

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, JUDGE

DIVISION IV

CA07-1260

MAY 14, 2008

HIGHLINES CONSTRUCTION
COMPANY, INCORPORATED and
CRAWFORD & COMPANY
APPELLANTS

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION,
[NO. F608595]

V.

BRADLEY TEAGUE

APPELLEE

AFFIRMED

Highlines Construction Company appeals an order of the Workers' Compensation Commission on September 27, 2007, in favor of appellee Bradley Teague, a former lineman for the company. Highlines contends that substantial evidence does not support the Commission's finding that Teague is entitled to a forty-percent wage-loss benefit. We hold that substantial evidence supports the finding, and we affirm the decision of the Commission.

Highlines argues that Teague's award of wage-loss benefits is not harmonious with Ark. Code Ann. § 11-9-522(b)(1) and that he is not eligible for such benefits under subsection (b)(2). Those subsections read as follows:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's

age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

(2) However, 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.

Ark. Code Ann. § 11-9-522 (Repl. 2005). Motivation, post-injury income, credibility, demeanor, and a multitude of other factors are other matters to be considered in claims for wage-loss-disability benefits in excess of permanent-physical impairment. *Henson v. General Elec.*, 99 Ark. App. 129, __ S.W.3d __ (2008); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Highlines did not dispute that Teague suffered a compensable injury to his left shoulder in August 2005 while working in Louisiana after Hurricane Katrina. He reached for his handline, was jerked, and hit his chin on the pole. The subsequent medical treatment he received for problems with his shoulder, arm, and neck included two cervical surgeries by Dr. James Adametz. Dr. Adametz released Teague to restricted light-duty work on October 18, 2006, finding that he had reached maximum medical improvement and assessing a ten-percent partial impairment to the body as a whole. Dr. Adametz's report of October 18 noted that Teague continued to complain of neck pain, shoulder pain, and numbness of the thumb, index finger, and middle finger.

Highlines accepted the whole-body impairment rating but controverted the issues of unpaid medical bills and wage-loss benefits. The administrative law judge conducted a

hearing and determined that Teague had presented credible testimony of his injury, recovery, restrictions, and efforts to move back into the workforce. The law judge concluded that Teague had proven that medical treatment was reasonable and necessary and related to his compensable injury, that Highlines was responsible for unpaid medical bills, and that Teague had sustained a forty-percent loss of wage-earning capacity in excess of his impairment rating.

The law judge's opinion, subsequently affirmed and adopted by the Commission, included the following findings:

The claimant has a high school education and work experience with Color Tile for five years along with experience as a machine operator and forklift operator and maintenance man on a hog farm and power line experience. The claimant was a journeyman lineman for eight or nine years making around \$40,000 per year. According to the claimant, once he received his release from the doctor and his restrictions, he contacted his employer and was never given a return call after many attempts to contact the employer. The claimant identified his restrictions as not being able to work more than 8 hours; cannot sit more than 8 hours; cannot lift more than 15 pounds; and cannot climb. The claimant underwent two surgeries and was assigned a 10% permanent impairment rating. Dr. Adametz opined on October 18, 2006, that the claimant could not return to his regular job but could do light-duty work.

The claimant is working for White River Trailer now as a welder and is unable to lift heavy pieces. The claimant works 36 to 40 hours per week, making \$7.78 per hour. The claimant has applied at other businesses such as Bad Boy Lawn Mowers, Unima and a business in Ash Flat, along with the respondent employer. . . .

The claimant has undergone two surgeries in an effort to relieve his pain and help get him back into the workforce. The limitations placed on the claimant now preclude him from returning to the strenuous lineman work he previously performed and because he is under stringent restrictions, his ability to earn the high wages has been compromised. The claimant has demonstrated his motivation to return to work by actively pursuing employment and ultimately working as a welder with restrictions. The claimant now makes around \$16,000 per year while he previously made in excess of \$40,000. The respondent employer was unable to return the claimant to work because of his work restrictions. . . . The claimant is working as a welder and he noted that

this can be difficult work and can require lifting in excess of his restrictions; however, the pay is substantially less than a journeyman lineman's pay.

Highlines asserts on appeal that the factors of Ark. Code Ann. § 11-9-522(b)(1) do not warrant Teague's wage-loss benefit because of his age (thirty-seven), high-school education, "vast" employment history, and refusal to seek work away from his hometown of Melbourne, Arkansas. The arguments that Highlines presents turn largely on the weight and credibility of evidence, which were matters within the province of the Commission rather than this court. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). As authority for its argument that Teague should have looked for work away from his hometown, Highlines cites our unpublished opinion *Second Injury Fund v. Hogan*, CA00-610 (Feb. 14, 2001). We remind counsel that, subject to exceptions not applicable here, unpublished opinions "shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court." Ark. Sup. Ct. R. 5-2(d).

Highlines's second argument concerns Ark. Code Ann. § 11-9-522(b)(2) and Teague's ability to earn wages equal to or greater than his average weekly wage. Highlines disputes the testimony of Teague and his ex-wife regarding the amount of salary he was earning before his compensable injury. Again, we will not disturb a finding based upon the credibility of the witnesses. Finally, Highlines asks this court to take judicial notice of Commission Advisory 2000-1 *Update* in order to determine that the parties' stipulation of temporary total disability rate translates to a lower salary than the Commission determined. Highlines presents no authority for this request, and we will not act upon it.

We hold that substantial evidence supports the Commission's finding that Teague is entitled to a forty-percent wage-loss benefit. Therefore, we affirm the decision of the Commission.

Affirmed.

PITTMAN, C.J., and VAUGHT, J., agree.