Not designated for publication.

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-920

	Opinion Delivered MARCH 4, 2009
CITY OF JONESBORO, MUNICIPAL LEAGUE WC TRUST, CARRIER APPELLANTS	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F509574]
V.	
TAMMY MORGAN APPELLEES	AFFIRMED

ROBERT J. GLADWIN, Judge

This appeal follows the June 17, 2008 decision of the Workers' Compensation Commission (Commission) affirming and adopting the January 11, 2008 opinion of the Administrative Law Judge (ALJ), that found that appellee Tammy Morgan was entitled to a wage-loss-disability award of fifty-five percent over and above the twelve-percent anatomical impairment. On appeal, appellants City of Jonesboro (Employer) and Municipal League W C Trust (Carrier) argue that the Commission erred in awarding appellee permanent-disability benefits because Employer had offered her suitable re-employment within her physical limitations. We affirm.

Facts

Appellee, whose date of birth is March 21, 1963, is a high school graduate. She also attended community college in West Virginia, taking courses in the criminal-justice and

surgical-tech programs, although she did not complete a degree in either program. Appellee's early employment history includes working as a claims adjuster, a bartender, and in a family-owned restaurant. At the time of these previous employments, appellee did not have any physical limitation or restrictions.

Upon returning to Arkansas in 2000, following her divorce, appellee secured a part-time position as a police officer for the city of Hughes, Arkansas. Appellee was in that position when she was hired by Employer. Appellee commenced her employment with Employer as a police officer on February 1, 2002. On December 29, 2003, she sustained the compensable injury that is the subject of the present claim. The injury occurred when she was chasing an individual in response to a call. As she attempted to pull a female suspect off of a fence, she crawled up onto the fence, grabbed the suspect, and fell backward. After securing the suspect, appellee explained to her sergeant that she had injured her back. Her sergeant had appellee complete her incident report and then go home.

When she reached her residence, she realized she had landed very hard upon falling, at which time she reported to her superiors that she was going to have her back examined. Appellee presented to the emergency room at St. Bernards Regional Medical Center on the day of the fall. At that time, she was given a shot for pain and sent home with instructions to return the following day for x-rays, because another accident had required the full attention of the staff that evening. She returned the next day, and a CAT scan indicated that she had pulled some muscles in her back.

Appellee subsequently came under the care of Dr. William C. Kent, appellants' designated medical provider and primary care physician. Dr. Kent later referred appellee to Dr. Scott Schlesinger, a Little Rock neurosurgeon, who conducted a neurological consultation on September 14, 2005. Appellee was seen in follow-up by Dr. Schlesinger on January 13, 2006, and pursuant to his diagnosis and recommended treatment plan, she underwent a lumbar right L5-S1 transforaminal decompression and TLIF fusion for spondylolithesis and neuro foramen disc herniation at L5-S1 on January 31, 2006.

Appellee was seen in follow-up by Dr. Schlesinger following her surgery, and between April 14, 2006, and June 7, 2006, appellee underwent three epidural steroid injections. Dr. Schlesinger referred appellee to a rheumatologist for ongoing problems. On November 10, 2006, appellee underwent a Functional Capacity Evaluation (FCE) pursuant to a referral from Dr. Schlesinger. The November 14, 2006 report relative to the afore evaluation reflects, in pertinent part:

> Overall, Ms. Morgan demonstrated the ability to perform work in the LIGHT work classification according to the US Department of Labor guidelines. She did exhibit several characteristics of Medium level work due to her decreased general mobility and decreased standing/walking abilities, she is best suited for Light work as defined below.

Appellee was again seen by Dr. Schlesinger on November 15, 2006. After noting the results of the FCE and her continuing back and leg pain, he opined that appellee had reached maximum-medical improvement , and gave her a permanent-partial-disability rating of twelve percent, in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition*.

Appellee continues to take Celebrex, Ultram, Tylenol and Nexium, and also uses Lidocaine patches in connection with the December 29, 2003 injury. Appellee also takes Crestor for her cholesterol. Appellee takes other medicines for non-injury-related complaints including Singulair (for sinuses) and Celexa (after previously taking Lexapro). Because of the side effects of her medication, appellee does not drive while taking her medication. Appellee resides in Rector and does not drive beyond Paragould even when not taking her medicine.

Prior to the December 29, 2003 compensable injury, appellee was very active in sports, constantly played with the children, climbed mountains in North Carolina, ran approximately a mile and a half every day, and tended to the yard and flower beds. Now, her husband frequently has to help her get out of the car. She is unable to pick up her grandchildren, and she has difficulty bending over to do laundry or dishwashing. She is no longer able to work outside in the yard or in her flower garden, and activities such as shopping are limited or modified due to appellee's physical capability, including using a shopping cart as a walker or a motorized cart.

Regarding appellee's current condition, some days she experiences a very sharp constant pain on the right side of her spine. Even when not experiencing the sharp pain, appellant feels a dull throb but is able to function when she gets her pain down to that level. Appellee also experiences pain in her right leg, in the form of a shooting pain down the back of her thigh to her knee and numbness in her right ankle, which she attributes to the December 29, 2003 injury. Appellee estimates that she has fallen at least ten times since the

December 29, 2003 accident as a result of numbness in her entire right leg. She occasionally uses a walker that was provided to her following her back surgery.

In a typical thirty-day period, appellee experiences at least five bad days when she is unable to get out of bed or can only make it to her recliner with the help of her husband and stepson. Her good days, where the pain is just a dull throb, are approximately ten to twelve days a month. On those days she is able to get out of bed, take her medicine, and may have a couple of hours when she is still not in deep pain. However, her condition is unpredictable, and normal activities can cause the severe pain to return. Appellee is unable to predict when she will experience a bad day, and she has concerns about being a dependable employee if employment was secured. Additionally, physical tasks such as bending, lifting, stooping, pushing, pulling, being on her feet, pursuing suspects and the ability to get in and out of a vehicle rapidly were all required to perform her job as a police officer, but they are unmanageable in her current condition.

In February 2007, appellee discussed potential alternative employment with Ms. Suzanne Hackney, former Director of Human Resources for Employer; however, appellee maintains that she was merely informed of the jobs that Employer had available, rather than actually being offered a position. Ms. Hackney acknowledged that she did not pre-screen based on appellee's qualifications or medical restrictions. Multiple positions were discussed during the meeting, but only two were within the range of appellee's physical restrictions. Both positions included education or experience that appellee lacks. Regarding an advertising-marketing-tech position appellee discussed with Ms. Hackney, it is undisputed that

appellee did not have the minimum qualification of two years experience in a related field of advertising, and she has very limited computer experience from her previous work as an insurance claims adjuster. An additional constraint is that her residence in Rector is approximately thirty-five miles from Jonesboro. Ms. Hackney also informed appellee of a grant-assistant position, but it was merely a temporary job of six weeks' duration, with no benefits. Appellee lacks knowledge of federal regulations pertaining to grants, is not proficient in the use of Microsoft Office, and has not obtained a bachelor's degree, all stated requirements of the job.

Ms. Hackney testified in the hearing before the ALJ that, based upon her dealings with appellee, she has found appellee to be honest and straightforward. Further, based on her observation of appellee both within and outside the confines of the courtroom, Ms. Hackney noted that appellee "appears to have difficulty getting up and down" and noticed that she would "grimace when she starts to get up." Ms. Hackney acknowledged that appellee was not qualified for the advertising-tech position, as reflected in the written job description, but explained that there are numerous times that Employer has to take less than what it has wanted and train the people hired. Ms. Hackney stated that the job description did reflect the minimum qualification for the job, but she insisted that accommodations would have been made on behalf of appellee to place her in the advertising-tech position. Ms. Hackney testified that she had informed Mr. Joel Gardner, the coordinator who was in charge of the advertising-tech position, that the job would be discussed with appellee. Ms. Hackney

conceded, however, that the advertising-tech position was one requiring daily attendance at work.

Ms. Hackney confirmed that she told appellee "that all those jobs were available to her," but admitted that she did not commit the offer of the jobs to appellee in a written letter, merely offering them verbally. After appellee declined the "offers," Ms. Hackney said she handed appellee a sheet of paper that said appellee had been offered these jobs, and appellee signed that she declined them. That signed document, however, is not a part of the evidence in the hearing record. Ms. Hackney acknowledged that she was aware that appellee was represented by an attorney at the time of the February 2007 meeting, but that she did not convey to appellee's attorney the offer of any job by Employer to appellee prior to the February 2007 meeting.

Appellee is currently pursuing her associate of arts degree. She plans to enter the business administration segment of the nursing field. Regarding her capability to perform such a job once she obtains a degree, her goal is to secure a position where the employer calls people on an as-needed basis. She hopes to be able to work on her "good days," maybe one or two days a week.

On January 11, 2008, the ALJ filed his opinion, finding that appellee was entitled to a wage-loss-disability award of fifty-five percent over and above the twelve-percent anatomical impairment. The ALJ determined that the evidence indicated that, although Employer provided appellee with a total list of job openings within the City of Jonesboro, it did not extend a job offer to appellee. Of the total jobs identified by Ms. Hackney, only two

were within appellee's physical restrictions/limitations. However, the ALJ found that both positions, on their faces, required education and experience that appellee did not possess. Further, of the two positions, one was a temporary position with no benefits. At the time of her injury, appellee's annual salary was approximately $28,964.00.

The ALJ further determined that the evidence supports a finding that, while appellee is unable to earn meaningful wages as a police officer as a result of the December 29, 2003 compensable injury and permanent physical restrictions and limitations in connection therewith, she has not been foreclosed from earning meaningful wages in other employments. He found that appellee failed to sustain her burden of proof by a preponderance of the evidence that she has been rendered permanently and totally disabled as a result of the December 29, 2003 compensable injury.

Appellants appealed the decision of the ALJ to the Commission. On June 17, 2008, the Commission filed its opinion affirming and adopting the decision of the ALJ. Appellants filed a timely notice of appeal on June 30, 2008.

Standard of Review

Typically, on appeal to this court, we review only the decision of the Commission, not that of the ALJ. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). In this case, the Commission affirmed and adopted the ALJ's opinion as its own, which it is permitted to do under Arkansas law. *See Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission.

See Branum, supra. Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In appeals involving claims for workers' compensation, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *See Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellate court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of appellee or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing,*

Inc., 360 Ark. 491, 202 S.W.3d 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis before the ALJ pursuant to Arkansas Code Annotated section 11-9-704(c)(2), and this court has stated that we defer to the Commission's authority to disregard the testimony of any witness, even an appellee, as not credible. *See Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006).

Discussion

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Henson v. General Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007). 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.* Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. *Id.* To be entitled to any wage-loss-disability benefit in excess of permanent-physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent-physical impairment as a result of a compensable injury. *Id.* Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Id.* The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Id.* A claimant's lack of interest in pursuing employment with her

employer and negative attitude in looking for work are impediments to our full assessment of wage loss. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Appellants assert that they located available and suitable work for appellee, but she rejected their attempts to accommodate her physical limitations. Moreover, Employer maintains that it was prepared to work with appellee to educate, train, and accommodate her. Appellants contend that this case appears to be the "mirror image" of *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996), in which this court held that,

> [A]t a minimum Ark. Code Ann. § 11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force, the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary.

Torrey, 55 Ark. App. at 231, 934 S.W.2d at 241. Here, Employer asserts that it sought to facilitate re-entry, but appellee denied them the opportunity to explore even the possibility of her succeeding in the advertising position.

In addition to Employer's efforts to return appellee to employment, appellants point out that appellee has (1) supervisory experience from running a family restaurant; (2) worked as a claims adjuster for Blue Cross and Blue Shield, as well as their competitors, for several years; and (3) some limited computer experience related to her employment with Blue Cross and Blue Shield. Notwithstanding appellee's various abilities that transcend her limitations, appellants point out that she now contends that she is unable to drive due to her medications. Despite that, she is able to attend classes, pick up her stepson who lives a "significant" distance away, and manages to go on other various personal outings. They argue that there are no medical records that support her contention that her medications make her unfit to drive.

Appellants cite Arkansas Code Annotated section 11-9-522(b)(2), which states in pertinent part that

> so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Here, appellants maintain that appellee was offered an advertising- tech position that was in the same general hourly pay rate as her previous position with the police department. However, despite multiple reassurances from Ms. Hackney that the supervisor of the position would work with her and train her to do necessary functions of the positions, appellee refused to even attempt to work in the position. Appellants reiterate that a claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. *Logan County v. McDonald*, *supra*. Appellants claim that there is no medical evidence to support her contention that she is experiencing pain so great as to prevent her from being able to work in an almost completely sedentary job—which the advertising tech position would have been—especially given her own testimony detailing physical activities that are just as, if not more, stressful than what she would be required to do in that position.

Arkansas Code Annotated section 11-9-526 states that if any injured employee refuses employment suitable to her capacity offered to or procured for her, she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Commission, the refusal is justifiable. Appellants assert that, based on the medical evidence

presented, and the description given of the advertising tech position offered to the claimant, there is no reasonable justification for appellee to have turned down the employment offered to her. If she can travel approximately thirty miles, each way, to pick up her grandson, attend classes pursuing a college degree, and stand outside to hold fence posts and assist her husband with other manual labor around their home, appellants assert that there is no reason that she will not even attempt to work in a position that would require her to sit at a desk for the majority of the day, with only occasional driving.

In addition to considering a claimant's lack of motivation to return to work, the Commission is charged with the duty of determining disability based upon consideration of the medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *See Logan County v. McDonald*, *supra*. Appellants reiterate that, although appellee is disabled to some extent, she is not so disabled as to be unable to function in a mostly sedentary job such as the advertising tech position. They reiterate that she is not uneducated and is currently pursuing an associate's degree with plans to subsequently seek a bachelor's degree. Appellee's position as a police officer afforded her skills that are readily transferable to a variety of positions, and she possesses other work experience that would easily transfer to other responsibilities, especially in a situation like the advertising-tech position where she had assurances that Employer would have provided her with any additional training and accommodations needed.

In summary, appellants acknowledge that appellee has some difficulties that others may not have, but her education, work experience, and related skills would, at the very least, make

it possible for her to be trained for either of the positions that were offered by Employer. As such, they argue that the award of fifty-five percent wage-loss disability was inappropriate and should be reversed, or at least reassessed to more accurately reflect her residual disability.

Appellee correctly points out that appellants' reliance on Arkansas Code Annotated section 11-9-505 and *Torrey*, *supra*, is entirely misplaced because she never sought up to one year in salary reimbursement. Although appellants contend that they made a bona fide and reasonably obtainable offer of return to work at wages equal to or greater than her average weekly wage at the time of the accident to appellee, no evidence was offered regarding the salary for the alleged job offer—despite the specific requirement in section 11-9-522(b)(2) that the wages for the new position be equal to or greater than appellee's average weekly wage at the time of the accident. She refers to the additional requirements of the advertising-tech position of being at work daily, as well as driving and getting in and out of a vehicle to call on customers, and maintains that it should have been obvious to Ms. Hackney from her own observations of appellee's physical difficulties in getting around that appellee would not have been able to perform the principle requirements of the job. Ms. Hackney specifically testified that she thought appellee had been honest and straightforward, and acknowledged both her difficulty in getting around and the appearance of her being in pain.

Although the ALJ, and later the Commission, rejected her claim of permanent-total disability, they did examine all of the wage-loss factors and determined her wage-loss disability to be fifty-five percent based upon her current physical restrictions, coupled with the frequency with which she experiences days where her activity level is almost non-existent

without considerable assistance from her husband. They found that in her present physical state she could not be a consistently reliable and dependable employee in terms of reporting to work on a daily basis. It was within their purview to make such determinations based upon the evidence before them.

Pursuant to Arkansas Code Annotated section 11-9-522(b)(1), the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical-impairment rating to the body as a whole. *See Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). Based upon the factors set forth in the ALJ's opinion, later affirmed and adopted by the Commission, we hold that the Commission's decision is supported by substantial evidence; accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and KINARD, J., agree.