

## ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-699

ROBERT WHITE

APPELLANT

V.

ARKANSAS STATE HIGHWAY &  
TRANSPORTATION DEPARTMENT,  
PUBLIC EMPLOYEE CLAIMS and  
SECOND INJURY FUND

APPELLEES

**Opinion Delivered** November 18, 2009

AN APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[ No. F704587]

AFFIRMED

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### LARRY D. VAUGHT, Chief Judge

Robert White appeals the decision of the Workers' Compensation Commission denying his claims for permanent-total and wage-loss disability benefits. White argues on appeal that there is a lack of substantial evidence supporting the Commission's decision. We affirm.

On April 18, 2007, White was employed with appellee Arkansas Highway Department when he suffered a compensable injury to his low back after a misstep. Appellee paid medical, temporary-total disability benefits, and permanent-partial disability benefits for a one-percent impairment rating. He was initially treated for this injury by Dr. Ron Bates, who diagnosed a lumbar strain, released White from work, and prescribed medications, heat, and rest. Because White continued to complain of pain, Dr. Bates recommended an MRI, which was performed on May 3, 2007. The MRI revealed a bulging disc at L4-5 and evidence of a previous right

hemilaminectomy and bulging disc at L5-S1.<sup>1</sup> After reviewing these results, Dr. Bates referred White to neurosurgeon Dr. Scott Schlesinger and continued White's work release.

Dr. Schlesinger recommended conservative treatment for White in the form of lumbar epidural injections, physical therapy, a TENS unit, and traction. Dr. Schlesinger continued to keep White off work during this recommended treatment. White had three injections, but they did not relieve his pain. On July 9, 2007, Dr. Schlesinger recommended a second MRI, which revealed significant degenerative changes but no evidence of a surgically treatable problem. Dr. Schlesinger recommended a functional capacity evaluation (FCE) and also concluded that White had reached maximum medical improvement.

The FCE was performed on August 7, 2007. The FCE examiner reported that White gave a reliable effort and concluded that White could perform medium work. After reviewing the FCE results, Dr. Schlesinger released White from treatment, stating, "there is nothing further I can do for him." Dr. Schlesinger said, "I believe [he] is motivated in desiring to do work, but I do not think he is going to be able to return to the kind of work he was previously doing. However . . . the limitations are well outlined in his FCE." On October 8, 2007, Dr. Schlesinger wrote that White was entitled to a seven-percent impairment rating to his low back if he had not been previously rated. If he had been rated previously, Dr. Schlesinger opined that White was entitled to a one-percent impairment rating for his 2007 injury. Dr. Bates continued to prescribe chronic-pain medication. Dr. Bates's report of December 6, 2007, reflected that White had

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<sup>1</sup>It was undisputed that in February 1990, White suffered a non-work-related back injury at L5-S1 that required surgery. After surgery, he returned to work at full duty and continued to work until the 2007 injury.

retired from the highway department because of pain.

White filed a claim for permanent-total and wage-loss disability benefits, which was controverted by appellee. At the hearing before the administrative law judge (ALJ), White testified that he was fifty-four years old and graduated from high school. While he had received a welding certificate of completion from a vocational school, he testified that he never worked as a welder. He worked as a stock boy and ran machinery for Platt Rogers for five and one-half years. Then in 1978 or 1979 he began working for the highway department and worked there for twenty-nine years in several different capacities—as a laborer, mower, truck driver, and backhoe operator. From 1988 until April 2007, he worked as a motor grader, which required him to operate heavy equipment to grade roads.

White testified that while his back condition was a little better than when he injured it in April 2007, he was in constant pain. He said that he took Hydrocodone for pain on a regular basis. He said that the medication made him drowsy and dizzy and that he did not think it would be safe for him to operate the motor grader while taking his medication. He also testified that he had difficulty sleeping, standing, and sitting. He could no longer fish, work in the yard, or travel. He said that he retired because he could not perform his work for the highway department. He testified that there were no light-duty jobs available at the highway department, but acknowledged that he did not confirm this with his employer. He claimed that he was permanently and totally disabled. White's wife, Patricia, testified that White's activities were limited and that after the FCE he took pain pills and rested for two days.

The ALJ found that White failed to prove by a preponderance of the evidence that he

was entitled to permanent-total or wage-loss disability benefits due to his 2007 compensable injury. The ALJ cited the FCE results that demonstrated White was capable of performing work at the medium classification. The ALJ also cited Dr. Schlesinger's report that issued White a one-percent impairment rating for the 2007 injury. While the ALJ recognized that Dr. Schlesinger stated that White would be unable to perform his prior work as a motor grader, the ALJ also noted that no physician had opined and the record did not support the conclusion that White was unable to perform work within the medium-work category or that he was permanently and totally disabled. Further, White admitted that he had not sought other suitable employment with the highway department or any other employers within the medium-work classification. The ALJ found that White was not seeking any employment at the time of the hearing, but instead elected to draw his retirement benefits, which grossed approximately \$1,893.96 per month. As such, the ALJ concluded that White was not motivated or interested in pursuing other suitable work, and this impeded the assessment of White's loss-of-earning capacity. The Commission affirmed and adopted the ALJ's opinion. White appeals from this decision.

White contends on appeal that there is a lack of substantial evidence supporting the Commission's decision that he is not entitled to permanent-total or wage-loss disability benefits. In reviewing decisions from the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 232, 201 S.W.3d 449, 453 (2005). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.*, 201 S.W.3d at 453. When a claim is denied because the claimant has failed

to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*, 201 S.W.3d at 453.

Permanent-total disability means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). The burden of proof is on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. § 11-9-519(e)(2).

Pursuant to Arkansas Code Annotated section 11-9-522(b)(1) (Repl. 2002), 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 permanently and totally disabled based upon the wage-loss factor. *Lee*, 89 Ark. App. at 233, 201 S.W.3d at 454. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.*, 201 S.W.3d at 454. 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, work experience, and other matters reasonably expected to affect his or her future earning capacity. *Id.* at 233, 201 S.W.3d at 454; Ark. Code Ann. § 11-9-522(b)(1). In considering factors that may affect an employee's future earning capacity, we consider the claimant's motivation to return to work, because a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Lee*, 89 Ark. App. at 233, 201 S.W.3d at 454.

We hold that substantial evidence supports the Commission's decision that White did not

meet his burden of proving his entitlement to permanent-total or wage-loss disability benefits. White's compensable injury did not require surgery, and he was issued only a one-percent impairment rating for it. The FCE evaluator concluded that White was capable of performing medium work. Neither of White's treating physicians opined that he was permanently and totally disabled or that he could not work. To the contrary, Dr. Schlesinger opined that White could return to work as per the FCE recommendation, which was at the medium classification. Further, there was substantial evidence supporting the Commission's finding that White was not motivated to return to work. He admitted that he had not looked for work within the medium-work classification and that he had not contacted the highway department to inquire about positions that were within his restrictions. Instead, he elected to receive retirement benefits.

White contends that the Commission arbitrarily disregarded his credibility and complaints of pain, which the Commission is not permitted to do. He cites his history of returning to work after the 1990 back injury and surgery and the FCE report that documented his complaints of pain throughout the evaluation. He points to his wife's testimony that after the FCE he was in pain for two days. White contends that the Commission ignored the evidence that he was taking pain medication that affected his ability to work. White argues that if the Commission had considered all of this evidence, "it is clear that [he] is not able to return to 'suitable work' because in his case there is no such thing."

We disagree. First, the Commission did not arbitrarily disregard the credibility of White and his complaints of pain. While the Commission did not expressly state, "We do not believe White's testimony that he is unable to work because of pain," it implicitly reached that

conclusion by finding that (1) the FCE report concluded that he would work at the medium level; (2) Dr. Schlesinger opined that White could work as per the FCE; and (3) White was not motivated to return to work. Credibility findings are matters within the province of the Commission rather than this court. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Second, White never presented any evidence that no “suitable work” existed for him. The burden of proof is on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. § 11-9-519(e)(2). The only evidence White presented on this issue was that he was in pain and could not work. He did not ask his employer if they had work within his restrictions available for him, and he did not pursue any other jobs within his work restrictions.

Accordingly, we hold that substantial evidence supports the Commission’s decision.

Affirmed.

HART and ROBBINS, JJ., agree.