

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H101867

THURN K. APPLE, EMPLOYEE CLAIMANT

WHITE RIVER AGENCY ON AGING, INC.,
EMPLOYER RESPONDENT

AGING SERVICES FUND/
RISK MANAGEMENT RESOURCES, CARRIER/TPA RESPONDENT

OPINION FILED SEPTEMBER 20, 2023

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

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

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal an opinion and order of the Administrative Law Judge filed May 2, 2023. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. An employer / employee relationship existed on or about February 8, 2021, and at all relevant times, when the claimant sustained a compensable injury in the form of a fractured sacrum.

3. The claimant earned an average weekly wage of \$398.40 with a temporary total disability / permanent partial disability rates of \$216.00 / \$200.00, respectively.
4. That the claimant has been assigned a five percent (5%) rating to the body as a whole, which has been accepted by the respondents.
5. That the claimant has failed to satisfy the required burden of proof that she is entitled to permanent and total disability but, in the alternative, has satisfied the required burden of proof, by a preponderance of the evidence, that she is entitled to an Award of wage-loss in the amount of five percent (5%).
6. The claimant is entitled to attorney's fees pursuant to Ark. Code Ann. §11-9-715. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.
7. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's May 2, 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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's determination that the claimant is entitled to a five percent (5%) award for wage loss.

Disability is defined under Arkansas law as the "incapacity because of compensable injury to earn, in the same or other employment, the wages which the employee was receiving at the time of the injury." Ark. Code Ann. § 11-9-102(5). The wage-loss factor is the extent to which a compensable injury affects a person's ability to earn a livelihood. *Rice v. Ga.-Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). Wage-loss disability is to be determined from a consideration of the medical evidence, together with

the other elements such as the injured worker's age, education, experience, and other matters affecting wage loss, including the claimant's motivation to return to work. *Id.* If a work-related injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong the disability or 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. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). Major cause means more than fifty percent (50%) of the cause. Ark. Code Ann. § 11-9-102(14)(A).

In the present case, the claimant is a sixty-eight (68) year-old woman with an eleventh-grade education prior to obtaining her GED. (Hrng. Tr., P. 6). The claimant had over twenty years of experience working on the assembly line at a shirt factory in Mountain View prior to purchasing and operating a grocery store with her husband for ten years before ultimately selling and returning to the assembly line. (Hrng. Tr., Pp. 7-8). At one point, the claimant was working four jobs simultaneously, ultimately quitting one to have time for sleep. (Hrng. Tr. P. 11). After an on-the-job fall with one employer in 2005, the claimant had surgery on her back. (Hrng. Tr., Pp. 11-12, 15). Bolts and screws from this surgery remain in place and the claim was ultimately settled for \$30,000.00. (Hrng. Tr., Pp. 38-39). The

claimant began working for the respondent employer in 2013 until she suffered an admittedly compensable fractured sacrum on February 8, 2021. (Hrng. Tr, Pp. 13-14).

The claimant has multiple pre-existing conditions contributing to her allegations that she is unable to work. Prior to her work-related injury, the claimant treated for multiple conditions, including left hip pain, type 2 diabetes with diabetic polyneuropathy, chronic kidney disease, piriformis syndrome of the left side, chronic pain syndrome, hip osteoarthritis, hand osteoarthritis, fibromyalgia, cervical degenerative disc disease, right shoulder arthropathy, hypertension, right shoulder rotator cuff tear or rupture, pain in left shoulder, arthritis of the knee, and bilateral sacroiliitis among many other medical issues and complaints. (Resp. Ex. 1, Pp. 23-28). On July 20, 2020, the claimant was treated for left knee and hip pain by her family physician, Dr. Eric Spann. (Resp. Ex 1, P. 32). Later, on July 22, 2020, a note from Fletcher Chiropractic reflects that the claimant treated for left-side low back pain with no accident or injury reported. (Resp. Ex. 1, P. 35). Dr. Spann ultimately referred the claimant to physical therapy for hip and low back pain after a September 21, 2020 visit. (Resp. Ex. 1, Pp. 36-37). According to Dr. Charles Varela in his report dated February 8, 2021, the claimant was evaluated by John Hilvert, physical therapist, on

September 28, 2020 for left-sided low back pain which she had for approximately five months prior to her work injury. Dr. Varela went on to state that at the time the claimant was seen by the physical therapist she had complained of paresthesia of the left lower extremity, transient weakness, and significant limitations secondary to pain. She complained of these issues when she saw Dr. Varela. (Resp. Ex. 1, P. 43).

Importantly, the claimant's compensable sacral fracture had resolved by June 2022. The claimant was seen by Dr. Varela on June 27, 2022, who opined that his impression of claimant's condition was "1. Status post probably S3 sacral fracture, acute, work related, resolved. 2. Chronic mechanical low back pain with symptoms not justified by objective findings, not related to work injury." (Resp. Ex. 1, Pp. 43-45). In fact, Dr. Varela was of the opinion that:

[b]ased on physical examination and review of records, it appears that the patient sustained a fracture of the sacrum at the L4-5 level. Based on examination today and because the patient does not have tenderness over the area of the sacral fracture, this fracture has resolved and there is no evidence that this would be a continuing source of the patient's pain. Therefore, this injury has reached maximum medical improvement (MMI), and the patient is released without impairment or restriction from this injury.

In addition, the patient has chronic low back pain. She has a long previous history of low back pain which is not related to her work injury. This is best documented on a note by the physical therapist John Hilvert on 9/28/2020, as well as 10/5/2020, where she is noted to have essentially the same symptoms of left-sided low back pain with lower extremity numbness and weakness as she complains of after her work injury.

It is because of her chronic low back pain, as well as this patient's age, and general physical conditioning, that I would place work restrictions on this patient. The patient can return to work with 25-lb weight restriction. If she cannot tolerate this type of work without restriction, the patient may need to consider other types of employment that are physically less demanding. However, again, this would be secondary to non-work-injury related factors. *Id.*

After obtaining a change of physician order through the Commission, Dr. Luke Knox evaluated the claimant on September 15, 2022, finding that:

I do not believe that there are any further medical treatment and/or additional diagnostic tests directly recommended and/or necessary associated with the sacral fracture and/or low back injury and complaints.

Secondly, I agree with Dr. Varela that Ms. Apple is at maximum medical improvement. I do not believe there are any other treatment options available. (Resp. Ex. 1, P. 53).

Dr. Knox assigned a 5% permanent impairment rating to the claimant's body as a whole but did not provide any work restrictions. *Id.*

As to the question of whether there was work available for the claimant within her restrictions, it is clear that both the respondent employer and other area employers could provide ample work for the claimant. Prior to being released to full duty, office coordinator Misty Glenn testified that the respondent was offered light duty, but that the claimant stated she could not complete them and "pretty much dusted and answered the phone." (Hrng. Tr., Pp. 47-48, 51). The claimant was transferred to another area after telling coworkers that she "just basically gets paid to do nothing." (Hrng. Tr., P. 48). Further, a report from vocational counselor, Keondra Hampton, identifies multiple job openings in the claimant's area making at least her average weekly wage of \$398.40. (See Resp. Ex. 2). Although the ALJ determined that the claimant had made some effort and "at least looked for available work," it is clear that the claimant waited three months to do so until just prior to the hearing. (Op., Pp. 17-18; Hrng. Tr., Pp. 43-44).

Based on the facts at hand, the claimant is unable to meet the requirements to be entitled to wage loss disability. The claimant has a long history of chronic pain unrelated to her work-related injury on February 8, 2021, and her providers agree that she has no ongoing issues resulting from this injury that would impact her ability to gain meaningful employment. In fact, the record reflects a disinterest in doing so. The only restrictions on the claimant's ability to work are all related to her long-standing pre-existing problems which are unrelated her on-the-job injury. None of the claimant's treating physicians have placed any restrictions on her work activities related to her compensable injury on February 8, 2021. The claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to a 5% wage loss award above her 5% anatomical rating.

For the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner