to working for the respondent consisted of being a food server, substitute teacher, factory work, furniture sales, and being an advertising manager for Kirby Vacuum Cleaners. The claimant worked for the respondent-employer for approximately ten (10) years in various positions. These positions included being an associate in the photo lab, a manager in the frozen foods department, a photo lab manager, and a field project supervisor.

Since the workplace accident, the claimant has not been able to earn meaningful wages in the same or other employment. The claimant testified that she suffers from both bowel and bladder incontinence and

uses a walker or a cane for stability. Additionally, the claimant provided credible testimony that she continues to suffer from severe pain. The claimant also testified that because of her back pain she is unable to drive for long periods of time, has difficulty cooking, can no longer engage in hobbies such as gardening, and is unable to adequately care for her ailing husband. The claimant's complaints of pain are corroborated by her use of a TENS unit and by the fact that she has been approved to receive medical marijuana.

For the foregoing reasons, we find that the claimant's future earning capacity has been affected by her compensable injury and that she is entitled to a ten percent (10%) wage-loss benefit.

### III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by the preponderance of the evidence that she is entitled to a ten percent (10%) wage-loss benefit. The claimant failed to prove by a preponderance of the evidence that she is entitled to permanent and total disability benefits. 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 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.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

I respectfully dissent from the majority's finding that Claimant is entitled to 10% wage-loss benefits.

First, the majority cites Claimant's incontinence as a reason she has not been able to earn meaningful wages in the same or other employment. The medical records are void of any evidence that supports a finding that (1) Claimant suffers from bowel and bladder incontinence or (2) that such is the result of the compensable injury.

Second, there is nothing in the record that suggests that Claimant is unable to earn meaningful wages because of her injuries. Claimant's functional-capacity examination shows that she can perform sedentary work; however, Claimant admittedly has not applied for any position since she reapplied for her position at Walmart in January 2016. Accordingly, any

inability to earn meaningful wages has been the result of Claimant's failure to even look for "other employment."

For these reasons, I respectfully dissent.

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CHRISTOPHER L. PALMER, Commissioner