

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001870

SHIRLEY FURLOW, EMPLOYEE	CLAIMANT
MISSISSIPPI COUNTY ECONOMIC OPPORTUNITY COMMISSION, EMPLOYER	RESPONDENT #1
FREMONT INDUSTRIAL INDEMNITY CO., ARK. PROPERTY & CASUALTY INSURANCE GUARANTY FUND, CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT # 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED SEPTEMBER 14, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 2, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On February 24, 2004, a prehearing conference was conducted in this claim, from which a pre-hearing order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the

issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission's Exhibit No. 1,

The testimony of Shirley Furlow, the claimant, Elizabeth Clem, coupled with the March 25, 2004, deposition testimony of Terry H. Owens, and the March 19, 2004, deposition testimony of Elizabeth Clem, along with medical reports and other documents comprise the record in this claim.

DISCUSSION

_____ Shirley Furlow, the claimant, with a date of birth of June 6, 1945, commenced her employment with respondent in August 1988. Claimant is a 1963 high school graduate who attended UAPB, formerly AM & N College in Pine Bluff, Arkansas, from 1963 through 1967, and majored in English and speech and drama. Claimant lacked one semester toward obtaining her degree. Claimant attended Bank Street College in New York from 1968 through 1969, and received a certificate in child development. Claimant also attended Mississippi County Community Collage from 1988 through 1989 for an associate degree in Early Childhood and Preschool.

While the claimant presents a varied employment history, to include unskilled, semiskilled, and skilled jobs ranging from custodian to Arkansas Revenue Office clerk, to substitute teacher, 90% of her employment history is comprised of early childhood education and child care. Claimant's involvement in the Head Start program commenced with the beginning of Head Start in 1964.

In 1996 claimant suffered an injury to her right knee as a result of falling off steps at her

home. The right knee injury was treated by arthroscopic surgery under the care of Dr. Joseph Yao, a Blytheville orthopedic physician. Claimant noted that the surgery was successful and that she did not have any further difficulty with her right knee following the surgery. More importantly, the testimony of the claimant reflects that the 1996 right knee injury and surgery did not impact on her ability to perform her employment duties, her employment, or her earnings.

As previously noted, claimant commenced her employment with respondent in 1988, as a preschool teacher dealing with 4 and 5 year old. Claimant's testimony reflects, with respect to her job duties at the time of her February 4, 2000, injury:

Okay. My job primarily was to care for infants. I was responsible for primary care given to four children ranging from ages six weeks to one and a half. I was required to do the observations and record the findings. To work with the children individually in whatever way, jumping, crawling, playing games, reading stories, nurturing, taking care of their personnel health needs.

* * *

Taking them to the restroom. Taking them to the playgrounds. Playing with them on the playground. Just doing all the types of things that a mother would do, but only in an educational environment.
(T.18-19)

Claimant estimates that approximately 80 to 85% of the time during a typical work day was spent on her feet while discharging her job duties for respondent. Claimant suffered her acknowledged compensable injury of February 4, 2000, when while going out of the building to her vehicle to retrieve some papers and teaching material she slipped and fell on the ice. Claimant testified regarding injuries sustained in the February 4, 2000, accident:

When I slipped and fell I broke my right ankle in three places. Both sides of the actual ankle were crushed somewhat and I had broken the tibia at the ankle. (T.20)

Neither the occurrence of the February 4, 2000, injury nor the extent and nature of medical treatment rendered to the claimant as a result of the injury is disputed by the parties.

Claimant testified regarding her initial medical treatment of February 4, 2000 injury:

Okay.. I was taken to a hospital and they performed surgery where they placed some metal in my leg and put a cast over it. And I remained in a cast from the date of the injury until later on in the spring. . . (T.20-21)

Physical procedure. Claimant had a second surgical procedure where the hardware was removed from her leg. Following the afore claimant continued to experience swelling and pain in the right ankle, and to obtain medical treatment relative to same. Claimant underwent a third surgical procedure relative to the right ankle when diagnostic studies disclosed misalignment. The third surgical procedure was had under the care of Dr. John Taylor, a Memphis orthopedic physician, with the placement of a multiplanar external fixator with gradual correction of deformity.

Claimant asserts that a fourth surgical procedure entailed re-breaking of the bone and placing frame back on it.

The course of the claimant's treatment and recovery span from February 2000 through August 2003. The testimony of the claimant reflects that following the her injury she worked up until April 2002, performing her duties as a teacher of preschoolers with adjustment and changes. Claimant has not worked since her release by Dr. Taylor on August 28, 2003.

Claimant attributes her inability to work to residuals of her February 4, 2000, accident.

Specifically, claimant notes that she experiences pain and swelling in her right ankle which limits her ability to remain on her feet for more than 15 to 30 minutes; requires the elevation of her right leg to address the swelling and pain; and impacts her ability to lift significant weights. Claimant walks with a limp. Further, claimant testified that when the pain becomes extremely severe she required the aid of crutches from support.

In describing a typical day since her August 2003, release, claimant noted that after she get up and prepare breakfast she has to return to elevate her foot because of the swelling and pain. Claimant's testimony reflects that the amount of time that she has to be off her feet because of the swelling and pain ranges from one hour to three to four hours before she is able to recover sufficiently to again get up. Further, claimant maintains that as the day progresses the pain and swelling become more intense, and, correspondingly requires a greater amount of time with her leg elevated before the same subside.

In describing the pain experience in her right ankle, claimant's testimony reflects:

The pain sometimes at night, sometimes extremely to the point that it is like a grabbing pain, you know, the kind that makes you buckle and sometimes it's just an aggravation pain. But for the most part, it aches all the time, for the most part. You know, your body adjusts. Sometime it's more painful that at other times, you know. The first part of the day it's just a gnawing, aggravation pain but after standing 15 to 30 minutes on it it becomes a little more intense by standing past those times to the point that I need medication. (T.25-26)

The testimony of the claimant reflects that she takes prescription medications, Loratabs 7.5 and Percocet, as well as non-prescription medication, arthritis strength Tylenol. Claimant explained that because the Percocet is stronger she may take it two or three days a week, however with

Loratab and extra strength Tylenol she will take at least once daily.

In addition to the 1996 injury to her right knee which resulted in surgery under the care of Dr. Yoa, claimant also suffered in injuries in a 1992 motor vehicle to her right shoulder and face. Claimant's testimony reflects that is her understanding that she suffered torn ligaments in the right shoulder in the 1992 motor vehicle accident. Further, claimant's testimony reflects that she continue to have problems with the right shoulder because of arthritis that has set up in the shoulder, to include problems with weakness and picking up things with the right arm. The testimony of the claimant reflects that in April 1998, she was diagnosed with borderline diabetes. Claimant is presently taking medication in an effort to get her excessive high sugar level under control.

The testimony of the claimant reflects that she has a drivers license and is able to drive a vehicle. Until November 2003, claimant owned a SUV, Chevrolet Blazer, and was able to operate same. Claimant also testified that she is able to cook and to do laundry and light house cleaning. In terms of shopping, the testimony of the claimant reflects that generally she uses a motorized shopping cart. The testimony in the record also reflects that claimant can usually attend church services and has modified or restricted amount of kneeling that she does during worship service.

Claimant is currently receiving social security disability benefits in the amount of \$410.00 per month with an additional \$336.00 per month in social security supplemental income. Claimant's testimony reflects that she considers herself to be retired at this point.

The evidence in the record reflects that on January 5, 2004, claimant underwent a functional capacity evaluation which concluded, in pertinent part:

Ms. Shirley Furlow underwent functional evaluation this day with reliable results for effort. Ms. Furlow is able to perform work at the Light PDC category with restrictions and limitations as noted above. Ms Furlow's blood pressure response during testing revealed severe hypertension and she was instructed to seek medical attention for her blood pressure. She would benefit from a work position that would allow for positional changes from sit to stand. When comparing her functional tolerances with her job description as a Teacher for the Mississippi County Head Start Program, she does not meet the necessary physical qualifications for the following: able to lift children, standing for long periods of time, jumping to participate in games. Please refer to the chart below for the characteristics of light work. (CX 1, p35)

On January 12, 2004, Dr. Charles Taylor assessed the extent of the claimant's impairment at 25% to the lower extremity relative to the February 4, 2000, compensable injury. (CX 1, p45) The record reflects a August 29, 2001, report of Dr. J. N. Gheraibeh an orthopedist with a Lake City, South Carolina address, which assessed the extent of the claimant's permanent disability to the lower extremity at 20%. (CX 1, p46)

At the request of the claimant's attorney, on February 9, 2004, claimant underwent a vocational evaluation assessment by Ms. Elizabeth Clem, an independent rehabilitation counselor. Ms. Clem authored a report relative to her evaluation of the claimant based upon an in person interview with the claimant, reviewed prior pertinent medical reports, review of the claimant's deposition, and the functional capacity evaluation of January 5, 2004. The report of Ms Clem concluded:

In terms of the labor market access loss from Ms. Furlow's subjective report, she states that she is unable to sit for 6-8 hours without elevating her leg

for most of that time to prevent swelling. Due to the fact that there are not employers that are likely to tolerate an employee who needs to sit/stand so frequently in the job, and more importantly that when sitting, they must elevate their leg at buttocks or higher. I would state that **these imitations would result in a 100% labor market loss. (RX 1, Exhibit No. 2)**

In addition to a March 19, 2004, deposition wherein Ms. Clem was questioned by the attorneys regarding her evaluation and conclusions with respect to the claimant's vocational assessment, Ms. Clem also testified regarding her reports and conclusions during the course of the hearing before the Commission.

The evidence in the record reflects that Ms. Terry H. Owens, a vocational specialist with Systemedic RMI, conducted an evaluation for a vocational outlook and a potential rehabilitation program relative to the claimant at the request of Respondent #1. During the course of her March 25, 2004, deposition Ms. Owens testified regarding the extent of her contact with the claimant, the resource material utilized in conducting her evaluation, and opinion regarding the available jobs within the claimant's geographical residence. In addition to testifying regarding the conclusions and opinions set forth in her January 14, 2004, report, Ms. Owens also provided testimony regarding the report of Ms. Clem. (Respondent #1 & Respondent #2, Joint Exhibit #1).

The January 14, 2002., report of Ms. Owens, reflects, in pertinent part:

Ms. Furlow is at maximum recovery from her workers' compensation injury, but still experience residual symptoms and has restrictions, per an FCE, which now limit her to no more than light job classifications. With her ongoing ankle problems, she should obviously avoid jobs that require prolonged walking, standing or heavy lifting, and as additionally noted on the FCE.

Although Ms. Furlow is 58 years old, she would still have another seven years, or longer, of gainful employment if she desires to pursue return-to-work. She has a very good work history, with transferable job skills and an AA degree from a local community college. Ms. Furlow should be able to return to work not in such areas as adult education(earnings up to \$15.00 per hour); home companion/sitter (earnings up to \$8.00 per hour); or various types of sedentary-light cashier/clerk job (minimum wage of \$7.00). These are examples of the types of jobs she should be able to do currently, and I could assist her with identifying a wider range of choices through a formal transferable skills analysis.

If Ms. Furlow wants to expand the job possibilities available to her, as well as her income potential, then short-term training in computer/software application skills would be recommended. These could be obtained locally through vocational-technical programs or short-term private/public computer classes. If Ms. Furlow determines that she would like to pursue return to appropriate employment, I would be glad to work with her. (Respondent #1 and Respondent #2 Joint Exhibit #1, Exhibits p16)

The testimony of the claimant reflects that while Mr. Sam Scrubbs is the executive director of the entire program of respondent-employer, she denied that he was responsible for overseeing all the salaries. Claimant maintains that the afore was the decision of th board of directors. Claimant creditably testified that while the contact for hire that she executed on June 3, 1999, reflected semi-monthly payments of \$773.05, the same did not include the standard cost of living increase. Claimant added that the increase reflected in her semi-monthly earnings of \$840.02 commencing in September 1999, was reflective of the cost of living increase which was retroactive.

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses a review of the medical reports, application of the appropriate statutory provision and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 4, 2000, the relationship of employee-employer-carrier existed among the parties.
3. On February 4, 2000, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$257.00/\$193.00 for temporary total/permanent partial disability benefits.
4. On February 4, 2000, the claimant sustained an injury arising out of and in the course of her employment.
5. The claimant has been paid appropriate temporary total and medical benefits relative to her February 4, 2000, compensable injury.
6. The claimant's healing period ended August 28, 2003.
7. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of February 2, 2000.
8. The claimant's current disability status is the product of the February 4, 2000, compensable injury in the employment of Respondents #1. Respondent #2 has no liability in this claim pursuant to Ark Code Ann. §11-9-525.
9. The claimant has a permanent partial disability in the amount of 25% to the right lower extremity below the knee.

CONCLUSIONS

_____The compensability of the claimant's February 4, 2000, injury in the employment of Respondent #1 is not disputed. Claimant's February 4, 2000, injury, which was accepted as compensable by Respondent #1, was confined to her right lower extremity. Claimant was paid temporary total disability benefits by Respondent #1 during the periods that she was within her healing period and not working as a result of the February 4, 2000, compensable injury. Further appropriate medical benefits were paid to and on behalf of the claimant relative to the February 4, 2000, compensable injury. Finally, Respondent #1 has paid permanent disability benefits to correspond with the anatomical impairment assessed the claimant growing out of the February 4, 2000, injury and four (4) subsequent surgical procedures relative to same.

Claimant asserts as a result of the February 4, 2000, compensable injury she has been rendered permanently and totally disable from engaging in gainful employment, and is entitled to corresponding permanent total disability benefits. Respondent #1 denies that the claimant is entitled to permanent total disability benefits relative to her February 4, 2000, compensable injury. Respondent # 1 is joined by Respondent #2, the Second Injury Fund, which was made a party to the claim by Respondent #1, in asserting as a defense to the claim for permanent total disability benefits the application of Ark. Code Ann §11-9-519(b) and Ark. Code Ann. §11-9-521(g) as a bar to the present claim. Respondents #1 and Respondent #2 cite recently ruling from the Full Commission on the afore to include Breed v Rockline and Barron v. Creative Foods, and Kenneth McDonald v. Batesville Poultry. WCC File No. E905523 (June 17, 2004). As an alternative argument, Respondents #1 maintains that if the claimant is found to be permanent and totally disable, liability for the payment of said benefits would rest with Respondent #2, the

Second Injury Fund.

The evidence preponderates that the claimant has not been rendered permanent and totally disable as a result of the February 4, 2000, compensable injury. It is undisputed that as a result of the February 4, 2000, compensable injury claimant has suffered a permanent physical impairment of 25 % to the right lower extremity below the knee. Further, as a result of the February 4, 2000, compensable injury and residuals attributable to same, claimant has incurred severe restrictions and limitations relative to walking, standing and lifting. The afore restrictions imposed on the claimant as a result of the February 4, 2000, compensable injury are largely confined to the right lower extremity.

Claimant is a high school graduate with post-secondary education. Indeed, the evidence discloses that claimant is approximately one semester short of receiving her degree in English and drama and speech. At the time claimant attended undergraduate at A M & N College, which later became UAPB, the same was geared toward becoming a high school English teacher. Claimant has undergone post-secondary studies at other colleges since leaving UAPB. Claimant candidly acknowledged that she considered herself to be retired.

The evidence in the record reflects that claimant has a valid drivers license and continued to operate her vehicle subsequent to her February 4, 2000, injury. Claimant has not sought employment since she was released as having reached maximum medical improvement relative to her February 4, 2000, compensable injury on August 28, 2003.

While the vocational rehabilitation experts differ on whether the claimant's February 4, 2000, injury has restricted her future employment to light or sedentary work, the evidence discloses that given the claimant's age, education, and work history absent the Odd Lot

Doctrine, which is not applicable to injuries suffered subsequent to July 1, 1993, that the claimant has not been rendered permanent and totally disable for engaging in gainful employment relative to her February 4, 2000, scheduled ankle injury. Ms. Elizabeth Clem, whose vocational assessment of claimant's employability restricts same to sedentary work, testified regarding the 11% of jobs within the market which fall within the category. Ms. Terry Owens' assessment of the claimant's vocational ability restricts claimant to job in the light category and identifies position in the market that the claimant could perform. Claimant is a highly educated and articulated individual with transferrable job skills who has removed herself from the job market.

Pursuant to prior rulings of the Full Workers' Compensation Commission regarding the application of Ark. Code Ann. §11-9-521(g) and Ark. Code Ann. §11-9-519 (b) the claimant is not entitled to benefits over and above the scheduled. Ark. Code Ann. §11-9-519(b) provides that in order to establish entitlement to total disability benefits claimant must have lost "both hands, both arms, both legs, both eyes or any two (2) thereof" in order to deem permanently and totally disable. Accordingly, the claimant, having suffered an scheduled injury with a permanent impairment of 25% to the right lower extremity is not entitled to the payment of permanent total disability benefits. Claimant's claim for permanent total disability benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge