

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301478

SHIRLEY KIRKLAND, EMPLOYEE	CLAIMANT
CINGULAR WIRELESS, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INS. CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 28, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on September 29, 2004, at Little Rock, Arkansas.

Claimant represented by THE HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by THE HONORABLE JOSEPH H. PURVIS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

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

On August 3, 2004, pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date 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 positions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of the claimant, Shirley J. Kirkland, coupled with medical reports and

other documents comprise the record in this claim.

DISCUSSION

Shirley J. Kirkland, the claimant, with a date of birth of November 30, 1948, is a high school graduate who lacks 12 hours of toward completing an undergraduate degree from Philander Smith College. Claimant last attended classes in 1998. Claimant commenced her employment with respondent-employer in 2001.

Prior to commencing her employment with respondents claimant had retired from SBC in April 2000, after approximately twenty-seven years of employment. Claimant was a first line manager before she retired. After a period of ten (10) months claimant became a contracted instructor for TSI in Dallas, Texas with her first assignment being in Tampa, Florida working for Telcom, a subsidiary of SBC. Claimant noted that as a contracted instructor she was still in a role of a manager training representatives to talk with customers.

The testimony of the claimant reflects that when she secured employment with respondent it was a step up, in that she was actually responsible for the managers. In describing her job duties with respondents, claimant's testimony reflects:

I was a regional manager in the call center which means that I was responsible for answering customer concerns when they escalated to me. Responsible for 13 managers who normally had between 13 and 15 reps reporting to them. (T. 9).

At another point claimant described the specific tasks performed in her employment with respondents:

. . . But that was just a small portion of my job because generally customers didn't make it to me. I actually wrote up processes, answered e-mail, initiated e-mail. We had different projects to work on trying to make our jobs a lot easier. When I say easier, in

the relationship with the customers when they call in. There were different processes that came along. Different packages. If you all have cell phones and I'm sure most of you do, you are familiar with the promotions that go on. You can get a plan one month for something and the next month it's something else. Well, when the new promotions came in you had to make sure the managers were aware of the changes and they in turn would make sure the reps were aware of those changes. Now, this was not something that was done daily. I'd have to say several times daily that you'd have to handle this. The job was very rewarding. You think in terms of it an eight to five job. It wasn't. I generally worked between 12 hours a day. That was just the norm. And then when you finished work you then went home, plugged in your laptop and you sit there and you're working again until sometimes 2:00 in the morning and then you get back up and go back to work. (T.11).

The compensability of the claimant's work-related injury is not disputed. Claimant's testimony reflects, with respect to the onset of her complaints:

Well, when I started working for Cingular it was February 2001 but shortly after I started working I noticed my fingers would tingle as I was keying. And it was like both hands, when I said tingle, kind of like when you go to sleep and maybe you wake up and one of your limbs is not functioning, it's kind of tingling and it will take awhile before the feeling would get back. I could use them but it was like they were kind of tingling, sometimes hurting a little bit. (T. 12).

Claimant, who is right hand dominant, testified that she is having more problems with the left hand.

After efforts at conservative treatment modalities relative to her upper extremity complaints, on August 22, 2002, underwent surgery under the care of Dr. G. Thomas Frazier for the diagnosed left cubital tunnel syndrome. Claimant declined to undergo surgery relative to her right upper extremity complaints given the results of the surgery on the left. Following her surgery claimant returned to the employment of respondent, however was unable perform

assigned job duties on a consistent basis due to residuals of her injury.

Claimant's testimony reflects, with respect to her current problems which she attributes to her compensable injury:

. . . Because I'm having to do everything pretty much with my right arm, I overused the right arm. I try to pick up things with my left arm, like a heavy iron skillet, I know I can't do that. So, I'm overcompensating, I'm using the right arm more and more. Well, then the fingers are becoming numb on this arm. Well, he didn't talk surgery, because we're not going to go there. . . .

* * *

But see - - and actually that didn't begin to bother me until after the surgery. Initially the surgery was just, the fingers were getting numb. The surgical procedure was to correct that to where my fingers would be okay. Well, I wasn't able to work until about six weeks, I believe, and of course there's no such thing as light duty so I just went full steam ahead and started working - -

Right. I didn't know anything else to do because I'm thinking the surgery has been successful. My arm and fingers were fine when I was at home. Well, then the pain started coming back so I kept trying to put it off thinking it's going to get better. Well, then I think it was about December before I could get back in to see him for the follow up visit. And by then they told me I had something called - - well, they did the bone scan first, I believe. And then they did an MRI. According to the neurologist, Dr. Rutherford, he didn't determine that anything was wrong with the surgical procedure so they diagnosed me as having RSD, reflex sympathetic dystrophy is what it stood for. (T. 14-16).

Claimant last discharged employment duties for respondents on December 20, 2002.

Claimant continued to receive treatment relative to her compensable injury following the December 20, 2002, date. The testimony of the claimant reflects that she informed her director, Sharon Reed, that she was unable to continue discharging employment duties due to her injury. Claimant added that at the time she took the position with respondents it was her plans to remain for a year or two. (T. 21-22).

The March 21, 2003, report of Dr. Frazier, relative to the claimant, reflects, in pertinent part:

Ms. Kirkland attempted to return to work, but developed increasing pain and swelling about her left elbow in the area of her surgical incision. She was evaluated for possible complex regional pain syndrome or reflex sympathetic dystrophy. This evaluation was performed by Dr. Reginald Rutherford, including electrodiagnostic testing and a triphasic bone scan. It was his opinion, and I concur, that Ms. Kirkland did not develop a complex regional pain syndrome. Further investigation demonstrated inflammation, or irritation, of the medial antebrachial cutaneous nerve of the forearm. Her symptoms have improved following continued outpatient therapy and treatment for this nerve irritation.

It is my opinion that Ms. Kirkland's work activities, which she performed following surgery, exacerbated her condition and necessitated additional treatment, as well as additional time off work, with participation in an extended outpatient therapy regimen.(CX. #1, p. 33).

The testimony of the claimant reflects that she takes prescription medication relative to her injury to include Vioxx, and Neurontin. Claimant is also seen in follow up by Dr. Rutherford in six month. Claimant has been released by Dr. Frazier.

There was a four day period in May 2004, during a strike by SBC that claimant attempted to return to work. Claimant's testimony reflects, with respect to the impact of the effort:

This was in May of 2004, this year. And I signed the paper thinking, okay, I can use a little money and this will give me an opportunity to see if I can use my hands, too. Not knowing where I would be assigned but I was hoping they were going to put me in a call center. What I was anticipating was being in the call center talking to customers and I wouldn't be keying as much and it would be kind of easy. Well, unfortunately you are not allowed to choose your assignment. The assignment that was given to me was directory assistance in Hot Springs. And, of course, SBC did have a four-day work stoppage that was May 21st through May 25th. And I took the assignment. We had to go to the training and I did it pretty much okay. It was a 12-hour day. And I was glad it was not longer than four days because I don't know that

I would be able to continue. It's not a lot of keying but it's, a customer come in. The customer is already on your headset, you're sitting there listening to them. So, I didn't have a lot of typing to do but the little that I did I could tell that I, I said, I can't continue to do this. It would just become too - - it would have been too rough. (T. 20-21).

Claimant was assessed with a permanent physical impairment of 10% to the upper extremity relative to the compensable injury. Respondents paid the afore. Respondents acknowledge that claimant is entitled to ten (10) days of temporary total disability benefits which have not been paid as well as certain medical benefits. Respondents will pay the afore benefits, which have been controverted.(Exhibit A).

Claimant testified that she desires either job placement assistance or possible retraining in order to return to work. Claimant noted that since the placement of computers in office setting her work experience has entailed the use of the keyboard, which she is unable to do as a result of her compensable injury. Claimant acknowledges that she uses her computer at home, however limits the amount of time she is on it, something she is unable to do in a work setting.

Claimant estimated that between December 2002, when she left the employment of respondents, and May 2004, she used her computer three to four hours a week. With respect to how she spend the rest of her time, claimant testified:

I have church work. I have friends that I like to go and visit or help out. Recently I had a friend who lost her husband and there were things that she needed to do. Right now we are in the process of doing thank you cards, which I'm helping her with that. But other than that just pretty much volunteer work, my church work. I'm not working.

* * *

I have a resume out right now. In fact, I had an interview with a gentlemen who's on the Clinton Library Staff, two weeks ago. He was looking for what they call a transportation manager. And I said, well, tell

me what that involves. He said, well, it's going to be a little bit of everything and I want to make sure their computer is in place, I want to make sure that we have rooms for people when they come in, he said, you won't handle the dignitaries but you'll handle the other people that com in. So, I need all of that to be arranged. It may just be a matter of getting supplies so it's going to be kind of like organizing an office - -

. . . . Well, he called me the following Wednesday, he said he had not gotten his budget approved yet, however, he wanted to circulate my resume around to other people there. . . . The pay jobs are like few and far between. So, I'm still hoping that I get something there. So, I sent the resume to them and other than that the only other job that I submitted my resume was something that was on computer on line and when I got to looking at it - - I turned it in but when it came back it was kind of like it was going to be kind of like calling from home, . . . (T. 35-37).

Claimant's testimony reflects that she earned \$57,250.00-\$65,000.00 annually which included bonuses, in her employment with respondents. Claimant noted that she has not been offered job placement assistance, re-training, or a job with respondents within her restrictions.

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

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 28, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On August 28, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$410.00/\$308.00, for temporary total/permanent partial disability.
4. On August 28, 2002, the claimant sustained an injury arising out of and in the

course of her employment.

5. In addition to other periods of total incapacitation, claimant was temporarily totally disabled for the period March 10, 2003, through March 20, 2003, and correspondingly entitled to the payment of temporary total disability benefits.

6. Claimant has sustained a permanent physical impairment of 10 % to the upper left extremity as a result of the compensable injury. Claimant also experiences restrictions in the use of her upper right extremity growing out of her employment with respondents. Claimant is unable to return to her former job duties with respondents due to the physical restrictions in her upper extremities growing out of her compensable injury. The evidence preponderates that vocational rehabilitation and or job placement assistance is warranted in the instant claim.

7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 28, 2002.

8. The respondents have controverted the claimant entitlement to vocational rehabilitation/job placement assistance, incurred unpaid medical expenses, and unpaid temporary total disability benefits.

CONCLUSIONS

The claimant suffered compensability gradual onset injuries to her upper extremities within the course and scope of her employment with respondents which culminated on August 28, 2002. Claimant ultimately underwent surgery on the left side, however declined to do so on the right - her dominant side- after the unfavorable result on the left. The injuries resulted in medical treatment, periods of temporary total incapacitation, and a 10% permanent physical impairment to the left upper extremity. The compensability of the claimant's injuries is not

disputed.

Claimant asserts entitlement to additional workers' compensation benefits growing out of her compensable injury, to include unpaid incurred medical benefits and temporary total disability as well as job placement assistance. Respondents acknowledge claimant's entitlement to and the controversion of the incurred unpaid medical and temporary total disability benefits, however dispute the job placement assistance. The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

Claimant is a highschool graduate with post-secondary education, lacking 12 hours to completion of her degree. Claimant last attended college in 1998. Claimant present a long and consistent employment history which included clerical and managerial experience. Claimant commenced her employment history working for Head Start in Detroit. Later claimant was employed at Honeywell in Boston. In 1968 claimant returned to Arkansas and secured employment with Blue Cross-Blue Shield as a file clerk. Claimant later performed jobs as a claims processor and statistician with BCBS.

In 1970 claimant went to worked for Employment Security Division as a clerical worker. Claimant held the position of assistant manager with Employment Security Division by the time she left the employment of same in 1973. Claimant was out of the workforce for a period of approximately one year as she cared for her family.

When claimant returned to the workforce she secured employment with Southwester Bell as a service rep. Claimant was later promoted to the position of business office supervisor. Claimant was ultimately transferred to Norman, Oklahoma. In 2000 after twenty-six years with

SBC, most of which as a manager, claimant retired. Following her retirement, claimant returned to the workforce with TSI, as an instructor. Later claimant secured employment with respondents.

The majority of the claimant's work activities entailed use of keyboards. Claimant is physically unable to perform prolonged keying/typing activities since her compensable injury. Subsequent to her compensable injury claimant continued employment with respondents until it reached the point that she was unable to continue doing so. Claimant last discharged employment duties with respondents on December 20, 2002. Claimant returned to the workforce in May 2004 for a period of four days during a work stoppage by SBC. The credible evidence reflects that during the four day effort claimant's endurance level breached to the point that it is unlikely that she would have been able to continue.

Ark. Code Ann. § 11-9-505 provides, in pertinent part:

(b)(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

(d) The purpose and intent of this section is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determined appropriate by the commission.

The above provisions clearly provide for job placement or "reemployment" assistance as a benefit under the Arkansas Workers Compensation Act in an instance where the injured employee has sustained an injury resulting in entitlement to permanent disability benefits.

In the instant claim claimant has made concerted at securing employment since leaving the employment of respondents on December 20, 2002, due to the compensable injuries and residuals therefrom. Claimant's experience of May 2004 with SBC demonstrated that she was physically unable to perform the type of job activities she did prior to her compensable injury. Claimant has submitted her resume to a potential employer and allowed it to be distributed in her efforts to secure employment.

While the evidence reflects that the claimant is highly skilled, educated, and experienced, the same does not distract from the fact job placement assistance is a benefits to which she is entitled under the provisions of Ark. Code Ann. § 11-9-505. To date, claimant has been unsuccessful in securing employment within her physical limitations. The claimant has sustained her burden of proof by a preponderance of the evidence that job placement assistance in warranted in the instant claim. Respondents have controverted the afore.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly rate of \$410.00, for the period March 10, 2003, through March 20, 2003, as a result of the August 28, 2002, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing and other apparatus expenses, to include medical relate travel, growing out of the August 28, 2002, compensable injury.

Respondents are further ordered and directed to provide to the claimant job placement assistance pursuant to Ark. Code Ann. § 11-9-505, relative to August 28, 2002, compensable

injury.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable Gary Davis, on the controverted portion of this award in accordance with Ark. Code Ann. § 11-9-715, § 11-9-801, and WCC Rule 10.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge