

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-918

ST. VINCENT HEALTH SERVICES,
INC. and INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA,
APPELLANTS

V.

DENISE BISHOP, SECOND INJURY
FUND, and DEATH & PERMANENT
TOTAL DISABILITY TRUST FUND,
APPELLEES

Opinion Delivered 11 FEBRUARY 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F700630]

AFFIRMED IN PART; REVERSED &
REMANDED IN PART

D.P. MARSHALL JR., Judge

Denise Bishop, the Director of Surgical Services at one of the St. Vincent hospitals, was passing by one of the surgical suites when she noticed an anesthetist struggling with an anesthetized patient. The surgical table's hydraulics had collapsed and Bishop rushed in to help. As Bishop tried to help several others hold the more than three-hundred-pound patient, she felt a snapping sensation and felt pain, numbness, and tingling in her neck and shoulders. Bishop—who had suffered from neck problems for years and had had two fusions in her neck—sought benefits for her injury. The Commission, in a 2-1 decision, found the injury compensable and awarded benefits. The Commission increased Bishop's anatomical-impairment rating from 12% to 13%, assigned her a 25% wage-loss disability, and found that the second-

injury fund had no obligation in the matter. St. Vincent appeals.

Compensability. This is a close question because of some “before and after” MRIs. One of the requirements of proving a compensable injury is that the injury be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2009). St. Vincent argues that the Commission’s compensability decision is not supported by substantial evidence because Bishop failed to meet this requirement.

In the days leading up to the collapsed-table incident, Bishop’s ongoing neck pain prompted her to seek the counsel of Dr. Jordan, a neurosurgeon at St. Vincent, on an informal basis. Dr. Jordan ordered an MRI of Bishop’s neck. This MRI revealed that Bishop’s two previous fusions were stable, but also showed some additional disc problems at the C-4/5 level. Less than a week later, Bishop was injured at work. Dr. Jordan ordered a second MRI to assess the damage. But this second MRI revealed no significant changes from the previous MRI. St. Vincent argues strongly for reversal from this evidence.

On the day of the incident, however, Bishop sought treatment in the ER. The ER doctor diagnosed Bishop with “acute myofascial strain.” And the doctor noted, in a section of the medical records entitled “PHYSICAL EXAM,” that Bishop was having muscle spasms in her neck. This same page had a diagram of the human body, on which the ER doctor noted muscle spasms in Bishop’s neck as well.

Our case law is clear: “[M]uscle spasms constitute objective findings as required by [the statute].” *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 146, 4 S.W.3d 124, 126 (1999). The ER doctor noted twice that Bishop was having muscle spasms in her neck on the day she was injured. These findings satisfied the statute’s objective-medical-evidence requirement. *Ibid.* Because reasonable minds could reach the Commission’s conclusion on the record as a whole, the Commission’s decision about compensability is supported by substantial evidence. *Averitt Express, Inc. v. Gilley*, 104 Ark. App. 16, 18–19, 289 S.W.3d 118, 120 (2008).

Wage-Loss Disability. The wage-loss factor is the extent to which Bishop’s compensable injury has affected her ability to earn a livelihood. *Averitt Express, Inc.*, 104 Ark. App. at 20, 289 S.W.3d at 121. Bishop first had to prove that she sustained permanent physical impairment as a result of the injury. *Henson v. General Elec.*, 99 Ark. App. 129, 134, 257 S.W.3d 908, 912 (2007). Then, in deciding the wage-loss question, the Commission may consider the medical evidence and a wide range of other relevant factors. Those factors include Bishop’s age, work experience, education, motivation, post-injury income, credibility, demeanor, and any other matters reasonably expected to affect her future earning capacity. Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002); *Henson*, 99 Ark. App. at 134, 257 S.W.3d at 912.

The Commission increased Bishop’s anatomical-impairment rating by 1%—from 12% to 13%. St. Vincent does not dispute this finding. In addition to the increased

anatomical-impairment rating, the Commission awarded Bishop 25% wage-loss disability. The Commission made two findings in support of its wage-loss decision. It found that Bishop “has been unable to return to work earning any wages since her compensable cervical surgery” and that she “will not be able to return to the work force at the same rate of pay.”

After Bishop’s injury and before her surgery, Bishop continued for several months to perform her job at St. Vincent as Director of Surgical Services but her neck pain and problems got worse and worse. And after her surgery, nearly ten months later, Bishop’s doctor released her to return to work with some restrictions. Bishop testified that, after her surgery, she was “prepared” and “ready” to go back to work. She did. On her third day back, however, St. Vincent fired her for reasons unrelated to her injury. Bishop has not worked since. On this record, the Commission’s finding that Bishop “has been unable to return to work earning any wages since her compensable cervical surgery” is erroneous. *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 520, 29 S.W.3d 706, 711 (2000).

The Commission’s second finding about wage-loss—that Bishop “will not be able to return to the work force at the same rate of pay”—is more of a conclusion than a finding of fact. In order for an appellate court to perform any meaningful judicial review, the Commission must make findings of fact applying the factors (from the statute and precedent) to this record. *Cross v. Crawford County Memorial Hosp.*, 54 Ark.

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App. 130, 134, 923 S.W.2d 886, 889 (1996). Indeed, “[a] specific finding must contain all the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved those issues in conformity with the law.” *Ibid.* Without such findings, we are left to speculate about what facts the Commission found in reaching its decision. We therefore reverse and remand for specific findings on the wage-loss issue. *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 17, 918 S.W.2d 206, 207 (1996).

Second Injury Fund Liability. The second injury fund is “designed to ensure that an employer employing a worker with a disability will not, in the event that the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his or her employment.” Ark. Code Ann. § 11-9-525(a)(1) (Supp. 2009). There are three requirements for establishing the fund’s liability. *Douglas Tobacco Products Co., Inc. v. Gerrald*, 68 Ark. App. 304, 309, 8 S.W.3d 39, 42 (1999). Bishop established the first two requirements, compensability and prior permanent-partial impairment. *Ibid.* The only issue, therefore, is whether substantial evidence supports the Commission’s conclusion that Bishop failed to prove that her previous disability or impairment combined with her recent compensable injury to produce her current disability status. *Ibid.*

In so holding, the Commission made one finding: “as the claimant previously worked unrestricted she is unable to show that any prior impairment has combined

with the recent compensable injury to produce the current disability status.” The record leaves no doubt that Bishop was working unrestricted before her most recent injury. But this fact—standing alone—does not decide this issue. *POM, Inc. v. Taylor*, 325 Ark. 334, 925 S.W.2d 790 (1996); *Hawkins Construction Co. v. Maxell*, 325 Ark. 133, 924 S.W.2d 789 (1996). The fund’s liability is premised on the fact that a previously injured employee was working at the time of her latest work-related injury. And the governing statute imposes no requirement that the employee’s prior injuries be symptomatic, or that the employee’s work activities be restricted by those injuries, at the time of the work-related injury. Ark. Code Ann. § 11-9-525.

As with the wage-loss issue, we reverse and remand for more findings of fact. The Commission’s single finding, though correct, is inadequate to support the Commission’s conclusion. There was much testimony and evidence elicited at the hearing that bears on the combination issue. Again, robust and thorough findings are necessary to facilitate meaningful appellate review. *Cross, supra*. The Commission’s “duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence.” *Singleton v. City of Pine Bluff*, 102 Ark. App. 305, 308, 285 S.W.3d 253, 256 (2008).

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Affirmed in part; reversed and remanded in part.

GLADWIN and BAKER, JJ., agree.