

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G804863

CRYSTAL GAINNEY, EMPLOYEE	CLAIMANT
GENOA CENTRAL SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
ARKANSAS SCHOOL BOARDS ASSOCIATION, WCT, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 18, 2024

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed March 1, 2024. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has authority over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.

3. The Claimant has failed to prove by a preponderance of the evidence that she was rendered permanently and totally disabled by her compensable back injury of July 16, 2018.
4. The preponderance of credible evidence does not prove that the Claimant sustained any wage loss disability over and beyond her 25% anatomical impairment, which Respondents No. 1 accepted and paid for her compensable back injury.
5. The issue of a controverted attorney's fee has been rendered moot and not discussed herein this opinion.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's March 1, 2024 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

MICHAEL R. MAYTON, Commissioner

Commissioner Willhite dissents

DISSENTING OPINION

This case involves a claim for permanent and total or wage-loss disability benefits. The ALJ determined that the Claimant was not entitled to any disability benefits beyond her anatomical impairment rating which was accepted and paid. After a *de novo* review of the record, I would award the Claimant wage-loss benefits of 25% in addition to her permanent impairment rating.

Claimant sustained a compensable lower back injury on July 16, 2018, when she slipped and fell on a wet floor. Claimant returned to work shortly after her injury, but continued to receive treatment from her authorized physician, Dr. Overley. This treatment included conservative care in the form of physical therapy and steroid injections which failed to produce any lasting results. Consequently, Claimant underwent a fusion at the L4-L5 level of her lower back in October of 2019. Following the surgery, Claimant received work restrictions from Dr. Overley, which

changed multiple times to accommodate her symptoms as she attempted to return to her employment duties. In February 2020, Claimant resigned from her position with the Respondent to care for her husband. At that time, Claimant continued to experience difficulties performing job duties that may have exceeded the temporary work restrictions given to her by Dr. Overley. An FCE was conducted on April 19, 2020 with reliable results and Claimant was placed in the light-duty category of work restrictions. On September 15, 2021, Claimant was determined to be at maximum medical improvement and given an impairment rating of 25% to her whole person.

An award of wage-loss benefits is appropriate where a compensable injury has affected the Claimant's ability to earn a livelihood. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W. 3d 916 (2004). The Commission is charged with the duty of determining the extent of disability. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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, 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). Such other matters include; motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313,

663 S.W.2d 946 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross v. Crawford County Memorial Hosp.*, *supra*. It is well established that a claimant's prior work history and education are also factors to be considered in determining eligibility for wage-loss benefits. See *Cross v. Crawford County Memorial Hosp.*, *supra*.; *Glass v. Edens*, *supra*.; *City of Fayetteville v. Guess*, *supra*.; *Curry v. Franklin Electric*, *supra*.

Claimant is 62-years of age and has a 10th grade education, she has not obtained a GED or any post-secondary education. The Claimant worked in a labor-intensive position with the Respondent as a custodial and cafeteria worker. Claimant worked in other labor-intensive positions, prior to working with the Respondent, as a house cleaner, daycare attendant and nurse's aide. The Claimant's husband, Mr. Boyce Gainey, testified that Claimant was unable to do chores around the house or gardening which she did prior to her work injury. The Claimant also has a permanent impairment rating of 25% to the whole person as a result of her compensable lower back injury and was given light-duty work restrictions which limit occasional lifting of weight above twenty (20) pounds. Further, the Claimant was also restricted from bending or squatting more than occasionally. In light of these factors, I find that Claimant's wage-earning ability has been negatively affected and would give her an additional 25% wage-loss factor.

Pursuant to Ark. Code Ann. § 11-9-522, a Respondent employer may avoid liability for any wage-loss benefits by allowing the injured employee to return to work, or by making a bona fide offer of employment. The offer of employment must be timely, definite and within the employee's work restrictions and must produce earnings similar to those earned prior to the employee's work accident. See *Hope Sch. Dist. V. Wilson*, 2011 Ark. App. 219, 382 S.W.3d 782 (2011), See also *Johnson County Reg'l Med. Ctr. v. Lindsey*, 2014 Ark. App. 586, 446 S.W.3d 647 (2014) and *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992).

In *Hope School District v. Wilson*. In *Hope*, the Claimant worked as a custodian when he suffered an admittedly compensable injury to his left shoulder. The Claimant returned to work and was given a revised schedule of work duties to accommodate his injury. Claimant subsequently resigned. After Claimant's voluntary resignation he was given an impairment rating based on his compensable injury to his left shoulder. The Arkansas Court of Appeals held that there was not a bona fide offer of employment for any period after Claimant last worked for Respondent in accordance with Ark. Code Ann. § 11-9-522(c)(1). See *Hope Sch. Dist. V. Wilson*, 2011 Ark. App. 219, 382 S.W.3d 782 (2011).

In the matter at hand, the Claimant returned to work prior to reaching maximum medical improvement or receiving permanent work restrictions but was

unable to continue her employment and resigned in February of 2020. Pursuant to the *Hope* case, the resignation does not preclude a wage-loss award. On April 19, 2020, the Claimant was given permanent light-duty work restrictions. On September 15, 2021, the Claimant was determined to be at maximum medical improvement and given a permanent impairment rating. At no time after the assignment of permanent work restrictions, or after the Claimant was determined to be at maximum medical improvement did the Respondent attempt to re-employ the Claimant. As a result, I find that Respondent did not return the Claimant to work or make a bona fide offer of employment, and as stated above I would award wage-loss disability benefits of 25% in addition to the given anatomical impairment rating.

M. SCOTT WILLHITE, Commissioner