ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION II

CA07-1248

June 4, 2008

PILGRIM'S PRIDE CORP. and
GALLAGHER BASSETT SERVICES, INC.
APPELLANTS

AN APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
[F410668]

V.

JIMMY PERREN
APPELLEE

AFFIRMED

On September 27, 2007, the Workers' Compensation Commission affirmed and adopted the decision of an administrative law judge (ALJ), who found that appellee Jimmy Perren was entitled to 40% wage-loss disability in addition to his 10% permanent-impairment rating. Appellants Pilgrim's Pride Corporation and Gallagher Bassett Services challenge the sufficiency of the evidence to support the decision.[1] They assert that appellee was not entitled to wage-loss disability or, alternatively, that he was entitled to less than 40% disability. We hold that the Commission's decision is supported by substantial evidence, despite proof that appellee declined employment as a truck driver, in light of evidence that he had performed manual labor throughout his life and that his injury left him unable to use his right arm without difficulty. Accordingly, we affirm.

At the time of the hearing, appellee was sixty-one years old. He went to school for ten

[1]The Death and Permanent Total Disability Trust Fund is also a party to this appeal, but it has opted not to file a brief.

years, but never obtained his GED. After finishing school, appellee did carpentry work and worked on a farm. He then moved to Illinois and worked for BorgWarner building clutches and power takeoffs in a factory. He was in the Navy from 1965 to 1968. While there, he went to diesel school and equipment operator school. He returned to BorgWarner after leaving the military. He also went to welding school around 1975 or 1976 and became a certified welder. In 1979, appellee began working for the Clay County Road Department. He was promoted to foreman in 1990. While working as a foreman, he supervised a crew of thirty-six workers. His work included taking care of equipment, managing work schedules, taking care of payroll, and managing his crew. He remained with the road department until 1991, when he left to work for Pilgrim's Pride (originally ConAgra).

When appellee began working for Pilgrim's Pride, he worked at the truck shop and the feed mill. Both jobs required manual labor, and when working as a mechanic, his job involved lifting and pulling. A year prior to suffering the compensable injury that was the subject of this case, appellee suffered another workplace injury when he fell eight to nine feet and landed on his shoulder. He was told by his doctor that he "had a real bad bruise," but he missed no time from work.

The compensable injury at the center of this case occurred on October 3, 2003. Appellee had finished working on fuel pumps and reported completion of the job to his supervisor. His supervisor then instructed him "to catch the truck that was coming in about to get on the scales." As appellee was jogging to the truck, he stepped on a rock and turned his ankle. He spun around and hit the side of the running board with his shoulder. When he stood up, he could not move his shoulder. Appellee reported the injury to his supervisor, who sent him to the company nurse. The company nurse referred appellee to the company doctor, Dr. Ron Bates. Dr. Bates diagnosed appellee with right shoulder strain. A subsequent MRI revealed a torn rotator cuff. After treatment, appellee rested at home for a week, then

returned to work. Appellee reported that he had trouble doing his work and had to work solely with his left hand. Dr. Jeffery Angel performed surgery to repair the rotator cuff on November 24, 2003. Appellee still had stiffness in his shoulder, and he underwent another procedure on March 2, 2004.

Appellee reached maximum medical improvement on June 21, 2004. Dr. Angel noted that appellee was using his shoulder but, "[Appellee] still lacks flexion above 90 degrees. Abduction above 80 degrees. He is neurovascularly intact. He does not have much pain. There is some pop at the very top. Once activated, he can keep it up there." Dr. Angel assessed a 10% permanent impairment rating and gave appellee a permanent work restriction, forbidding overhead lifting. He returned to work, but he was laid off four days later due to downsizing. Appellee testified, however, that he would have been unable to do the work had the position still been available. He described the work as requiring him to pull wrenches, replace augers and bearings, and climb degrees. He stated that he could not do this with one hand. Richard McDougald, manager at Pilgrim's Pride, noted that appellee was a "good worker" and that he hated to see appellee go. However, the company planned to eliminate the job prior to appellee's accident.

Because Pilgrim's Pride wanted to keep appellee and because he had a valid Commercial Driver's License, Pilgrim's Pride offered him a job driving a feed truck. Appellee testified that he was familiar with the job,[2] but that he could not have performed it because he would have to drive the truck one-handed. He stated that he would have been unable to shift the truck with his right hand and that it would have been dangerous to try to drive the

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[2]Appellee described the physical labor involved with driving the truck:

> The augers and everything on the trucks are hydraulic, and the boom can raise up to swing left and right with a switch. To get the augers and everything going, there are levers you have to pull. There are bins that have to be opened, and you have to use a ratchet and a socket, and some of them require reaching pretty high to crank open. It is physical work.

truck solely with his left hand. He would have also had to open bins with his left hand, and he stated that he would have been unable to do so. McDougald opined that the job fit within appellee's restrictions and stated that the hydraulics on the truck could have been operated with one hand. However, McDougald agreed that it would be unsafe for appellee to try to shift with his left hand while driving with his left hand.

After leaving Pilgrim's Pride, appellee applied for and received unemployment benefits. During that time, he looked for employment that did not require strenuous use of his right hand. One of the jobs he looked at was with Sunrise Honda delivering motorcycles. Appellee had also applied for and received social-security-disability benefits, but he stated that he is still looking for employment. Appellee testified that if he uses his shoulder a lot, he will "pay for it" the next day. He stated that he was able to use a riding mower and that he could use a weed eater if he holds it with his left hand. He also stated that he had two horses, but he has not ridden them since his accident. Appellee's wife also testified that appellee enjoys riding motorcycles; however, he has to use cruise control if he rides long distances.

The ALJ found that appellee did not prove entitlement to permanent and total disability, as appellee represented that he was able and available to work and because appellee could do at least sedentary work. However, the ALJ found that appellee was entitled to 40% wage-loss disability, relying upon appellee's permanent impairment, Dr. Angel's opinion that appellee would not be able to return to doing manual labor, and appellee's qualification for social-security-disability benefits. The ALJ observed that appellee was motivated to seek further employment and had a positive attitude in looking for work. He also found that the truck-driving job was not a bona fide offer of employment given appellee's inability to do the job. The Commission affirmed and adopted the opinion of the ALJ.

Appellants challenge the award of wage-loss disability. They contend that appellee was entitled to no wage-loss disability or, alternatively, that he was only entitled to a minimal

amount of wage-loss disability. When reviewing decisions from the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). 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, this court must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Normally, this court only reviews the findings of the Commission and not those of the ALJ. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). However, when the Commission adopts the conclusions of the ALJ, as it is authorized to do, this court considers both the decision of the Commission and the decision of the ALJ. *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

Pursuant to Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002), 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. *McDonald*, *supra*. 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). In considering factors that may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes an assessment of the claimant's loss of earning capacity. *SSI, Inc. v. Lohman*, 98 Ark. App. 294,

___ S.W.3d ____ (2007).

First, appellants contend that appellee was not entitled to wage-loss disability because he is fully capable of working. They assert that appellee failed to prove that he was entitled to wage-loss disability in light of the fact that he declined employment within his capacity and did so after Dr. Angel allowed him to return to work.

Appellants appear to argue that a claimant must be completely incapable of working before being entitled to wage-loss disability. This is simply not the law. If appellee were completely incapable of working, then he would have been permanently and totally disabled. *See McDonald*, *supra* (noting that the Commission is authorized to find a claimant permanently and totally disability based on wage-loss factors). Appellee actually made a claim for permanent and total disability, and this claim was rejected by the Commission. Wage loss is awarded to the extent that a claimant has loss the ability to earn wages. *Id.* And when considering the aforementioned wage-loss factors, appellee's ability to earn wages has certainly diminished. Appellee worked as a laborer for most of his life. He only has a tenth-grade education and does not have his GED. He is prohibited from doing any overhead lifting. When moving his right shoulder, he experiences pain.

As for appellants' argument that appellee rejected suitable employment, we are mindful that, if a claimant rejects a bona fide and reasonably obtainable offer of employment at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent-partial disability in excess of his permanent-impairment rating. *See* Ark. Code Ann. § 11-9-522(b)(2) (Repl. 2002). However, substantial evidence supports a finding that the truck-driving job was outside appellee's abilities. True, he never attempted to do the job, but he did not believe that he could safely drive the truck using only his left arm. McDougald agreed that it would be unsafe for appellee to drive the truck and operate the gear shift with only his left hand.

Appellants also call into question appellee's motivation to work, observing that appellee was collecting unemployment and social-security-disability benefits. They argue that, for the Commission to find that appellee was entitled to wage-loss disability, it would have to rely on his "self-serving testimony and convenient belief . . . that he is not physically capable of working for Employer as either a mechanic or a truck driver." But once the Commission finds a claimant credible, this court is bound by that determination. *See Lohman*, *supra*. Here, it found appellee's testimony credible regarding his motivation to work.[3] His testimony, along with other evidence, shows that appellee looked for employment after being laid off from his job, that he had an extensive history as a manual laborer prior to his workplace accident, that he continued to work as best he could after the accident until his position was eliminated, and that appellee was a "good worker." This evidence supports a finding that he was motivated to work.

Finally, appellants argue that if appellee was entitled to wage loss, it should be reduced to a minimal amount. They cite three opinions from the Commission where it awarded less than 40% wage-loss disability to claimants sixty years of age. In response appellee cites four *unpublished* opinions where this court has awarded either 35% or 40% wage-loss disability to certain claimants.[4] As previously stated, our standard of review requires us to affirm if reasonable men could reach the decision made by the Commission. *See Baker*, *supra*. The non-binding authority cited by the parties illustrate that the determination of wage-loss disability is fact intensive. There is no formula for determining wage-loss disability; rather, the Commission is allowed to use its own superior knowledge of industrial demands, limitations,

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[3]Even the dissenting Commissioner found appellee's testimony credible. *See* Appellants' Brief at Add. 20, Commission's Op. at 15 (Commissioner McKinney dissenting).

[4]We will save full commentary on parties citing unpublished opinions for another day. For now, the following citations should suffice. *See* Ark. Sup. Ct. R. 5-2(d) (prohibiting citation to unpublished opinions); *Family Dollar Stores, Inc. v. Edwards*, 97 Ark. App. 156, 245 S.W.3d 181 (2006) (observing that the Commission's opinions are not precedent to this court).

and requirements in conjunction with the evidence to determine wage-loss disability. *See Henson v. General Elec.*, 99 Ark. App. 129, ___ S.W.3d ___ (2007). Though other reasonable persons may not have awarded 40% wage loss, the factors previously mentioned (appellee's age, education, work history and motivation to work) support the Commission's award.

The Commission's decision to award appellee 40% wage-loss disability is supported by substantial evidence. Accordingly, we affirm.

GLOVER and HEFFLEY, JJ., agree.