

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 10-409

MARIANN MORRISON
APPELLANT

V.

CONFECTIONATELY YOURS, INC.
and WAUSAU UNDERWRITERS
INSURANCE CO.

APPELLEES

Opinion Delivered OCTOBER 20, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION [NO. F801206]

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Mariann Morrison sustained an admittedly compensable back injury while working for appellee Confectionately Yours, Inc., on January 22, 2008. Ms. Morrison was diagnosed with a herniated disc at the L5-S1 level. After a course of conservative treatment, Ms. Morrison was assigned a seven percent permanent anatomical impairment rating, which was accepted by the appellee. A controversy subsequently arose regarding Ms. Morrison's claim for wage-loss disability benefits, and after a hearing on the issue the Workers' Compensation Commission found that Ms. Morrison failed to prove entitlement to such benefits. Ms. Morrison now appeals, arguing that the Commission's decision denying her wage-loss claim is not supported by substantial evidence. She contends that the Commission

erroneously penalized her for choosing not to undergo surgery to repair the herniated disc. We affirm.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Henson v. General Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Willis Shaw Exp., Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Henson, supra*. The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In reviewing decisions from the Workers' Compensation Commission, the appellate court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for

the denial of relief. *Id.* We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

At the March 12, 2009, hearing, Ms. Morrison testified that she is twenty-five years old and worked for the appellee as a cake decorator. Ms. Morrison graduated high school and indicated that she made good grades. She worked for Confectionately Yours for three years prior to her injury, and stated that her entire employment history has been decorating cakes since the age of fifteen. She earned \$10.50 per hour at the time of her accident.

On January 22, 2008, Ms. Morrison squatted down to pick up some large buckets of icing and injured her back. She visited Dr. Keith Holder on January 25, 2008, and was diagnosed with lumbar strain. Dr. Holder prescribed medication and physical therapy. In addition, Dr. Holder reported that Ms. Morrison could return to work with the restrictions that she not lift more than fifteen pounds or engage in repetitive back motions. Ms. Morrison testified that she tried to return to work, but that appellee did not have any work within her restrictions.

Ms. Morrison underwent an MRI, and on March 4, 2008, Dr. Holder diagnosed a herniated disc and kept Ms. Morrison on the same work restrictions. Ms. Morrison subsequently came under the care of Dr. Gary Moffitt, and on April 14, 2008, Dr. Moffitt prescribed conservative treatment and reported that she could continue to work but should not lift, push, or pull with more than ten pounds of force. Moreover, Ms. Morrison was

directed to limit bending and twisting at the waist. On May 14, 2008, Dr. Moffitt reported that he had nothing further to offer Ms. Morrison in the way of treatment and recommended that she see a neurosurgeon.

Ms. Morrison eventually came under the care of a neurosurgeon, Dr. James Blankenship. Dr. Blankenship ultimately recommended surgery. On June 3, 2008, Dr. Blankenship reported:

I have told her at present she has failed a very longstanding and aggressive conservative treatment plan. I told her that considering surgery now four to five months into this is certainly not unreasonable. I told her the difficulty arises in how to treat her young spine surgically. I told her that if she were older given the combination of L5 and S1 finding that I would recommend a complete facetectomy with reconstruction of this disk space. I do feel like she has a significant discogenic etiology for her pain. Considering her age, I would recommend a simple decompression with minimally invasive approach and then an aggressive active physical therapy program post decompression if she elected for this. I told her that it is possible that arthrodesis would be needed on down the road but at present this should be treated from a minimalistic standpoint. I told her that a consideration of epidural steroid injection in my opinion is not very reasonable given the time duration. Epidural steroid injections are utilized frequently in treatment of patients with radiculopathy, but it is generally not felt to be of any long term benefit and the patient is certainly in the subacute heading to chronic pain category with significant guarding of her back. I have gone over the risks and benefits of a simple discectomy and decompression, and after discussing this with her at length, she has elected to go home and discuss and call us. I told her that is a very reasonable thing for her to do and I have encouraged her to call us and then let us know where she wants to go from here.

On July 21, 2008, Dr. Blankenship reported:

I understand from your letter dated 7/14/08 that Ms. Morrison has decided that she either cannot make up her mind or has decided she does not want to have surgical intervention. If the patient does decide that surgical intervention is something she is interested in then certainly a consideration of this would be reasonable as I have stated previously. At present, the patient has been afforded in my opinion enough time to make a legitimate decision about this and to date she has been unable to do so. . . .

I do not feel like there is anything else from a non-surgical standpoint that would be of benefit. I do feel like that the patient's disk herniation at L5-S1 is symptomatic and causative of her current pain complaints. Since the patient at present does not want to proceed on with surgical intervention and is now nine weeks into a decision making process without deciding to proceed on with surgery I do feel like she is at maximum medical improvement. Obviously this decision is based on the patient's reluctance to come to a decision. Obviously deciding not to undergo surgical intervention is well within the patient's rights but it is also reasonable to expect that after this time duration that a decision could be rendered based on extensive consultation.

Dr. Blankenship assigned a seven percent anatomical impairment rating for an unoperated-on disc herniation. Dr. Moffitt later reported on December 19, 2008, that Ms. Morrison could continue to work with the same restrictions.

Ms. Morrison testified that she has not worked since suffering her compensable back injury. She stated that medication helps some, but that she continues to be in pain and conservative treatment has not afforded any substantial relief. Ms. Morrison said that her back problem affects her daily activities and prevents her from performing her job as a cake decorator. She explained that decorating wedding cakes is a tedious process requiring standing very still for long periods of time and having a steady hand to lift and stack the cakes. Ms. Morrison further testified that she did not know of any other job she could perform.

Ms. Morrison testified that she has not ruled out surgery completely, but expressed concerns about the risks. Ms. Morrison stated that she continues to exercise and use a TENS unit and hopes that her back will improve on its own. Ms. Morrison stated that there has not been any significant improvement in her condition since Dr. Blankenship recommended

surgery, and thought that she would wait about ten more months and then reconsider surgery if her back has not improved.

In this appeal, Ms. Morrison argues that there is no substantial evidence to support the Commission's denial of wage-loss disability benefits. She asserts that her entire work history has been as a cake decorator, a job she can no longer perform as a result of her compensable back condition. Ms. Morrison notes that after reaching maximum medical improvement and being assigned a seven percent anatomical impairment, she remains under restrictions limiting her lifting to ten pounds and limiting her bending and twisting at the waist. Ms. Morrison submits that the only way that a fair minded person could reach the Commission's conclusion is to conclude, as a matter of law, that Ms. Morrison is not eligible for wage-loss because she did not undergo the recommended surgery. Ms. Morrison asserts that it is unknown whether surgery would help her condition, and that surgery could possibly make her condition worse. Ms. Morrison was earning \$10.50 per hour before her work-related injury, and she contends that it was gross speculation to conclude on this record that she is currently capable of earning that wage.

Viewing the evidence in the light most favorable to the Commission's findings, we hold that its opinion displays a substantial basis for denying Ms. Morrison's claim for wage-loss disability benefits. Ms. Morrison is a young woman of only twenty-five years, and the Commission found her to be intelligent and well spoken. The Commission further found that she presented herself well at the hearing and had developed skills as a cake decorator that

would serve her well in other lines of work. While there have been work restrictions placed on Ms. Morrison, she has not attempted to look for work inside those restrictions. The Commission thus found that Ms. Morrison's motivation to return to any work other than her previous job was low. In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or negative attitude impedes our assessment of the claimant's loss of earning capacity. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). Contrary to Ms. Morrison's argument, the Commission did not deny wage-loss based on her decision to forego surgery. The Commission denied wage-loss because Ms. Morrison failed in her burden to prove that she has suffered a decrease in her ability to earn a livelihood. Because the Commission's opinion displays a substantial basis to support this conclusion, we affirm.

Affirmed.

HART and GRUBER, JJ., agree.