

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-762

NEWBERRY GREEN FOREST
PRODUCTS and CHARTIS
INSURANCE

APPELLANTS

V.

CHARLES MCGILL

APPELLEE

Opinion Delivered January 4, 2012

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F705733]

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Appellee Charles McGill sustained compensable injuries to his right wrist, left ankle, and lumbar spine on May 31, 2007, when he fell putting a tarp on a trailer while working for appellant Newberry Green Forest Products. McGill filed a claim for permanent and total disability or, alternatively, wage-loss disability benefits. The administrative law judge (ALJ) issued an opinion on February 7, 2011, finding that McGill had failed to prove that he was permanently and totally disabled, but that he had established by a preponderance of the evidence that he had suffered a loss in wage-earning capacity equal to a 15% impairment to the body as a whole.

In so holding, the ALJ made the following findings with respect to McGill's wage-loss claim:

The claimant is not permanent [sic] and totally disabled but his ability to earn wages has been affected. His work history is that of a tractor trailer driver for at least



fifty years. He has been required throughout his life to sit and concentrate on driving for long periods of time. He can no longer perform those tasks. The claimant credibly testified that given the level of pain he experiences due to his compensable injury he would not be able to sit for the long periods of time needed to drive a tractor trailer.

Given the medical evidence of the fracture to his spine along with the claimant's credible testimony, regarding pain and the medications associated with the control of that pain[,] I agree that tractor trailer driving that the claimant once participated in is no longer possible.

The claimant does have a GED and a long work history of driving commercial trucks. At the time of the hearing, he was seventy years of age. He has a history of willingness to work; however, his testimony indicates that retirement is an option that he has considered given his age. I do believe that his willingness to work is somewhat lacking given his testimony regarding retirement.

The claimant's pool of available jobs is smaller due to his compensable injuries and their effects. The claimant can no longer perform a job that requires sitting and concentrating for long periods of time. While the claimant has lost the above described abilities, he still has the physical abilities that you would expect a man of his age to possess.

After the consideration of all the evidence including age, education, and work experience, I find that the claimant's employment opportunities have been substantially reduced by the physical limitations caused by his compensable injuries. In my opinion, this loss of wage-earning capacity would entitle the claimant to an amount of wage loss that would be equal to a whole body impairment rating of 15 percent. This amount is over and above any consideration of any anatomical impairment.

Newberry Green Forest Products appealed the wage-loss disability determination to the full Commission. On May 23, 2011, the Commission entered a decision affirming and adopting the decision of the ALJ. Commissioner McKinney concurred in the majority's finding that McGill had failed to prove that he was permanently and totally disabled, but dissented on the majority's award of wage-loss benefits, commenting that the reason McGill had not found suitable employment was his desire to retire, not his compensable injury.



Newberry Green Forest Products appeals, contending that there was not substantial evidence to support an award of wage-loss disability.

In reviewing decisions from the Workers' Compensation Commission, we view 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. See *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.*

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Henson v. Gen. Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007); *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). 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. *Henson, supra*. Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage-loss disability. *Id.*; *Ark. Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993). To be entitled to any wage-loss disability benefit in excess of permanent-physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent-physical impairment as a result of a compensable injury. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346



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S.W.2d 685 (1961); *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Henson, supra*; see also *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Here, there is substantial evidence to support the Commission's conclusion that McGill is entitled to additional wage-loss benefits. In making its determination, the Commission considered the wage-loss factors and specifically noted McGill's age, his relative lack of formal education, his singular work history as a truck driver—a job that required him to sit and concentrate on driving for long periods of time, and his relative lack of willingness to work given his testimony regarding retirement. The Commission further considered that, while there was testimony that McGill was not under any permanent restrictions and was physically capable of performing his former job duties, McGill had testified that, given the level of pain he experiences due to his compensable injury, he would not be able to sit for the long periods of time needed to drive a tractor trailer. The Commission then found that McGill's pain, coupled with the pain medications he required to control his pain, made his employment as a tractor-trailer driver impossible. These findings were supported by the record and constitute substantial evidence to support an award of wage-loss benefits.

Affirmed.

HART and ROBBINS, JJ., agree.

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

M. Keith Wren, for appellee.