

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E508014

LYNDA G. RUDD

CLAIMANT

A.L. TENNEY TRUSTEE

RESPONDENT EMPLOYER

STATE FARM FIRE & CASUALTY CO.

RESPONDENT CARRIER NO. 1

**DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

ORDER AND OPINION FILED SEPTEMBER 20, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on July 13, 2004. A prehearing conference was held on March 31, 2004, and a prehearing order was filed on April 8, 2004. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury to the low back and neck on November 1, 1991.
2. The respondents have accepted a 26% permanent impairment rating to the body as a whole.

3. The compensation rates are \$231.37/173.53.

4. The end of the healing period is August 14, 2002.

The claimant contends that she is permanently and totally disabled and that she falls under the odd lot doctrine. Alternatively, the claimant contends she is entitled to wage loss benefits as well as attorney's fees.

Respondent No. 1 contends that the claimant is not permanently and totally disabled and that work was available within her limitations and restrictions at respondent employer. Respondent further contends that it has offered vocational assistance and the claimant has failed to make any effort of motivation to return to work. Respondent asserts a credit for long term disability benefits the claimant is receiving (\$2,800 per month).

Respondent No. 2 contends that should the claimant be awarded permanent and total disability benefits pursuant to the statute and case law, Respondent No. 1 is required to pay the anatomical rating prior to payment of permanent and total disability benefits and should not be credited for the anatomical rating against the \$75,000 maximum required under Ark. Code Ann. §11-9-502 before the Trust Fund takes over. Respondent No. 2 did not take a position on permanent and total disability.

Respondent No. 1 responded to Respondent No. 2's contention, stating that case law does not support the position that respondents should not be entitled to a credit for permanent disability benefits paid toward the \$75,000 limit. Respondent No. 1 contends that any permanent disability benefits that are paid to the claimant would apply toward that \$75,000 limit in the event the claimant is found to be permanently and totally disabled.

Respondent No. 2 provided the case, *Nelson v. Timberline*, which came down in 1998, and this case overturns some prior case law that recognized Act 20, even though it was omitted.

The claimant contends that her injury was before Act 796 and Respondent No. 1 is not entitled to an offset for long term disability unless it can prove that the payments were made in lieu of workers' compensation benefits.

From a review of the record as a whole, to include medical reports, documents excellent briefs and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable injury to the low back and neck on November 1, 1991.
2. Respondent No. 1 has accepted a 26% permanent impairment rating to the body as a whole.
3. The compensation rates are \$231.37/173.53.
4. The end of the healing period is August 14, 2002.
5. The claimant has proven by a preponderance of the evidence that she has sustained a diminished wage earning capacity amounting to 50% in wage loss benefits

in excess of the impairment rating and Respondent No. 1 is responsible for these benefits.

6. Respondent No. 1 is not entitled to credit or an offset for long term disability benefits paid the claimant under a group plan.

DISCUSSION

The claimant, 55 years old, began her employment with the respondent employer in July 1980. In November 1991, the claimant sustained an admittedly compensable injury when she was in the storeroom on a ladder attempting to retrieve some paperwork when she lost her balance and fell into some shelving. The claimant had her first surgery on May 15, 1995, a fusion and diskectomy at C5-6 and C6-7. The claimant returned to work until she had her second surgery on June 12, 1996, involving her low back. The claimant again returned to work and worked until her third surgery in December 1997, when she again had neck surgery. The claimant had a fourth surgery on March 6, 1998 and again returned to work and worked until the last surgical procedure on September 7, 2000.

According to the claimant, she continued to work between 1991 and September 2000, as a claims supervisor. In addition to supervising employees, she wrote reports and followed up on any paperwork discrepancies. The job required lifting, pulling file, bending and walking.

The claimant testified that her office manual provides if you have not returned to work in 12 months, you are terminated. According to the claimant, she was not released to return to work within 12 months following her September 7, 2000, surgery.

The claimant applied for long term disability benefits and is currently receiving those as well as social security disability benefits.

According to the claimant, she has a lot of muscle spasm pain in her neck and shoulders, which prevents her from performing repetitious tasks and is unable to lift and bend or do long term sitting because of her back and leg numbness. The claimant testified that she has some good days but following normal activities, she will be on the sofa for the next few days having to apply ice or heat. The claimant can drive and does occasional shopping but could not work a 40-hour week.

The claimant confirmed she currently receives \$2,800 per month long term disability, \$725 from workers' compensation, \$552 for her granddaughter's SSI and \$1,400 social security disability. The claimant is currently taking prescription medication, to include OxyContin, Hydrocodone, Lidoderm patches, Soma, Vioxx, Ambien and Lexapro, but that is her only medical treatment. According to the claimant, she applied for each position presented by the vocational evaluator but was not selected for any position. The claimant confirmed that her last salary was in excess of \$53,000 plus 10% for a 401(K).

Patricia Ferguson, office administrator for the respondent employer, has been employed for 34 years for the employer. Ms. Ferguson explained the employer's long term disability plan was totally paid by the employer and pays 60% of the employee's salary after being off work 90 days. Ms. Ferguson explained the claimant was a business case analyst when she last worked for the employer. The job involved making phone calls, basic office work. Ms. Ferguson explained the claimant was a good worker. Ms. Ferguson testified under direct examination that work was available for the

claimant and accommodations could be made; however, the claimant never contacted the employer about returning to work with a doctor's release. Ms. Ferguson did confirm that she had never contacted the claimant with a position for her to return to work. Ms. Ferguson confirmed that there were no part time positions now available and all the full time positions are filled. Ms. Ferguson also confirmed employees are terminated after 12 months if they have not returned to work.

Chelle Cooper Williams, vocational case manager for Corvel Corporation, did a vocational assessment on the claimant in this matter. Ms. Williams noted that the claimant had a good work history of clerical work. Ms. Williams identified some barriers that might prevent the claimant from re-entering the work force, these barriers include her financial situation, having responsibility of her granddaughter, and taking pain medication and her physical problems.

Ms. Williams was questioned under cross examination about her efforts to contact the claimant's employer. Ms. Williams testified unequivocally that Sandy McKissick at State Farm advised her not to contact the current employer as there was no work available for the claimant. Ms Williams confirmed that she had only met with the claimant one time in May 2003 and had one telephone conversation with her a few weeks later and no further contact. There was no follow up after providing the job leads.

The claimant contends she is now permanently and totally disabled. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning capacity is impaired. In addition to medical evidence demonstrating the degree to

which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors, such as the worker's age, education, work experience, and any other matters which may affect the worker's future earning capacity. Ark. Code Ann. §11-9-522; *Tiller v. Sears*, 27 Ark. App. 159, 767 S.W.2d 544 (1989). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

An employee who is injured to the extent that she can perform services that are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist may be classified a totally disabled under the odd-lot doctrine. *Lewis v. Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). The odd-lot doctrine recognizes the obvious severity of some injuries may combine with other factors to preclude the employee from obtaining employment in any reasonably stable market, although the worker is not altogether incapacitated from work. *Id.* The factors which may combine with the obvious severity of the employee's injury to place him in the odd-lot category are the employee's mental capacity, education, training and age. *Id.* If the claimant makes a *prima facie* showing that he falls in the odd-lot category, the respondents have the burden of proving that "some kind of suitable work is regularly and continuously available to the claimant." *Id.*

In the present case, the claimant has proven by a preponderance of the evidence that she has sustained diminished wage earning capacity amounting to 50% wage loss. The claimant has a high school diploma and one year of college and one year of business school along with completion of a computer class. The vast majority of the claimant's work experience has been with the respondent employer, working there since July 1980 and some factory work experience. Following her compensable November 1991, injury, the claimant has undergone five surgeries with the last surgery on September 7, 2000. The claimant returned to work following the first four surgeries but did not return to work following the fifth surgery. The claimant testified that her employment with the respondent employer terminated after she had not returned to work within one year of her injury. The claimant's end of healing period was August 14, 2002.

While Pat Ferguson, office manager for the respondent employer, testified that there was work available for the claimant, she also noted that a job offer was not extended to the claimant. Further, she stated there were no job openings available now. The vocational consultant, Chelle Williams, testified that she was instructed not to contact the respondent employer about returning the claimant back to work there. I simply was not convinced that a job was available for the claimant to return to the respondent employer. The past four occasions when the claimant had returned to work following her surgeries, she had not been away from work over one year and following the September 2000, surgery, she was not released to return to work within the one-year period. The respondent's employer's policy is that employees are terminated if they do not return to work within one year of any absence.

The respondents did employ Chelle Williams to perform a vocational assessment and assist the claimant in finding other employment. Some positions were identified that were in the sedentary category and the claimant testified that she did apply to these and was not selected.

The respondents contend the claimant has some barriers to reentering the workforce. The most important barrier is the claimant's financial disincentive since she now receives long term disability benefits of \$2,800 per month, social security disability benefits of \$1,400, SSI for her granddaughter's disability of \$522 and workers' compensation benefits of \$725. The claimant also has custody of her granddaughter who has a hearing impairment. The claimant takes the granddaughter to school and to therapy on a regular basis.

The respondents also provided a surveillance video of the claimant during a week in May 2003. The video depicted the claimant driving, getting in and out of the vehicle, taking her granddaughter places and shopping. I did not find the video particularly damaging to the claimant since it was merely daily activities. The claimant was bending, getting in and out of the vehicle, and picking up dropped mail and such. The claimant was loading her car after shopping with bags and she did place a 20-pound bag of dog food in her car and did assist her granddaughter onto a small ledge. Again, these were sporadic activities that were not precluded by her medical reports. I saw nothing in the video to suggest anything particularly strenuous or unusual. Certainly, the claimant did not contend she was an invalid, just unable to work.

After considering all the wage loss factors, to include, age, education, work experience, medical evidence and other matters reasonably expected to affect earning

power, I find the claimant has sustained a 50% wage loss diminished earning capacity in excess of the impairment rating. The claimant has shown motivation in returning to work on four separate occasions following surgeries and after the fifth surgery the claimant did not return to work. The medical evidence reveals the claimant does take a number of medications and the claimant testified that she must lay down during the day and cannot stand or sit for long periods of time and cannot perform tasks that involve lifting and bending. The claimant still experiences muscle spasms stemming from her neck and shoulders as well as numbness in the legs. Dr. William Ackerman, on January 19, 2004, indicated that he did not believe the claimant would be able to resume gainful employment; however, Dr. Thomas Kizer had earlier suggested the claimant start with volunteer work and then move back into paid employment. While a return to full time work might be a stretch for the claimant initially, the claimant has a vast amount of office experience and skills and should be able to resume some type of sedentary employment on a part time basis to start, if not full time. Respondents furnished the claimant some types of positions for which she should qualify. The claimant is a bright woman with good work skills in her background.

Since permanent and total disability benefits were not awarded, Respondent No. 2's contention regarding the \$75,000 maximum for Respondent No. 1 will not be addressed.

Respondent No. 1 asked that it be given credit for long term disability benefits paid by the employer in a sole employer paid disability plan. The claimant contends that respondents are not entitled to a credit on long term disability benefits paid. The claimant contends under the statute and case law at the time of this injury, the

respondent is entitled to credit for long term disability, if it is advance payment of compensation or in lieu of workers' compensation benefits.

Ark. Code Ann. §11-9-807 (1987) provides:

If the employer has made advance payments for compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. If the injured employee receives full wages during disability, he shall not be entitled to compensation during the period.

The Arkansas Supreme Court has addressed the issue of advance payment of compensation in *Southwestern Bell Telephone Co. v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966). The Court adopted the general rule cited by *Larson's Workers' Compensation Law*, 97-51:

As to private pensions or health and accident insurance, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits.

In the *Siegler* case, the employer provided a "Plan," which included disability payments to an injured employee during his period of disability. The company fully funded the "Plan" and the employees made no contribution to it. The "Plan" did not contain any indication that benefits received under it were to be treated as advance payments of compensation. The employer contended that it should be allowed a setoff against the worker's compensation award for any amounts paid the employee under the "Plan." The Court held that only where the employer clearly establishes that the sums paid or provided by it to an injured employee are advanced payments of compensation could it be entitled to any offer. In all other instances the employee could recover the full amount of his disability benefits provided by the Act.

In the present case, there was no indication or evidence presented that the employer clearly established that the sums paid under the long term disability plan were advanced payments of compensation. Therefore, the employer is not entitled to an offset.

ORDER

The claimant has proven by a preponderance of the evidence that she has sustained a diminished wage earning capacity amounting to 50% in wage loss benefits in excess of the impairment rating and Respondent No. 1 is responsible for benefits. Respondent No. 1 is not entitled to credit or an offset for long term disability benefits paid the claimant under a group plan.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**