DIVISION III

ROBERT J. GLADWIN, Judge
ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CA06-458

NOVEMBER 8, 2006

BILLY HENDRICKS

APPELLANT

V.

CROWN CONTRACTORS, LIBERTY MUTUAL INSURANCE COMPANY and DEATH & PERMANENT TOTAL DISABILITY

APPELLEES

APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION
[NO. D909205]

AFFIRMED

Appellant Billy Hendricks appeals the March 16, 2006, decision of the Arkansas Workers' Compensation Commission finding that appellant failed to establish that he is totally and permanently disabled or that he sustained a diminished earning capacity in excess of ten-percent. Appellant's sole point on appeal is that the Commission's decision is not supported by substantial evidence. We affirm.

Appellant sustained an injury while working on February 26, 1989, when he stepped on a piece of pipe that rolled and caused him to twist his back as he caught himself from falling. At that time, he was an electrical foreman for appellee Crown Contractors. After being injured he was treated by a number of doctors, including Dr. Richard Davis, and

eventually went back to work on light duty and then ultimately on full duty. He was only able to stay on full duty for a few months and then had to stop due to back and muscle spasms.

Subsequently, appellant was referred to Dr. Morrison Henry, a neurosurgeon, for an MRI and nerve conduction studies. The records presented at the hearing indicated that the first MRI showed minimal degenerative disc disease at L4-5 with no evidence of a disc herniation. Also, the EMG and nerve conduction studies of the lower extremities were normal at that time. Dr. Henry repeated nerve conduction studies and conducted an MRI scan in November 1989, but no new findings were noted. Dr. Henry then found appellant to have a ten-percent permanent impairment and recommended vocational rehabilitation. No physician who treated appellant since the 1989 injury recommended surgery. Appellant did not return to the work place, and sometime in 1990 he began receiving social security disability. He continues to receive social security disability and has continued his treatment with Dr. Davis since the injury. When appellees would no longer pay for his medication as prescribed by Dr. Davis, appellant filed his claim with the Arkansas Workers' Compensation Commission seeking to establish that he is totally and permanently disabled or that he sustained a diminished earning capacity in excess of his ten-percent permanent impairment.

The Arkansas Workers' Compensation Commission affirmed and adopted the decision of the administrative law judge finding that appellant failed to prove by a preponderance of the evidence that he is totally and permanently disabled, or that he has sustained a diminished

earning capacity in excess of his ten-percent permanent impairment. The Commission did find that appellant proved by a preponderance of the evidence that he is entitled to additional medical benefits in the form of continued treatment from Dr. Davis, Celebrex as prescribed, and attorney fees.

This court reviews a decision of the Workers' Compensation Commission to determine whether there is substantial evidence to support it. *Rice v. Georgia-Pac. Corp.*, 72 Ark. App. 149, 35 S.W.3d 328 (2000). Substantial evidence is that relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). We review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if its findings are supported by substantial evidence. *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). The issue is not whether we might have reached a different decision or whether the evidence would have supported a contrary finding; instead, we affirm if reasonable minds could have reached the conclusion rendered by the Commission. *Sharp County Sheriff's Dep't v. Ozark Acres Improvem't Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001). Where the Commission denies a claim because of the claimant's failure to meet her burden of proof, the substantial-evidence standard of review requires that we affirm if its decision displays a substantial basis for the denial of relief. *Rice, supra*.

Appellant claims he made a prima-facie case that he fit within the odd-lot doctrine and therefore should have been awarded benefits for being permanently and totally disabled. Even though the odd-lot doctrine was abolished by Act 796 of 1993, codified at Ark. Code Ann. § 11-9-522(e) (Supp. 1999), because appellant's injuries occurred prior to 1993, the doctrine remains applicable to this case. *See Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). The odd-lot doctrine provides benefits for an employee who is injured to the extent that the only services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist and he may be classified as totally disabled. *Patterson v. Ark. Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000). Appellant has the burden of making a prima-facie showing that he falls within the odd-lot doctrine based upon the factors of permanent impairment, age, mental capacity, education, and training. *Id*. Only after he makes this showing does the burden shift to the employer to show that some kind of suitable work is regularly and continuously available to him. *Id*. The court may also consider the appellant's motivation to return to work, because a lack of interest or a negative attitude impedes our assessment of the appellant's loss of earning capacity. *Ellison, supra*.

Appellant relies on the documentary evidence presented at the hearing in support of his claim. At the request of appellee Liberty Mutual Insurance Company, Professional Reviews, Inc., submitted a review of appellant's medical condition dated August 25, 2004. Appellant emphasizes the findings by quoting the following:

> Apparently this claimant stepped on a short piece of pipe as it rolled and he twisted his back. He apparently was placed MMI [maximum medical improvement] on 01/13/90. He has been treated for chronic left radicular pain, numbness and tingling and with medications. An MRI, as recently as 03/06/, revealed L4-L5 circumferential disc bulge and facet joint osteoarthritis, as well as L5-S1 with narrowing of the right intervertebral foramen.

Appellant further refers to Dr. Davis's statement in a letter dated September 8, 2004, that since appellant's back injury, appellant had chronic, persistent back pain with radiculopathy in each leg. He further stated that appellant had significant limitations due to pain that would not allow him to stoop, bend, or lift. The doctor recommended that appellant continue taking anti-inflammatory medication because without it, his back pain keeps him from functioning.

Finally, appellant emphasizes statements made by Dr. Barry Baskin, who was hired to do an independent medical evaluation for purposes of this case. Dr. Baskin did not have x-rays, the MRI scans, or CTS to review when making his evaluation. Dr. Baskin said, "I think that the chances of him going back to work are very slim at this point in time." The doctor considered that appellant quit school in the twelfth grade and had worked as an electrician, a carpenter, and a plumber, but had not worked since he began receiving social-security benefits in 1990. Dr. Baskin stated that appellant did not have any marketable skills to fall back on other than manual labor activities.

Appellant argues that his advanced age and lack of education and training place him squarely under the odd-lot doctrine. He cites *Patterson, supra*, for the holding that a claimant is not required to show that he can do no work. The fact that a claimant can work

some does not preclude him from being considered totally disabled if his overall job prospects are negligible. *Id.* Appellant claims that the burden shifted to the employer to show evidence that suitable work was regularly and continuously available to the appellant. *Id*. He argues that because appellees failed to provide evidence of suitable work available to him, the Commission erred in denying his claim.

Appellees claim the appellant did not make a prima-facie showing under the odd-lot doctrine. At the time appellant was released to return to work, he was forty-two years of age. He had an eleventh-grade education but did obtain his electrician's license and was actually a foreman supervising other electricians. The medical evidence showed that he had some minimal degenerative changes on his MRI, he had a normal EMG/NCV study, and he had absolutely no surgery and no expectation of ever having surgery. It was Dr. Baskin's opinion that appellant was not disabled and that he could perform some employment activity. Appellant stated that he was capable of mowing and maintaining the acreage where he lived, that he drove his automobile, and that he participated in deer hunting. However, appellant claimed that these activities took extra time because of the many breaks required for his back. Based upon the factors of permanent impairment, age, mental capacity, education, and training, this court agrees that appellant did not make a prima-facie showing that he falls within the category of an employee who is injured to the extent that the only services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, and he may be classified as totally disabled.

Alternatively, appellant argues that the evidence introduced proved that his ability to earn a living is severely limited, that he has suffered a wage loss, and that therefore, he is entitled to an award of wage-loss disability far in excess of his ten-percent permanent impairment rating. He claims that he did not refuse rehabilitation, but that the appellees did not suggest any specific program. He cites *Oller v. Champion Parts Rebuilders*, *Inc.*, 5 Ark. App. 307, 635 SW.2d 276 (1982), where this court stated that the claimant's refusal to participate in rehabilitation cannot be treated as a bar to an assessment of wage-earning loss.

Appellees argue that wage-loss determinations are made by the Commission on the basis of factors much like those considered in the odd-lot doctrine. The Commission considers medical evidence, age, education and experience of the worker, and other matters reasonably expected to affect the worker's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978). Appellees claim that the reasoning in *Rooney* and other cases decided before Act 796 passed in 1993 is applicable herein because the injury occurred in 1989. Again, appellees emphasize that appellant was only forty-two years of age at the time he was released to return to work and that he had an eleventh-grade education, but had obtained his electrician's license and was actually a foreman supervising other electricians at the time of the injury. Appellant had a lot of work experience as an electrician in factories, construction, and in performing repair work.

Also, appellees argue that under *Ellison*, *supra*, a lack of motivation and a lack of interest in returning to work impedes the assessment of a claimant's loss of earning capacity. Here, appellant has shown a lack of motivation in that he has not returned to work since shortly after his injury, and he has remained on social-security disability since 1990. He testified that he saw no need to get a GED because he did not feel he would be able to return to work. He reached maximum medical improvement at age forty-two, and at the time of the hearing, he was fifty-seven years of age. Accordingly, we find that appellant is not entitled to a wage-loss disability in excess of ten-percent. Therefore, reviewing the evidence in the light most favorable to the Commission's findings, this court affirms the Commission's decision.

Affirmed.

BIRD and ROAF, JJ., agree.