

# ARKANSAS COURT OF APPEALS

DIVISION I  
No. CA08-906

BETTY GERRALD BARNETT  
APPELLANT

V.

DOUGLAS TOBACCO, NATIONAL  
FIRE IC OF HARTFORD, SECOND  
INJURY FUND, DEATH &  
PERMANENT TOTAL DISABILITY  
TRUST FUND

APPELLEES

Opinion Delivered MARCH 18, 2009

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. E417422]

AFFIRMED

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**ROBERT J. GLADWIN, Judge**

Appellant Betty Gerrald Barnett appeals the June 16, 2008 decision of the Arkansas Workers' Compensation Commission, which awarded her an increase of two-percent on the whole-body impairment of thirteen percent that had been previously adjudicated, but denied her claim for additional wage-loss disability. On appeal, she contends that the Commission improperly applied the guides for the evaluation of permanent impairment. She further argues that the Commission's finding that she did not incur any additional wage-loss disability is not supported by substantial evidence. We affirm the Commission.

Appellant sustained a compensable back injury on October 4, 1994, and required surgeries in 1995 and 1996. The parties stipulated that appellant sustained a thirteen percent whole-body-anatomical-impairment rating. This court concluded in *Douglas Tobacco Products*

*Company, Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999), that appellant sustained a fifty percent wage-loss disability and that appellee Second Injury Fund was liable for the wage-loss benefits. Appellant subsequently requested additional wage-loss benefits; however, that request was denied by this court in *Gerrald v. Douglas Tobacco Products Co.*, No. CA01-745 (Ark. App. Feb. 27, 2002) (unpublished). Appellant has again sought additional benefits, alleging that due to her June 6, 2005 surgery, she is entitled to an additional fifteen percent anatomical-impairment rating. She contends that she is totally and permanently disabled or, in the alternative, entitled to additional wage-loss-disability benefits plus attorney's fees.

On June 6, 2005, appellant underwent a laminectomy fusion for spondylolisthesis at L4 and S1 and for spondylolisthesis at L5-S1 by Dr. Saer. Dr. Saer then assessed appellant with a fifteen percent whole-body-impairment rating using the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, 4th Edition. By opinion filed June 28, 2007, the administrative law judge (ALJ) found appellant's condition changed her whole-body-anatomical rating by an additional two percent. The ALJ found that the change was due solely because she underwent a third surgery. The ALJ determined whether appellant's wage loss had been impeded by the subsequent surgery in June of 2005, finding that it did not. The ALJ found that appellant's condition actually improved after her third surgery.

Appellant testified as follows regarding her condition after the third surgery:

- Q     Isn't it true that your right leg was giving you the most trouble when you went in for surgery?  
A     Yes.

- Q And isn't it true that that surgery helped the condition of your right leg dramatically?
- A Yes.
- Q When you actually woke up from surgery, you told me that the pain in your right leg was almost entirely gone.
- A Yes.
- Q During the next six months to a year you testified that you were having an aching sensation in your groin and down both legs, but not the excruciating pain that you were experiencing before the surgery?
- A Right.
- Q Is that true?
- A That's true.

Appellant testified that her right-lower extremity was her primary problem before the 2005 surgery and that the 2005 surgery greatly improved her condition. Then, in July of 2006, more than a year after her third surgery, she was getting up from the breakfast table and pain arose in her left-lower extremity. The ALJ determined that nothing in the medical records after appellant's July 2006 breakfast incident gave an indication as to the cause of appellant's left-lower-extremity complaints. The ALJ found that the record showed appellant received significant benefits after her 2005 surgery. Appellant testified she was better after the 2005 surgery than she was in 2000 when she was again seeking more wage-loss benefits. This court found in 2002 that appellant was not entitled to additional wage loss over and above the previous award of fifty percent wage loss, and the ALJ stated that he could not find that appellant had undergone a change in physical condition to warrant permanent and total disability or an increase in wage-loss disability benefits. The ALJ stated that he did not disregard appellant's testimony regarding left-lower-extremity pain; however, he labeled it a "mystery ailment" according to the medical records. The Full Commission affirmed and

adopted the ALJ's opinion by order filed June 16, 2008. Appellant filed a timely notice of appeal, and this appeal followed.

When reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Averitt Express, Inc. v. Gilley*, 104 Ark. App. 16, \_\_\_ S.W.3d \_\_\_ (2008). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we are required to affirm. *Id.* Our review is limited to the findings of the Commission. *Id.*

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 id.* Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority opinion.

Appellant contends that there is not substantial evidence in the record to support the Commission's conclusions that she only had an increase of two percent, for a total of fifteen percent, in her permanent impairment. She argues that the increase should be fifteen percent in addition to the thirteen percent already in place, making her total impairment twenty-eight

percent. She maintains that the physicians, not the Commission, are to assess impairment. Because Dr. Saer opined that appellant has a fifteen-percent-impairment rating as a result of the surgery performed June 6, 2005, appellant argues that the Commission ignored Dr. Saer by giving her fifteen-percent disability from all surgeries. Appellant points out that the Commission may not arbitrarily disregard or ignore medical evidence. *Hill v. Baptist Med. Ctr.*, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

Appellees Douglas Tobacco and National Fire Insurance Company of Hartford (appellees) claim that appellant has misstated the law. Appellees point out that the law requires that the Commission decide which portions of the medical evidence to credit and translate into a finding using the AMA Guides. See *Jones v. Wal-Mart Stores, Inc.*, 100 Ark. App. 17, 262 S.W.3d 630 (2007). We agree, and, accordingly, we hold that appellant's argument that the Commission acted improperly in making such a determination is incorrect.

Appellee Second Injury Fund argues that appellant failed to carry her burden of proving all of the elements of her claim by a preponderance of the evidence. We agree that by failing to elicit additional information from Dr. Saer, appellant has fallen short in providing any evidentiary basis for the fact-finder to conclude that the third surgery was entitled to the full fifteen-percent rating by itself.

Appellant also argues that both the ALJ and Dr. Saer miscalculated under the AMA Guides. She contends that a single level spinal fusion rates a twelve-percent rating. With multiple levels operated upon, medically documented pain, and rigidity, one percent should be added per level. Appellant was operated upon on two levels. Therefore, she argues that two percent should be added for the two levels. Two percent plus twelve percent equals

fourteen percent. She argues that two percent should be added for the second operation, which would equal sixteen percent. For the third operation, another one percent should be added, which would be seventeen percent.

She next argues that the seventeen percent should be added to the thirteen percent already in place. She maintains that there is no evidence to support an increase by a mere two percent to a total of only fifteen percent, when she had at least an additional fifteen percent as a result of the latest surgery without regard to her previous thirteen percent rating from prior surgeries. Therefore, appellant contends that neither Dr. Saer nor the Commission properly applied Table 75 of the AMA Guides.

Appellees claim that the fifteen-percent-impairment rating established by the Commission is in accord with the Guides. Appellant's thirteen-percent-impairment rating has been previously established. See *Douglas Tobacco, supra*. Appellant never challenged the determination, and it is the law of the case. See *Jones v. Double "D" Props., Inc.*, 357 Ark. 148, 161 S.W.3d 839 (2004). The only change since that determination was the surgery performed by Dr. Saer in June 2005. The AMA Guides assign an additional one percent for a third surgery and an additional one percent because the surgery was performed on two levels. The resulting total is fifteen percent, which is the finding of the Commission. We hold that the Commission's finding is, therefore, supported by substantial evidence.<sup>1</sup>

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<sup>1</sup>Appellee Second Injury Fund claims that neither Dr. Saer nor appellant have arrived at the proper rating under the Guides. Appellee Second Injury Fund points out that Arkansas Code Annotated section 11-9-522(g)(1) states that the guide shall not include pain as a basis for impairment. Therefore, appellee Second Injury Fund argues that Table 75, Section IV-C is the only section that can be used to rate a one-level fusion. That section allows a maximum of nine percent whole-body impairment for lumbar fusions. Nevertheless, appellee Second Injury Fund correctly points out that the law of

Pursuant to Ark. Code Ann. § 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). This wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). In considering wage-loss disability, the Commission can consider such factors as the claimant'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).

Appellant contends that she had an increase in disability as a result of the latest surgery. She argues that the Commission's finding that she did not suffer an increase in wage-loss disability is not supported by substantial evidence. Even if the Commission's finding of an additional two-percent impairment were correct, she maintains it entitles her to a *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), analysis as required under Arkansas Code Annotated section 11-9-522(b)(1). She argues, therefore, that she is entitled to have an evaluation of her age, education, prior work experience, as well as the medical aspects of her claim to determine the combined effects on her present ability to be employed. She points out that the ALJ failed to do such an analysis. Because she has had an increased disability rating relating back to her 1994 injury, appellant argues that she is entitled to a new evaluation

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the case requires that the two prior conditions receive a total of thirteen percent to the whole body. Appellee Second Injury Fund objects to the sixteen-percent rating based upon Table 75 as argued by appellant.

of this increased impairment and a new consideration of what her increased disability rating has done to her ability to be gainfully employed.

Appellees maintain that the Commission correctly determined that appellant is not entitled to additional wage-loss benefits. Appellees point out that in her first appeal to this court, appellant argued the Commission erred in finding she was only fifty percent wage-loss disabled and that, like her argument in the present case, the Commission failed to state facts in support of its award. *See Douglas Tobacco, supra*. This court rejected those arguments, citing the Commission's findings that work was available to her and that she lacked motivation to return to work. *Id.* In her second appeal to this court, she claimed that an increase in her pain level entitled her to additional wage-loss benefits. This court rejected the claim, affirming the Commission's findings that her condition, though having deteriorated somewhat, did not demonstrate a sufficient change to justify a modification of the wage-loss award. *See Gerrald, supra*. In a reversal of that stance, appellant now argues that a surgery that dramatically decreased her pain constitutes a change sufficient to entitle her to a modification of the wage-loss award.

Appellees first argue that appellant failed to demonstrate a change in condition that would entitle her to consideration of a modification of her wage-loss disability. Arkansas Code Annotated section 11-9-713 grants the Commission authority to modify an award subsequent to the expiration of the time for appeal only upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. This court has twice affirmed the wage-loss ruling in this case. *See Douglas Tobacco, supra*, and *Gerrald, supra*. Therefore, the only remaining possibility for her to receive a modification of her wage-loss

claim is if she could demonstrate a change in her physical condition attributable to her compensable injury.

The ALJ found, and the Commission affirmed, that the evidence was that the third surgery actually decreased appellant's disability. She testified that she felt better after surgery, and that the pain in her right leg was almost entirely gone when she woke up from surgery. Appellees contend that an improvement does not justify an increase in her wage-loss determination. We agree.

As appellees correctly point out, appellant raised a problem with her left-lower extremity before the Commission, but there is no objective medical evidence that her left-lower-extremity pain is related to her compensable injury. One doctor stated in his records, "I think it's more knee than back," in reference to appellant's left-lower-extremity pain. Therefore, substantial evidence supports that her left-leg pain is not related to her compensable back injury.

Appellant's failure to demonstrate a change in her physical condition precluded a consideration by the Commission of her age, education, work experience, and other matters. The ALJ never reached the wage-loss issue because appellant presented insufficient evidence to compel consideration of any factors beyond the threshold issue of a change in condition from the surgery.

Finally, appellant argues that the Commission failed to make sufficient findings with respect to the wage-loss issue so that this court might determine whether the Commission followed the law. We hold that the Commission satisfied its obligation to "make findings sufficient to justify the denial." *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 17, 918 S.W.2d

206 (1996). The ALJ, whose opinion was adopted by the Commission, found that appellant's condition improved after her third surgery, citing appellant's testimony admitting that her right-lower-extremity pain abated after the surgery. The ALJ further found no evidence in the medical records suggesting the cause of her left-leg pain. Also, the ALJ found that appellant's left-lower-leg pain was unrelated to her compensable injury. These findings are sufficient to satisfy the requirements for factual findings in a workers' compensation proceeding.

Affirmed.

PITTMAN and HENRY, JJ., agree.