

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA11-977

KEN GUNTER

APPELLANT

Opinion Delivered February 15, 2012

V.

ARKANSAS STATE HIGHWAY &  
TRANSPORTATION DEP'T, and  
PUBLIC EMPLOYEE CLAIMS  
DIVISION

APPELLEES

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION,  
[NO. F811566]

AFFIRMED

---

**ROBERT J. GLADWIN, Judge**

On June 13, 2011, the Arkansas Workers' Compensation Commission affirmed and adopted the administrative law judge's (ALJ's) March 1, 2011 opinion, wherein appellant Ken Gunter was awarded wage loss in an amount that would be equal to a fifteen-percent, whole-body impairment. On appeal, Gunter contends that the Commission's award is not supported by substantial evidence. We affirm.

Gunter sustained an admittedly compensable injury to his lumbar spine while working for appellee Arkansas State Highway and Transportation Department on November 6, 2008, and as a result underwent surgery and received a permanent-impairment rating of ten percent to the body as a whole. On May 10, 2010, Gunter's treating neurosurgeon, Dr. Capocelli, cleared him to return to work duty under the following restrictions:

Lifting should be limited to an occasional basis with avoidance of sustained repetitive use of the trunk which would include sustained squatting. Kneeling is not a good



option. He is to alternate sitting and standing, at least 5 minutes per hour or with his lifting being light up to about 20 pounds from 0 to 36 inches, medium from about 25 pounds to about 37 to 54 inches and 20 pounds from about 54 to 70 inches, all on occasional basis, which would be up to 1/3rd of the day. He can carry 25 pounds for about 50 feet on 1/3rd of the day. He can push/pull up to about 50 to 60 pounds only occasionally up to 1/3rd of the day. He can sit for about 35 minutes on length at a time. He can stand for about 20 minutes at a time. Walking can be occasional up to about 1/3rd of the day with the above sitting and standing restrictions included. His agility to bend and stoop is rare, crouching and sitting I would not recommend this in any kind of frequency through his day. He can grasp lightly without much difficulty as well as pinch and use his hands and other functions.

Because of the restrictions resulting from the compensable injury, Gunter was unable to return to his job with the Arkansas Highway Department, and they made no other job available to him.

A hearing was held on December 2, 2010, and Gunter contended entitlement to permanent-partial-disability benefits greatly in excess of his impairment rating, which was at ten percent as determined by Dr. Capocelli in a letter dated June 8, 2010. Appellees Arkansas Highway Department and Public Employee Claims Division denied liability for payment of any amount of permanent-partial disability in excess of the ten-percent-impairment rating.

By opinion filed March 1, 2011, the ALJ acknowledged that a vocational-rehabilitation expert hired by appellees testified that access to a large portion of the labor market was eliminated because of the effects of Gunter's job-related injury, that Gunter made a diligent effort to find employment and had been unable to do so, and that Gunter's testimony was credible. The ALJ awarded Gunter fifteen-percent wage-loss disability, and Gunter filed a notice of appeal. By opinion filed June 13, 2011, the majority of the Full Commission, with Commissioner Hood filing a written dissent, affirmed and adopted the opinion of the ALJ. Gunter brings this appeal asserting that there is no substantial evidence to support the



Commission's award of only fifteen-percent wage-loss disability in view of the testimony of the vocational-rehabilitation expert that was hired by appellees and the permanent restrictions imposed by the neurosurgeon who performed surgery on Gunter's back.

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. *Staffmark Invs., LLC v. King*, 2009 Ark. App. 830. 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. *Burris v. L & B Moving Storage*, 83 Ark. App. 290, 123 S.W.3d 123 (2003). 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. *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995).

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. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Enter. Prods. Co. v. Leach*, 2009 Ark. App.



148, 316 S.W.3d 253. 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. Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Other factors may include—but are not limited to—motivation to return to work, post-injury earnings, credibility, and demeanor. *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). 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. *Logan Cnty. v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643.

Gunter contends that there is no substantial evidence to support the Commission's award of only fifteen-percent wage-loss disability. First, he points to the Commission's determination that Gunter was credible and made a diligent effort to find employment. Further, he insists that Heather Taylor, the vocational-rehabilitation expert who was hired by appellees, supports his argument. Ms. Taylor testified that Gunter was very cooperative with her in his efforts to find employment. She testified that Gunter's inability to find a job was not from lack of trying and that Gunter was diligent in his efforts to find a job. She opined that the restrictions placed on Gunter caused him not to have access to several categories of jobs that he would have had prior to his injury. She testified that well over fifty percent of the labor market is no longer available to Gunter because of his permanent restrictions. Thus,



Gunter contends that substantial evidence does not support the Commission's decision of only fifteen-percent impairment.

We hold that substantial evidence supports the Commission's award of fifteen-percent disability. Prior to working for the Arkansas Highway Department, appellant worked for Exxon convenience stores as a regional supervisor for about three years, earning between \$27,000 and \$28,000, which is somewhat less than what he earned at the Highway Department. Gunter testified that he could return to that type of work, but he had not been able to find that type of job in the marketplace. Gunter also worked for Three States Supply, a heating and air-conditioning supply company, at the sales counter for about six years. He testified that he could do this type of work, but he had not been able to find such employment. Ms. Taylor testified that Gunter was diligent and cooperative in searching for a job, and she was not sure why he had not found one. Further, Ms. Taylor stated that the high unemployment rate and state of the economy were factors in Gunter's inability to find a job.

The Commission found that Gunter had "job skills that do not involve activities that are physical in nature," and that those skills were transferable and marketable. In the ALJ's opinion, which was affirmed and adopted by the Commission, the ALJ concluded that,

[t]he available job market for the claimant has been greatly reduced given his inability to perform physical functions as he once enjoyed. Due to that reduction in the available job market for the claimant and other factors including age, education, work history, willingness to work, and his physical restrictions I find that the claimant has sustained a wage loss in an amount that would be equal to a whole person impairment of 15 percent. This 15 percent is to be considered above and beyond the 10 percent impairment rating that the parties have stipulated to in this matter.



Cite as 2012 Ark. App. 143

Substantial evidence supported this conclusion.

Affirmed.

PITTMAN and MARTIN, JJ., agree.

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

*William L. Wharton*, for appellees.