

**ARKANSAS COURT OF APPEALS**

DIVISION II

No. CA12-220

MILDRED DRAKE

APPELLANT

V.

SHERIDAN SCHOOL DISTRICT, RISK  
MANAGEMENT, and DEATH &  
PERMANENT TOTAL DISABILITY  
TRUST FUND

APPELLEES

Opinion Delivered February 27, 2013

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F805842]

AFFIRMED

**WAYMOND M. BROWN, Judge**

Appellant Mildred Drake appeals from the Arkansas Workers' Compensation Commission's decision denying her permanent-anatomical-impairment benefits and wage-loss disability. Drake argues on appeal that the Commission's decision is not supported by the evidence and is contrary to the law and facts of this case. We find no error and affirm.<sup>1</sup>

Drake worked for appellee Sheridan School District as a cafeteria worker for over ten years. During the summer break, she would work on the floor crew waxing, cleaning, and stripping the floors of the schools in the district. On June 11, 2008, she slipped and fell on her back while cleaning floors. She was initially seen by Dr. Winston, who performed x-rays and prescribed her pain medication.

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<sup>1</sup>This is the second time this case is before us. We originally ordered rebriefing due to deficiencies. *Drake v. Sheridan Sch. Dist.*, 2012 Ark. App. 531.

She was then seen by Dr. William Blankenship. Dr. Blankenship performed diagnostic tests on Drake and ultimately diagnosed her with a sacral insufficiency fracture. A July 8, 2008 MRI of Drake's sacrum indicated that her sacroiliac joints were symmetric and unremarkable. She was given a lumbosacral brace. An August 1, 2008 MRI of Drake's lumbar spine showed a minimal annular bulge at the L4-5 level with patent canal and foramen; however, there was no focal finding to account for Drake's symptomatology. Dr. Blankenship ordered a nerve-conduction study on Drake's lumbar spine, which came back normal. He released Drake to return to work with lifting restrictions on August 28, 2008. An MRI performed on October 17, 2008, showed that Drake's sacral fracture had healed. In a letter dated November 3, 2008, Dr. Blankenship stated that he was at a loss to explain Drake's persistent complaints of pain. He referred Drake to Dr. Earl Peeples.

Drake was seen by Dr. Peeples on November 20, 2008. Dr. Peeples prescribed Drake a TNS unit and released her to return to work with restrictions. He noted that Drake should probably be considered for MMPI testing if she failed to resolve her pain issues. On December 10, 2008, Dr. Peeples opined that Drake should continue to work under restrictions.<sup>2</sup> He also recommended that Drake have psychological testing performed.

Drake requested a change of physicians to Dr. Harold Chakales. She was first seen by Dr. Chakales on January 5, 2009. Dr. Chakales ordered a repeat MRI of Drake's lumbar spine. In a letter dated February 16, 2009, Dr. Chakales stated that there was no evidence of

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<sup>2</sup>Drake had returned to work some time in November 2008, performing clerical work whereby she would take money from the students and work on student accounts in the cafeteria.

recurrent sacral insufficiency fracture and that, although the MRI of Drake's lumbar spine showed degenerative changes, there was no evidence of significant findings. Drake was taken off work by Dr. Chakales in May 2009. He treated Drake with epidural injections, but he ordered a discogram and CT scan on August 10, 2009, after the injections were not helpful. The discogram revealed pathology at L4-5, which Dr. Chakales described as "grossly abnormal." He opined that Drake was a potential surgical candidate and continued to recommend surgery in subsequent visits. Dr. Chakales declared Drake to be at maximum medical improvement on December 2, 2010. He later opined that Drake was permanently impaired, and on March 8, 2011, Dr. Chakales gave Drake a permanent anatomical rating of ten percent to the body as a whole.

Drake was seen by Dr. Michael Calhoun on March 31, 2010, for an independent medical exam. Dr. Calhoun opined that Drake was not a surgical candidate for her degenerative problems because they were minor, and her complaints of pain seemed to outweigh the objective medical findings. According to Dr. Calhoun, since Drake did not have disc herniation or spondylolisthesis, she did not have a permanent impairment. He recommended that Drake consult with a pain-management specialist. On April 4, 2010, Dr. Calhoun released Drake to return to work without any restrictions. Dr. Calhoun was later questioned about Dr. Chakales's assignment of a ten-percent impairment rating to Drake. Dr. Calhoun stated that he did not know how Dr. Chakales had come up with that rating.

Drake underwent a functional-capacity evaluation on May 13, 2010. The results were unreliable, but Drake still demonstrated the ability to work in at least a sedentary classification of work.

Drake sought permanent-total-disability benefits, or alternatively, wage-loss benefits, for her compensable injury. The administrative law judge (ALJ) issued an opinion on October 18, 2011, finding that Drake was entitled to an eight-percent impairment rating to the body as a whole, and that she was entitled to twenty-five percent wage loss. Both parties appealed this decision to the Commission. The Commission reversed the ALJ in an opinion filed on February 13, 2012. According to the Commission, Drake failed to prove that she was entitled to any permanent anatomical impairment. The Commission stated in pertinent part:

The Administrative Law Judge awarded the claimant an 8% rating, with 3% for the pelvis and 5% for the lumbar spine. This rating is not valid pursuant to the *Guides*. The 3% rating found at Page 85, Table 64 is for either, “sacroiliac joint fracture or ischial bursitis.” The claimant has not been assessed with either of those. The claimant has a healed sacral fracture. It is clear from the multiple MRIs and bone scans that the claimant has had, the fractures were healed. The claimant also testified that the doctors told her the fractures were healed. The Administrative Law Judge also gave a 5% rating for a degenerative finding. Dr. Calhoun looked at the same table and found that no permanency would apply. It is of note that Dr. Chakales, the claimant’s treating physician, at one time opined that the claimant’s lumbar MRI showed no significant findings. However, he gave the claimant a 10% anatomical impairment rating. Therefore, after considering the *Guides*, the opinion of Dr. Calhoun and the opinion of Dr. Chakales, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any permanent anatomical impairment.

The Commission also reversed the ALJ’s award of twenty-five percent wage-loss disability to Drake, due to Drake’s failure to prove her entitlement to any permanent anatomical impairment. The Commission further stated that appellee Sheridan School District was ready,

willing, and able to provide a job for Drake, but that Drake did not want to return to work. This timely appeal followed.

In appeals involving claims for workers' compensation, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence.<sup>3</sup> Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>4</sup> The issue is not whether we might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision.<sup>5</sup> 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.<sup>6</sup>

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission.<sup>7</sup> When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts.<sup>8</sup> The Commission is not required to believe the

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<sup>3</sup>See *Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, 366 Ark. 297, 235 S.W.3d 499 (2006).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

<sup>7</sup>*Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000).

<sup>8</sup>*Id.*

testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief.<sup>9</sup> The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict.<sup>10</sup> Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony.<sup>11</sup> While the Commission may be insulated to a certain degree, it is not so insulated to render appellate review meaningless.<sup>12</sup> Likewise, the Commission may not arbitrarily disregard evidence in support of a claim.<sup>13</sup>

Here, the Commission was faced with conflicting opinions from two doctors concerning Drake's level of impairment. Dr. Chakales opined that Drake suffered a ten-percent impairment to the body as a whole while Dr. Calhoun found no percentage of impairment. In the end, the Commission chose to accept Dr. Calhoun's opinion of no permanent anatomical impairment. Additionally, the Commission found that the sacral injury Drake suffered was not the type of injury covered by the *Guides*. Substantial evidence supports the Commission's denial of permanent anatomical-impairment benefits. Accordingly, we affirm.

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<sup>9</sup>*Id.*

<sup>10</sup>*Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

<sup>11</sup>*Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

<sup>12</sup>*See Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

<sup>13</sup>*Id.*

For her second point, Drake contends that the Commission erred in denying her wage-loss benefits based on its finding that appellee was ready, willing, and able to provide her with a job, but that she did not want to return to work. 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.<sup>14</sup> The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood.<sup>15</sup> When determining wage-loss disability, the Commission should consider, in addition to medical evidence, the claimant's age, education, experience, and other factors affecting wage loss.<sup>16</sup> Other factors may include—but are not limited to—motivation to return to work, post-injury earnings, credibility, and demeanor.<sup>17</sup> 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.<sup>18</sup> The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability.<sup>19</sup>

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<sup>14</sup>*Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005).

<sup>15</sup>*Enter. Prods. Co. v. Leach*, 2009 Ark. App. 148, 316 S.W.3d 253.

<sup>16</sup>Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961).

<sup>17</sup>*Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

<sup>18</sup>*Logan Cnty. v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

<sup>19</sup>*Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643.

Drake's wage-loss argument is misplaced, considering the fact that the Commission found that she failed to prove that she suffered a permanent anatomical impairment. Wage-loss disability is appropriate only when there has been a finding of an anatomical impairment. Since no such finding was made in Drake's case, we affirm the Commission.

Affirmed.

WALMSLEY and GLOVER, JJ., agree.

*Gary Davis*, for appellant.

*Worley, Wood & Parrish, P.A.*, by: *Melissa Wood*, for appellees.