

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-1268

BARBARA MILLER

APPELLANT

V.

WHITE HALL SCHOOL DISTRICT and
RISK MANAGEMENT RESOURCES;
SECOND INJURY FUND

APPELLEES

Opinion Delivered June 2, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F505561]

AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant, Barbara Miller, appeals from the Arkansas Workers' Compensation Commission's determination that her entitlement to additional temporary total disability benefits began later than she contended. Further, she challenges the Commission's finding that she sustained only a twenty-percent wage-loss disability. Finally, she contends that appellee Second Injury Fund has liability for some of the benefits payable to her. We affirm the Commission's decision.

Prior to her employment with appellee White Hall School District, appellant had sustained an injury that had resulted in a "fused" left knee. She had also undergone right-knee replacement surgery. Appellant was employed with the District as a school bus driver transporting special-needs children. The parties stipulated that appellant sustained a compensable injury to her back on May 23, 2005, while trying to assist an agitated child who

was on her bus. To treat her injury, she underwent surgery on October 21, 2005. Following the surgery, appellant continued to suffer from pain, and a treating physician recommended a lumbar fusion. After this treatment was denied by appellees, she sought a dorsal column stimulator to block the pain. On April 20, 2006, a physician who conducted an independent medical evaluation opined that appellant was a candidate for a lumbar fusion, but further opined that if she did not undergo surgery, she had reached maximum medical improvement and was entitled to a twelve-percent permanent partial impairment rating.

On August 29, 2006, the parties entered an agreed order that provided that appellant's healing period ended August 24, 2006, that she was to be paid temporary total disability benefits through that date, that she would be paid permanent partial disability benefits for a twelve-percent rating to the body as a whole commencing August 25, 2006, and that she would receive a dorsal column stimulator. She again saw her treating physician on September 21, 2006, and the physician discussed dorsal column stimulation trials, but he observed that it would not cure all her pain. He further noted that a fusion was also unlikely to cure all of her symptoms. He also stated that diagnostic testing did not show any mechanical instability in appellant's lumbar spine, although he noted degenerative disc disease. On December 14, 2006, following review of appellant's MRI, the physician recommended a fusion. Appellant underwent the surgery on December 29, 2006.

Appellant participated in a functional capacity evaluation on October 3, 2007, and she was found to be capable of light work. On April 24, 2008, appellant's physician opined that

she was at maximum medical improvement from her prior surgery. He noted that “[b]ased on her functional capacity, she could return to light duty, although I doubt seriously she will be able to maintain a full time position.”

A hearing was conducted on appellant’s entitlement to benefits. Particularly, appellant noted that by agreed order, her healing period ended on August 24, 2006, but she contended that she entered a second healing period on September 21, 2006. She further contended that she had a significant wage loss that exceeded her impairment rating. The District and its insurance carrier contended that appellant had been paid the appropriate periods of temporary total disability and further contended that, if there was any wage loss, it was the responsibility of the Second Injury Fund. The Second Injury Fund contended that it had no liability.

The case was ultimately decided by the Commission, and the Commission found that appellant’s healing period began on the date of her lumbar fusion on December 29, 2006, rather than when she resumed treatment with her physician on September 21, 2006. The Commission noted that she did not have new structural changes on September 21, 2006, and there was no opinion from her treating physician that she entered a healing period on that date. In considering wage-loss disability, the Commission noted that appellant was fifty-two years old, was a high school graduate, and had earned an associate’s degree in nursing. The Commission also noted that she had worked two years as a nurse, and had worked in a bank, as a bus driver, and as a secretary. The Commission further noted that appellant had undergone two surgeries to her back and had been assigned a twelve-percent anatomical

impairment. The Commission found that appellant was credible, was motivated to return to work, and gave reliable effort during her functional capacity evaluation, which indicated that she was able to perform light physical work. The Commission concluded that, based on her age, lack of education, anatomical impairment, and her motivation to return to work, she sustained a wage-loss disability of twenty percent. The Commission also addressed the District's contention that the Second Injury Fund was responsible for appellant's wage loss and found that the Second Injury Fund had no liability. The District did not appeal from the Commission's decision on Second Injury Fund liability.

On appeal from the Commission's decision, appellant argues that her entitlement to temporary total disability benefits should include the time from September 21, 2006, the first time she saw her physician after the agreed order ended her first healing period, to December 29, 2006, the date of her surgery. To receive temporary total disability benefits, a claimant must prove by a preponderance of the evidence that she was within a healing period and was totally incapacitated from earning wages. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008). The healing period ends when the claimant is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* We will affirm the Commission's decision on healing period if it is supported by substantial evidence. *Id.*

Here, appellant entered into an agreed order that her healing period ended on August

24, 2006. Appellant's treating physician noted on September 21, 2006, that diagnostic testing did not show any mechanical instability in her lumbar spine. In sum, appellant's first healing period ended on August 24, 2006, and there were no evident changes on September 21, 2006. Given that appellant's condition remained the same and that appellant had agreed that her first healing period had ended, we conclude that substantial evidence supports the Commission's decision that her second healing period did not begin on September 21, 2006.

Next, we consider wage loss. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643. The Commission bases its determination upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, work experience, motivation, post-injury income, and credibility and demeanor. *Id.*

Appellant notes her physician's determination that "[b]ased on her functional capacity, she could return to light duty, although I doubt seriously she will be able to maintain a full time position." She argues that given the applicable factors, she sustained a wage-loss disability greater than twenty percent, noting that she is currently unemployed despite having sought employment. We note, however, that while appellant asserts that she cannot make post-injury the same amount of income that she did pre-injury, there is no evidence regarding a disparity between pre-injury and post-injury incomes as there was in *Taggart*—upon which appellant relies—where this court reversed a wage-loss determination because the Commission did not

consider the disparity between the claimant's pre-injury and post-injury earnings. While appellant is unemployed, the functional capacity evaluation established that she was capable of light duty. Given appellant's age, education, work experience, and her functional capacity, we cannot say that substantial evidence does not support the Commission's decision.

Finally, we consider appellant's argument that appellee Second Injury Fund has liability for some of the benefits payable to her. We observe, however, that appellant did not argue either before the Commission or the administrative law judge that the Second Injury Fund was liable. Rather, the issue was raised by the District, the issue was decided adversely to the District, and the District did not appeal from that decision. Before a party can raise an issue on appeal, it must demonstrate that it has been adversely affected or aggrieved by the action of the administrative agency, and the injury must be concrete, specific, real, and immediate, rather than conjectural or hypothetical. *Second Injury Fund v. J & S Trucking*, 71 Ark. App. 218, 30 S.W.3d 112 (2000). Appellant has not shown that she was aggrieved by the Commission's decision on an issue that she did not raise either before the Commission or the administrative law judge. Accordingly, we decline to address the issue.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.