

DIVISION I

Judge Neal's unpublished opinion for April 19, 2006

CA05-1148

April 19, 2006

MEDICALODGES, INC.,
TRAVELERS INSURANCE
APPELLANTS

AN APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[F213823]

v.

MARIE HERRON
APPELLEE

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

In this workers' compensation case, the parties bring this appeal and cross-appeal from a decision of the Arkansas Workers' Compensation Commission (Commission) that awarded appellee/cross-appellant Marie Herron additional benefits. On direct appeal, appellants/cross-appellees Medicalodges Incorporated (Medicalodges) and Travelers Insurance Company (Travelers) argue that the Commission erred when it found that (1) Herron sustained a permanent impairment in the amount of twenty percent to the body as a whole and (2) Herron sustained a wage loss of fifty percent over and above the permanent anatomical impairment. On cross-appeal, Herron argues that the Commission erred when it failed to find that she was totally and permanently disabled and, therefore, its decision to award her wage-loss disability of fifty percent above her impairment rating is not supported by substantial evidence. We affirm both the direct appeal and the cross-appeal.

The facts of this case are as follows. On February 8, 2000, while working as a certified nurse's aid for Medicalodges, Herron sustained a compensable lower-back injury. She was initially treated by Dr. M. Leon Purifoy. Dr. Purifoy ordered x-rays of Herron's

back, and the x-ray results were normal. Herron returned to Dr. Purifoy on March 17, 2000, with continued pain and back spasms. She underwent an MRI on March 23, 2000. The results of her MRI were also normal.

Dr. Purifoy referred Herron to Dr. Michael Pappas, an orthopedic surgeon. Dr. Pappas ordered a bone scan of Herron's lower back. The bone scan revealed "[m]ild arthritic changes in the extremities bilaterally. No spine pathology or significant asymmetry." Dr. Pappas diagnosed Herron as having lower lumbar sprain.

On February 21, 2001, Herron underwent a second MRI. Comparisons with her March 2000 MRI revealed no significant changes. Herron was evaluated by Dr. Barry Green on November 18, 2002. Dr. Green found that Herron had reached maximum-medical improvement (MMI) and assigned her a five percent impairment rating to the body as a whole. Medicalodges and Travelers accepted Dr. Green's impairment rating and paid Herron benefits.

Thereafter, Herron continued to receive treatment from numerous doctors and physical therapists. On October 25, 2003, Herron underwent a third MRI. This time the MRI revealed "[m]ild disc bulge and degenerative facet changes at the L3-4, L4-5, and L5-S1 levels. At L5-S1, this is slightly prominent and there is resultant bilateral lateral recess mild narrowing especially on the left side." Herron underwent a discogram on March 25, 2004. The discogram revealed the following: (1) an abnormality at L4-5 with focal annular tear; (2) disc degeneration at L6-S1; and (3) an annular tear in the right posterolateral annulus at L5-6.

After reviewing the results of Herron's October 2003 MRI and her March 2004 discogram, Dr. Eric Akin diagnosed Herron with lumbar strain. On May 12, 2004, he wrote that he did not recommend surgery and "[was] at a loss to make any further recommendations

for treatment.”

On June 11, 2004, Dr. Andrew Prychodko wrote the following, “After several specialist consultations we are resigned that the extent and location of the most severely involved disc leaves us no interventional treatment approaches for the discogenic pain, therefore placing her at MMI.” At that time, Dr. Prychodko assigned Herron an impairment rating of twenty percent to the body as a whole.

Herron subsequently sought additional benefits. She argued that: (1) Dr. Green’s assessment that she had reached MMI was premature and that she should be awarded additional temporary-total disability benefits from December 16, 2003, through May 12, 2004; (2) the medical treatment that she received from February 17, 2004, through June 11, 2004, was reasonably necessary; (3) she should be awarded a twenty percent anatomical impairment associated with her compensable injuries; (4) she was now totally and permanently disabled or in the alternative she should be awarded wage loss disability benefits in excess of the twenty percent whole person impairment. Medicalodges and Travelers controverted Herron’s claim.

Following a hearing on the matter, the administrative law judge (ALJ) entered an opinion on October 26, 2004, that found the following:

- (1) The medical treatment Herron received from February 17, 2004, through June 11, 2004, was reasonably necessary in connection with her compensable injury.
- (2) Herron was entitled to temporary-total disability benefits from December 16, 2003, until May 12, 2004.
- (3) Herron proved by a preponderance of the evidence that she sustained permanent impairment in the amount of 20% to the body as a whole.
- (4) Herron was entitled to permanent-partial-disability benefits in the amount of 20% to the body as a whole.
- (5) Herron failed to prove by a preponderance of the evidence that she was permanently totally disabled.

(6) Herron proved she had sustained wage loss of 50% over and above her permanent anatomical impairment of 20%.

The full Commission affirmed and adopted the ALJ's decision. From that decision, the parties now bring this appeal and cross-appeal.

When the Commission affirms and adopts the ALJ's opinion as the decision of the Commission, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *Fayetteville Sch. Dist. v. Kunzelman*, ___ Ark. App. ___, __ S.W.3d __ (Nov. 16, 2005). Therefore, in reviewing the case, we consider both the ALJ's decision and the Commission's majority opinion. *Id.*

In reviewing decisions from the Workers' Compensation Commission, the appellate court views 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*, __ Ark. App. __, __ S.W.3d __ (Jan. 26, 2005). Substantial evidence exists if reasonable minds could reach the same conclusion as the Commission. *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. *Logan County v. McDonald*, __ Ark. App. __, __ S.W.3d __ (Apr. 6, 2005).

On direct appeal, Medicalodges and Travelers first argue that the Commission erred when it found that Herron sustained a twenty-percent permanent impairment to the body as a whole. Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969); *Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole

whether his earning capacity is diminished or not. *Johnson, supra*. Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a) (Supp. 2005).

Medicalodges and Travelers specifically argue that the medical evidence does not support the twenty-percent impairment rating, that Dr. Prychodko's impairment rating was out of proportion to Herron's actual injury, and that the rating assigned by Dr. Green most closely matches Herron's injury.

In assessing Herron's entitlement to permanent disability, the Commission wrote the following:

The claimant has been assigned two competing impairment ratings. Both ratings were made in accordance with the Diagnosis-Related Estimates (DRE) Model of Chapter 3 of the AMA Guides. Dr. Green placed the claimant in DRE lumbosacral category II, which is equivalent to a 5% rating. Dr. Prychodko placed her in category IV, which is equivalent to a 20% rating.

The distinction in these two ratings is that Dr. Prychodko opined – based on the discogram performed on March 25, 2004 – that the claimant exhibited “multilevel spine segment structural compromise.” Under the AMA Guides, multilevel structural compromise is sufficient to place a patient in Category IV. AMA Guides § 3.3g, Table 70. Dr. Green's rating was made more than a year before the discogram. Dr. Green did not know, and had no way of knowing, of [what] the multilevel structural compromise revealed on the post-discogram CT. Because Dr. Green did not have access to the discography and its findings, [we] find that Dr. Green's opinion is entitled to less weight in this matter than that of Dr. Prychodko. Therefore, [we] find that the claimant has proven by a preponderance of the evidence that she has sustained permanent impairment in the amount of 20% to the body as a whole.

As noted above, the multilevel structural compromise noticed by Dr. Prychodko was observed on a post-discogram CT – obviously an objective and measurable test. [We] find that the claimant has proven by a preponderance of the evidence that the existence of her permanent impairment is supported by objective and measurable physical findings. There is no evidence in the record to show that this multilevel structural compromise pre-existed the compensable injury. ... Therefore, [we] find that the claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent impairment or disability.

It is the province of the Commission to weigh conflicting medical evidence. *Fayetteville Sch. Dist. v. Kunzelman, supra*.

Here, when we view the evidence in a light most favorable to the Commission's

findings, we cannot say that reasonable minds would not have reached the same conclusions as the Commission. Therefore, we affirm the Commission's finding that Herron sustained a twenty-percent permanent impairment to the body as a whole.

Medicalodges and Travelers's second argument and Herron's cross-appeal can be addressed together. Medicalodges and Travelers argue that the Commission erred when it found Herron sustained a wage loss of fifty percent over and above her permanent anatomical impairment to the body as a whole. They specifically argue that, when the wage-loss factors are applied to the facts of the case, the Commission's decision is not supported by substantial evidence. In her cross-appeal, Herron argues that the Commission erred when it failed to find her totally and permanently disabled.

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 totally and permanently disabled based upon wage-loss factors. *Logan County, supra*. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Mem'l Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Wage-loss disability is to be determined from a consideration of the medical evidence, together with the other elements such as the injured worker's age, education, experience, and other matters affecting wage loss, including the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In order to be entitled to any wage-loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 278 (1998).

At the time of the hearing before the ALJ, Herron was forty-nine years old. She

testified that she almost finished high school and that she never obtained her GED. She had previously worked as a seamstress, housekeeper, cashier, and quality assurance manager. Herron believed that she was unable to work. She also believed that she could not be retrained. She expressed a desire to return to work as a CNA. During her testimony, Herron stated that her pain had affected her quality of life, in that she was no longer able to perform housework. She said that her medication had failed to alleviate her pain and that her medication caused her to sleep.

Furthermore, Herron's functional capacity evaluation (FCE) indicated that she was unable to work. The following was noted in her FCE summary report:

Physical Effort Findings:

Overall test findings, in combination with clinical observations, suggest the presence of near full, though not entirely full, effort on Mrs. Herron's behalf. In describing sub-maximal effort, this evaluator is by no means implying intent. Rather, it is simply stated that Mrs. Herron can do more physically at times than was demonstrated during this testing day. Any final vocational or rehabilitation decisions for Mrs. Herron should be made with this in mind.

Reliability of Client Reports Findings:

Overall test findings, in combination with clinical observations, suggest some minor inconsistency to the reliability/accuracy of Mrs. Herron's subjective reports of pain/limitation. Overall inconsistencies were considered minor, with her subjective reports generally matching well with distraction-based clinical observations. In describing such findings, this evaluator is by no means implying intent. Rather, it is simply stated that Mrs. Herron can do more at times than she currently states or perceives. While her subjective reports should not be disregarded, they should be considered within the context of such RCR findings.

Summary of Findings:

Did the client give reliable and consistent effort?

What is the client's current lifting capacity?

The client gave a consistent effort during the testing. All effort was considered extremely low level from a functional standpoint. The client consistently needed manual assistance to help control balance while walking.

This matched my previous encounter with the client.

The client has no real lifting capacity to speak of. She is unable to adequately stabilize her lumbar spine to allow for lifting. She has good leg strength but cannot seem to keep her spine in a position that allows for the added stress of a lift.

In its opinion, the Commission found:

The claimant was 49 years old as of the hearing. She has worked for a number of years as a CNA; before that, she worked as a quality control supervisor, a seamstress, a furniture builder, a housekeeper, and a cashier. She completed only the eleventh grade and does not have her GED or high school diploma, though she does have nursing training from Texarkana College. She has not had surgery on her back; her disability appears to be due in part to her back pain, but also in part to the effect of the medications she is taking for that pain. [We] note that she has a previous impairment rating for a carpal tunnel injury, but there is no evidence this prior injury plays any role in her current disability. Finally, the claimant has applied for social security benefits, and she testified that she cannot go back to work. [We] find that the claimant is not motivated to return to work.

It appears undisputed from the medical evidence that the claimant is presently unable to work. Nonetheless, [we are] not convinced from the record that the claimant's present inability to earn meaningful wages is permanent. [We] find that the claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled.

Even so, it is clear from the record that her compensable injury has negatively affected her ability to work and earn wages. [We] find that the claimant has proven by a preponderance of the evidence that she has sustained wage loss of 50% over and above her permanent anatomical impairment of 20%.

The Commission properly considered Herron's age, education, and other experience.

When the evidence is viewed in a light most favorable to the Commission, reasonable minds could agree with the Commission's award of a wage-loss of fifty percent over and above Herron's twenty percent permanent impairment rating. Reasonable minds could also agree with the Commission's finding that Herron was not permanently disabled. When reasonable minds are confronted with all the evidence, including Herron's testimony and her FCE, we cannot say that they could not have concluded, as the Commission did, that Herron was not permanently disabled. Accordingly, we affirm the Commission's finding that Herron

sustained a wage loss of fifty percent over and above her permanent-anatomical-impairment to the body as a whole.

Affirmed on direct appeal; affirmed on cross-appeal.

BIRD and BAKER, JJ., agree.