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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 10-1137

THAEO KHAMPANE APPELLANT V. RHEEM MANUFACTURING CO., OLD REPUBLIC INSURANCE CO., and DEATH AND PERMANENT TOTAL DISABILITY FUND APPELLEES	**Opinion Delivered** April 20, 2011 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F607106] AFFIRMED

WAYMOND M. BROWN, Judge

This is an appeal from the Workers' Compensation Commission, which found that Thaeo Khampane was entitled to 45% wage-loss disability in addition to her 11% permanent anatomical impairment rating. Khampane sought benefits for being permanently and totally disabled, and she argues that the Commission's decision to the contrary is not supported by substantial evidence. We affirm.

At the time of the hearing before the administrative law judge (ALJ), Khampane was forty-three years old. She is originally from Laos and has the equivalent of a tenth-grade education, but she has her GED. She cannot read or write English, but she can speak English in limited amounts. She suffered a compensable lower back injury in December 2005 when trying to lift a heavy box while employed by Rheem Manufacturing. She returned to light-

duty work, but that work lasted only ninety days.

Medical records showed significant disc herniation at L4-5 and L5-S1. Most of the treatment was conservative, though she did submit to surgery in July 2008. Khampane testified that her condition had not improved since the surgery. She had frequent appointments with her treating physician, Dr. Arthur Johnson. In a note dated September 2, 2008, he wrote that he was going to keep her off work for another month. His restrictions upon her return to work included no lifting greater than fifteen pounds and no frequent bending, kneeling, or stooping. She continued to have pain in her lower back and legs. In February 2009, Dr. Johnson found that Khampane had reached maximum medical improvement:

> At this point, the patient has recently obtained a maximum medical improvement and she will always have some residual pain in the right lower extremity. We will give her restrictions of no lifting greater than 7 to 10 pounds and no frequent bending, kneeling, or stooping, and we will see her back in the clinic on a p.r.n. basis. We will also discontinue her hydrocodone and start her on Avinza 30 mg p.o. daily. We will give her an ASA reading of 11%.

In September 2009, Khampane's attorney referred her to a vocational evaluation. The evaluator concluded that she was limited to unskilled and sedentary jobs and that she was "not employable." He wrote:

> I have investigated the Unskilled / Sedentary job market in the Fort Smith area and have not found Unskilled / Sedentary occupations to exist in substantial numbers. Among the companies that I have been able to make contact with are: Adko, Hickory Springs, Meek, Owens Corning, AR Poly, OK Foods, Whirlpool, and Rheem. These represent some of the larger employers in the area. Only Whirlpool has Unskilled / Sedentary work in a few positions. However, Whirlpool is downsizing and expects additional layoffs. I have attempted to contact these employers: AR Lamp, Baldor, GA

> Pacific, Gerber, Kraft, Klein Tools, Baekert, and Trane. However, I have been unable to reach people who could tell me if these companies have Unskilled / Sedentary work. If I am able [to] obtain additional information I will supplement my report.

Before working for Rheem, Khampane worked at OK Foods as a poultry eviscerator for fourteen years. According to her testimony, the job required her to cut chicken at a long table while standing for eight hours a day. Khampane did not believe that she could do that job in her present condition. She has not looked for employment since June 2006, and she receives social-security disability payments. She can drive an automobile for limited distances only, but she is able to take her children to and from school. She also started cooking at home the month before the hearing.

Khampane argued that she was permanently and totally disabled, given her lack of education and employment prospects. The ALJ disagreed. While he found that Khampane was unable to return to her job at Rheem, he believed that her former duties with OK Foods were within the restrictions placed on her by Dr. Johnson. The ALJ acknowledged that Khampane's job prospects were limited due to her lack of education, lack of proficiency in English, and lack of jobs, but he believed that there still remained jobs in the area. He also disagreed with the vocational evaluation that stated that Khampane was unemployable. The ALJ ultimately concluded that Khampane was entitled to 45% wage-loss disability. The Commission affirmed and adopted the ALJ's opinion.

Khampane appeals from the Commission's decision, arguing that she cannot work and is permanently and totally disabled. 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 decision and affirm if that decision is supported by substantial evidence.[1] Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.[2] The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision.[3] When the Commission affirms and adopts the opinion of the ALJ, the Commission makes the ALJ's findings and conclusions its own; in such cases, we consider both the ALJ's opinion and the Commission's.[4]

"Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.[5] The burden of proving permanent total disability is on the claimant.[6] If a claimant is not permanently and totally disabled, the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole.[7] This wage-loss factor is the extent to which a compensable injury has

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[1] *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004).

[2] *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999).

[3] *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

[4] *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

[5] Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002).

[6] Ark. Code Ann. § 11-9-519(e)(2).

[7] Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002).

affected the claimant's ability to earn a livelihood.[8] The Commission can award wage loss up to permanent and total disability.[9] Attendant factors relevant to whether a claimant is unable to earn any meaningful wage include medical evidence, age, education, experience, and other circumstances reasonably related to a claimant's earning power.[10]

In arguing that she is permanently and totally disabled, Khampane relies heavily on Dr. Johnson's opinion that she will always have some residual pain, her testimony that she could not return to her job at OK Foods (contrary to the Commission's finding), the vocational evaluation that stated that she is not employable, and the fact that Dr. Johnson's February 2009 report does not mention anything about being released to work. But the question is not whether the record could support a finding that Khampane is permanently and totally disabled. Rather, it is whether substantial evidence supports the Commission's finding that she is not. The substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief.[11] Here, no medical doctor has taken Khampane permanently off work. In September 2008, Dr. Johnson wrote that he was keeping Khampane off work for one month. While the records show that she is still in pain, there are no records after that date instructing her to remain off work. At best, she can only show that

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[8] *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

[9] *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005).

[10] *Rutherford v. Mid-Delta Cmty. Servs., Inc.*, 102 Ark. App. 317, 285 S.W.3d 248 (2008).

[11] *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000).

she has restrictions that make it difficult to work. The Commission expressly rejected the vocational evaluator's conclusion that Khampane was unemployable, opining that she could do the work that she previously did for OK Foods. A claimant cannot claim permanent and total disability as long as she can earn wages in some capacity, even if that capacity is very limited.

In the alternative, Khampane argues that she is entitled to more than the 45% wage-loss disability awarded by the Commission. She gives us no basis for reevaluating her wage-loss disability, even if we were in a position to do so (which we are not). The Commission is in a better position to evaluate a claimant's ability to earn wages in the same or other employment, as it has superior knowledge of industrial demands, limitations, and requirements.[12] Without a convincing argument to the contrary, we hold that the Commission's award of 45% wage-loss disability is supported by substantial evidence.

Given Khampane's limited education, poor English-speaking ability, and medical restrictions, she will have extremely limited job prospects. But the question we must answer is whether substantial evidence supports the Commission's finding that she is not permanently and totally disabled. We hold that substantial evidence supports the finding; therefore, we affirm.

Affirmed.

WYNNE and ABRAMSON, JJ., agree.

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[12] *Arkansas State Hwy. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).