

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **G305185**

CYNTHIA J. FORSGREN, EMPLOYEE	CLAIMANT
HEALTH MANAGEMENT ASSOCIATES INC., EMPLOYER	RESPONDENT#1
LIBERTY MUTUAL GROUP, CARRIER	RESPONDENT#1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT#2

OPINION FILED **SEPTEMBER 12, 2024**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER JR., Attorney, Fort Smith, Arkansas.

Respondents #1 are represented by RICK BEHRING JR., Attorney, Little Rock, Arkansas.

Respondent #2 is represented by CHRISTY L. KING, Attorney, Little Rock, Arkansas; although not appearing at the hearing.

STATEMENT OF THE CASE

On July 23, 2024, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 16, 2024, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on March 18, 2012.
3. Claimant sustained a compensable injury on March 18, 2012.

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4. The respondents have controverted the claim regarding wage loss.

5. The compensation rates are \$574.00 for temporary total disability and \$421.00 for permanent partial disability.

By agreement of the parties, the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Whether claimant is entitled to wage loss benefits.
2. Whether claimant is entitled to medical benefits.
3. Attorney fees.

At the hearing, the parties announced that issue #2 had been resolved and was not presented. All other issues are reserved by the parties.

The claimant contends that “She returned to work following her compensable injuries and her job duties aggravated her symptoms. As a result of the impact of her job duties on her condition she requested her employer to provide her with part-time work or at least work that she could perform without aggravating her condition and her employer refused to grant such request. As a consequence of her employer failing to provide job accommodations the claimant ended up leaving that employment. The permanent restrictions that have been placed on the claimant as a result of her compensable injuries negatively impacts her access to the labor market and therefore the claimant contends that she is entitled to wage loss disability. The claimant contends that she is entitled to reasonably necessary medical treatment. The claimant contends that her attorney is entitled to an appropriate attorney’s fee.”

Respondents #1 contend that “To date, all benefits to which the claimant is entitled have been paid and have not been controverted. The respondents accepted this claim as compensable. To date, the respondents have paid for all reasonable and necessary medical treatment. To date, the

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respondents have paid all appropriate temporary disability benefits. To date, the respondents have paid all appropriate permanent partial disability benefits related to permanent anatomical impairment ratings assigned to her neck (7%) and right shoulder (6%). The claimant returned to work for the respondent employer. Upon information and belief, the respondent employer offered work within her restrictions until her voluntary resignation/separation. The respondents are investigating this claim; however, at this time, the respondents contend that the claimant is not entitled to any wage loss benefits. The respondents reserve the right to supplement and/or amend their contentions prior to the full hearing.”

Respondent #2 contends that “The Death and Permanent Total Disability Trust Fund reserves its right to identify the issues to be litigated upon completion of discovery.”

From a review of the entire record including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 16, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a loss in wage earning capacity in an amount equal to 15% to the body as a whole.

FACTUAL BACKGROUND

Following the hearing, I requested briefs from the parties on the issue of wage-loss disability. Those briefs were very much appreciated and are blue backed to the record of this case.

HEARING TESTIMONY

Claimant testified that in 2012, she suffered an admittedly compensable injury to her neck, shoulder, and arm while employed with respondent Health Management Associates. Claimant eventually received surgery on her shoulder which did not resolve her issues. She continued to have numbness that radiated down her arm and into the palm of her hand.

Claimant was released to work but testified that she had trouble operating the mouse on the computer and caring for patients, such as hanging an I-V bag above her head and giving injections. At the end of a twelve-hour shift, her neck and shoulders hurt. Claimant's work was considered light duty work but she was never symptom free while doing that. When she was switched to full duty work, her condition worsened. She reported to both her doctor and employer that she was having problems while working but felt there was nothing being done to help her. She resigned her employment in December 2014. Claimant was seen by Dr. Blankenship after Dr. Harp ordered a cervical MRI. Dr. Blankenship prescribed a course of physical therapy, medication, some topical cream, and referred her to Dr. Cannon, a pain management specialist. Her condition improved when she was not working but was still there. Dr. Blankenship suggested surgery would be appropriate, but claimant wanted to avoid that unless it was her last resort. She believes resigning from her job helped her avoid having surgery on her neck.

Since her resignation in 2014, claimant has not worked anywhere and has not sought employment anywhere else. As of the date of the hearing, claimant was sixty-five years old with an associate degree in nursing from WestArk. She has worked as an RN since December 1979.

Claimant made it clear that she was not claiming she was totally disabled and conceded it might be possible for her to find some kind of part-time work if it was light duty. However, claimant has chosen not to do that because she feared ending up in a situation where she would be required to

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perform duties that would worsen her condition. Claimant wants to avoid surgery, if possible, and believes not working is her safest way to do so.

On cross examination, claimant said that prior to working as a nurse, she had worked in an office and had done sales for a hardware store. Both those positions required her to work on a computer and answer phones, just as she had to do while working as a nurse. Claimant said that working as an office clerk is something she does not want to do because it is boring.

Claimant agreed that Dr. Harp had released her to return to work without restrictions in October 2013 and that she worked at full duty at that time until she resigned in December 2014. She earned the same wages after being released to return to full duty in October 2013 until she resigned in December 2014.

Claimant testified that her duties varied while working as an RN. Some of her nursing activities made her symptoms worse, but others did not affect her at all. Claimant said she missed a few days of work because of her arm before she resigned. Her job was modified to reduce her hours from twelve-hour shifts to eight-hour shifts. At the time she resigned, she was not under any work restrictions, and her position as an RN was still available to her. Claimant agreed that except for the fact she resigned, she could still be at respondent HMA as of the date of the hearing.

Claimant conceded that when Dr. Harp released her regarding her right shoulder, he did not impose any work restrictions on her. She stated that she had not returned to treatment for her right shoulder since she was released in March 2016. The work restrictions imposed by Dr. Blankenship included limiting lifting overhead to twenty-five pounds, which would have probably been within her job duties as an RN. She did not know if respondent HMA could have accommodated the restriction of “no prolonged hyperextension or extension of the neck,” because she had resigned before receiving that restriction and thus never presented it to respondent HMA.

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Claimant stated that she takes Ibuprofen as needed for her pain and returns yearly to get an injection from Dr. Cannon. While Dr. Blankenship indicated early in her treatment that it was possible for her to have surgery on her neck, claimant agreed that nothing in the records since that time suggested that she needed surgery.

Claimant testified in the ten years since she resigned from HMA, she had not looked for a job or filled out an employment application with anyone, nor had she attempted any job retraining. She said she had no plans to ever return to work. Claimant says that she cooks meals, walks, mops, dusts and vacuums occasionally. She has no driving restrictions and participates in the care of her grandchildren, who were all under thirteen years of age. She volunteers at her church and she and her husband have traveled extensively since she resigned.

On redirect examination, claimant said that she was not doing physical work while she was on vacation and had the ability to control when she rested. She did not have that same flexibility while she was working at the hospital. Claimant testified that her resignation in 2014 was not due to her desire to travel. She accrued vacation time while working and that vacation time would have been enough for her to take the trips that she has taken since she resigned.

Claimant said she had not chosen Dr. Harp as her physician and that he did not do anything to help her get a lighter duty job, but instead released her to full duty. It was Dr. Blankenship that put the restrictions on her that Dr. Harp failed to place upon her. She felt she had no option but to resign because Dr. Harp was not helping her. Claimant said she has permanent restrictions for her shoulder and her neck. Her daily activities are affected by not doing things as quickly as she used to. She believes having a regular job would aggravate her condition.

On recross examination, claimant did not know what modifications she could have been given to accommodate her physical problems. She was unwilling to accept a position that was not going to

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allow her to work as an RN.

I found claimant to be a credible witness and a good historian as to what had taken place in this matter over the past dozen years.

REVIEW OF THE EXHIBITS

While the parties submitted ample medical records, a detailed review of them would be superfluous. Claimant ably described her course of treatment, including the timeline that I will outline in the adjudication section of this opinion. The permanent impairment ratings were not contested and have already been paid.

ADJUDICATION

The Commission is charged with the duty of determining disability based on a consideration of medical evidence and other factors affecting wage loss, such as the claimant's age, education, and work experience. Motivation, postinjury income, credibility, demeanor, and a multitude of other factors are matters to be considered in claims for wage-loss-disability benefits in excess of permanent-physical impairment. *Cooper v. Univ. of Ark. for Med. Scis.*, 2017 Ark. App. 58, 510 S.W.3d 304.

As mentioned above, I find the timeline of claimant's treatment to be relevant in weighing the evidence in this case.

1. She was first treated by Dr. Harp for a right shoulder injury, including surgery on June 18, 2013.
2. Dr. Harp declined to give claimant an injection in her shoulder on October 21, 2023, releasing her claimant to full duty. He repeated that release on December 18, 2023.
3. Despite that release, she continued being treated by Dr. Harp for the next year. On March 14, 2024, he recorded that "the patient specifically requests that we proceed with an MRI on her

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shoulder and cervical spine to evaluate for continued symptoms,” and he concurred such could be useful.

4. At the June 13, 2014, visit, Dr. Harp noted that the request for cervical spine X-rays had not been authorized, and he again recommended such. This entry refers to claimant undergoing therapy on her neck.
5. On November 10, 2014, the results of an MRI were discussed in Dr. Harp’s notes; there is a protrusion on the right side at C4-5. He discussed with claimant a surgical referral, but issued her a note to return to work at full duty with no restrictions.
6. On December 1, 2014, claimant resigned her employment, citing her neck and right arm injuries. She stated that her request for job modification had been denied.
7. On March 9, 2015, claimant began seeing Dr. Blankenship for her neck injury. She continues to treat with his clinic, seeing him, Dr. Cannon, or as in the most recent visit being April 29, 2024, APRN Rhonda Findley. A new MRI was recommended and a return visit to Dr. Blankenship for evaluation was mentioned. At that last visit, claimant stated her neck condition was getting worse.

As I said above, I found claimant to be a credible witness, in large part because she testified to matters that did not help her case. She admitted that she has not looked for any kind of work since she resigned from respondent in 2014. She convinced me that if she was not able to work as an RN, she was not interested in another job within her physical limitations.

“Although a lack of interest in pursuing employment impedes the assessment of the claimant’s loss of earning capacity, it is not a complete bar.” *Ark. DOT v. Abercrombie*, 2019 Ark. App. 372. In her post-trial brief, claimant requested a wage loss disability of 30%-40%. I recognize “there is no exact formula for determining wage loss,” *Hixon v. Baptist Health*, 2010 Ark. App. 414. Had claimant

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gone back to work at some type of employment and earned considerably less than she made as an RN at the time she resigned, I would have had a more precise measure for what her wage loss disability should be. However, I understand why she resigned when she did, given Dr. Harp's release to full duty despite the disc protrusion in her neck that he was not treating. While her failure to seek other employment in the years since demonstrates a lack of motivation to return to the workforce, that alone does not bar claimant from receiving some degree of wage loss benefits. After considering all the factors set forth in the first paragraph of this section of this opinion, I am satisfied that claimant has proven she has a wage loss disability of 15% above her physical impairment ratings.

ORDER

Claimant has met her burden of proving by a preponderance of the evidence that she has suffered a loss in wage earning capacity in an amount equal to 15% to the body as a whole. Respondent has controverted claimant's entitlement to payment of permanent partial disability benefits in an amount equal to 15% based upon this loss in wage earning capacity.

Pursuant to A.C.A. § 11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$ 637.45.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE