

ARKANSAS COURT OF APPEALSDIVISION IV
No. CA12-1001GRAVETTE SCHOOL DISTRICT and
THE ARKANSAS SCHOOL BOARDS
ASSOCIATION WORKERS' COMP.
TRUST

APPELLANTS

V.

RICK HARMON

APPELLEE

Opinion Delivered April 24, 2013

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F612023]AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL**BILL H. WALMSLEY, Judge**

Appellants, Gravette School District and the Arkansas School Boards Association Workers' Compensation Trust, appeal from the Workers' Compensation Commission's order finding that appellee Rick Harmon had sustained wage-loss disability in the amount of twenty-two percent. Appellants argue that the Commission used an improper standard and that the award is not supported by substantial evidence. Appellee argues on cross-appeal that he is entitled to additional wage-loss disability. We affirm on direct appeal and cross-appeal.

Appellee sustained an admittedly compensable back injury on October 18, 2006, while working for the Gravette School District. Appellants accepted liability for permanent partial impairment of eleven percent to the body as a whole. A hearing was held on February 6, 2012, to determine the extent of wage-loss disability.

When he was injured, appellee was working as a teacher and as the director of the Alternative Learning Environment in Gravette. Following his injury, appellee underwent

nonsurgical treatment and continued to work. For the 2010–2011 school year, appellee was moved to the middle school to be an academic at-risk coach. Appellee said that his condition deteriorated to the point that he could not effectively perform his job, so he had surgery in January 2011. He said that the surgery improved his condition.

Appellee returned to work as an academic coach in October 2011. His job involved both walking around a classroom to monitor students and sitting down to work with smaller groups of students. He testified that he only worked for about three-and-a-half hours every day before the pain became too bad and he went home. Appellee said that the pain normally caused him to take one day off per week. He was paid on an hourly basis and said that he only earned about \$6000 after returning to work in October. In December 2011, the funding for appellee’s position ran out and his employment ended. He said that if his position was still funded, he would still be trying to work three to four hours a day.

Appellee said that he was not teaching at the time of the hearing because he could not work a full day. He had worked as a school teacher for twenty-five years and had been an assistant principal and an administrator. He had also worked in the mortgage brokerage business for two years as a loan originator. Appellee had a master’s degree and at the time of the hearing was 59 years old. He said that he had contacted the Bentonville and Springdale school districts, but they did not have any openings at the time, which he considered normal. Friends had informed him of two teaching job openings, but appellee said that the positions required full-time work. He had not applied for any administrator positions.

Appellee said that a typical day for him included walking, reading, and working on a

book he was writing. He said that he would write for three to four hours. He said that he could only sit for about twenty minutes without needing to get up, but if his feet were up he could sit for about forty minutes. Appellee said that he could stand for about fifteen minutes without needing to sit. He said that for him to work he would need a lot of freedom to take care of the pain when it became too bad. He said that the functional capacity evaluation (FCE) caused him increased pain, and he was unable to function very well for the next three or four days. On October 20, 2011, Dr. Blankenship noted that appellee's FCE indicated that he could work at the light-demand classification. Dr. Blankenship placed a permanent weight-lifting restriction on him of twenty pounds, said that he should not sit or stand for prolonged periods of time, and said that he should not twist or bend at the waist.

The administrative law judge (ALJ) entered an opinion on April 30, 2012. Noting the conclusions in the FCE, the restrictions imposed by Dr. Blankenship, and appellee's testimony, the ALJ found that appellee was unable to sustain the hours and daily work required for teaching or the job of a school administrator. The ALJ also considered appellee's work history, education, experience, and age in concluding that his employment opportunities had been substantially reduced by the physical limitations caused by his compensable injury. She awarded wage loss of eleven percent. Both parties appealed to the Commission, which affirmed and adopted the ALJ's decision but modified the wage-loss award to twenty-two percent upon finding that the ALJ's analysis was more consistent with this award. Appellants filed a notice of appeal, and appellee filed a notice of cross-appeal.

In reviewing a decision from the Arkansas Workers' Compensation Commission, we

view the evidence and all reasonable inferences in the light most favorable to the Commission's findings. *Sw. Energy Co. v. Ezell*, 2011 Ark. App. 782. We affirm those findings if they are supported by substantial evidence, which is relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* We will not reverse the decision of the Commission unless we are convinced that fair-minded persons considering the same facts could not have reached the same conclusions. *Id.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; rather, it is whether there is substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had been sitting as the trier of fact. *Id.* It is the function of the Commission, not this court, to determine the credibility of witnesses and the weight to be given to the evidence. *Id.* Because the Commission affirmed and adopted the ALJ's opinion as its own, we consider both the ALJ's order and the Commission's majority order in our review. *Smith v. Commercial Metals Co.*, 2011 Ark. App. 218, 382 S.W.3d 764.

The established standard for wage-loss disability is as follows:

When a claimant has been assigned an anatomical-impairment rating to the body as a whole, the Commission may increase the disability rating and find a claimant permanently disabled based on the wage-loss factor. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. When determining wage-loss disability, the Commission should consider, in addition to medical evidence, the appellant's age, education, experience, and other factors affecting wage loss. Other factors may include—but are not limited to—motivation to return to work, post-injury earnings, credibility, and demeanor. A lack of interest in pursuing employment impedes the assessment of the claimant's loss of earning capacity, although it is not a complete bar. The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability.

Sw. Energy Co. v. Ezell, 2011 Ark. App. 782, at 3–4 (internal citations omitted).

Appellants argue that the ALJ and the Commission erroneously awarded wage-loss benefits based on the determination that there was a reduced pool of available jobs for appellee. Appellants claim that it was error to analyze only the immediate availability of similar jobs because appellee's education and experience in the education field provided him with numerous skills that were transferable to employment opportunities within his physical restrictions. They claim that the Commission's analysis was erroneously based on the fact that appellee testified that he had not found, within the month that he was laid off, another teaching job that would allow him to work part-time. We disagree. The ALJ's opinion specifically references consideration of appellee's age, education, experience, and motivation to return to work. Combined with an inability to perform certain physical functions, these factors can reduce the available job market and, thus, affect a claimant's ability to earn a livelihood. The proper standard was used.

Appellants also argue that appellee is not entitled to wage-loss benefits because his unemployment was caused solely by a lack of funds for his position, not his compensable injury. If a claimant returns to work at wages equal to or greater than his average weekly wage at the time of the injury, he is not entitled to permanent-partial disability benefits in excess of his anatomical-impairment rating. *Sw. Energy Co.*, *supra* (citing Ark. Code Ann. § 11-9-522(b)(2) (Repl. 2002)). Although appellee's complete lack of employment was caused by economic factors, prior to his unemployment he was unable to earn the same wages he was receiving at the time of his injury. Thus, his compensable injury had affected his ability to

earn a livelihood.

In arguing that there was not substantial evidence to support the Commission's award of wage-loss benefits, appellants claim that there are a sufficient number of jobs in the education field within appellee's light-duty restrictions and that he has numerous transferable skills that would enable him to find suitable employment in other fields. Despite the fact that neither the FCE nor Dr. Blankenship required appellee to work only half days, the ALJ found that appellee credibly testified that he was unable to perform his light-duty job on a full-time basis. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted, and when it does so, its findings have the force and effect of a jury verdict. *Id.*

Appellants also claim that appellee demonstrated a lack of motivation to find new employment. They argue that appellee did not indicate that he had asked about any accommodations he could have received for the two positions that his friends had told him about. Appellee's motivation, however, was a matter of credibility, and the ALJ found that he was motivated to return to work.

Regarding other jobs, the ALJ referenced "office type work" and working from home, but she noted that it was unlikely that the pay would be comparable to appellee's pre-injury salary. Appellee cites evidence of his post-injury earnings in arguing that he was entitled to

at least fifty-percent wage-loss disability. We do not find that greater wage loss was warranted because, although appellee's earnings were reduced significantly when he returned to his job after surgery, a more sedentary job would likely have allowed him to work more hours.

Although we might have reached a different conclusion if we had been sitting as the trier of fact, we cannot say that reasonable, fair-minded persons could not have reached the conclusion arrived at by the Commission. Thus, we affirm the award of twenty-two-percent wage-loss disability.

Affirmed on direct appeal; affirmed on cross-appeal.

GLOVER and WHITEAKER, JJ., agree.

Bassett Law Firm LLP, by: *Curtis L. Nebben*, for appellants.

Walker, Shock & Harp, PLLC, by: *Eddie H. Walker, Jr.*, for appellee.