

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109016

JANET TUDOR	CLAIMANT
CATHERINES STORES CORP.	NO. 1 RESPONDENT
AMERICAN INSURANCE COMPANY INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED AUGUST 30, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JAMES FILYAW, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

Respondent No. 2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 8, 2004, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 4, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On March 24, 2000, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to the left ankle and foot on March 24, 2000.

4. The claimant is entitled to a compensation rate of \$194.00 for temporary total disability and \$154.00 for permanent partial disability.

5. Respondents' No. 1 paid temporary total disability from March 26, 2000, through March 29, 2000, from April 30, 2000, through May 21, 2000, and from January 8, 2001, through August 3, 2002.

6. Healing period ended on March 25, 2002.

7. Respondents No. 1 have accepted a 25 percent permanent partial disability to the left foot.

8. Medical expenses have been paid.

By agreement of the parties the issues to litigate are limited to the following:

1. Permanent total disability.
2. Second Injury Fund liability.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is entitled to additional temporary total disability benefits, permanent partial disability benefits, and/or that she is totally disabled.

In regard to the foregoing issues Respondents No. 1 contend that the claimant's healing period ended on March 25, 2002, and she is entitled to no additional temporary total disability benefits. Respondents No. 1 contend that their liability is the actual

anatomical impairment of 25 percent to the foot and ankle. If the claimant has disability in excess of that rating, it is the liability of the Second Injury Fund.

In regard to the foregoing issues Respondent No. 2 contends that, based upon statutory language found at Ark. Code Ann. §11-9-521-G which refers a 11-9-519 begin that this claimant is entitled to no more than what the impairment rating was for her scheduled injury scheduled injury. That these two sections of the Arkansas code have recently been addressed by the Commission in the McDonald v. Batesville Poultry Equipment claim, Claim number E905523 which the Commission held that short of the circumstances set out in 518(b), that is the absence of or the loss of both hands, both arms, both legs, both eyes, that the claimant is not entitled to any additional disability above the anatomical impairment rating.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. Respondents No. 1 have submitted two packets of documentary evidence marked Respondents' No. 1 and Respondents No. 1's Exhibit No. 1. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified and it has been stipulated that she sustained a compensable injury to her left ankle and foot on March 24, 2000.

The claimant testified that she was fifty-nine years old and had worked for the respondent for ten years prior to her injury. The claimant explained that her duties for the respondent were sales as well as some management responsibilities. The claimant testified that she had finished high school and attended about a year of business college. The claimant testified that as a result of her compensable injury she has had surgery on her ankle. The claimant testified that her mobility has slowly decreased in that she is pretty much wheelchair bound presently. The claimant testified that she can stand for only about three to five minutes at a time. The claimant testified that after her compensable injury she underwent a complete physical by her regular doctor and it was discovered that she had fibromyalgia which had developed over the last four years. The claimant testified that she also has problems with asthma.

On cross examination by Respondent No. 1, the claimant testified that before she moved to Arkansas she did clerical type work as well as worked on payroll for the credit department at Sears, she has done document work for the County Clerk's office and she has worked as a receptionist. The claimant testified that she was a stay at home mom for approximately thirteen or fourteen year. The claimant testified that she also has worked as a Mary Kay consultant. The claimant agreed that Dr. Hawkins was the physician who did surgery on her left heel and ankle area and that he released her to return to work with permanent restrictions on April 12, 2002. The claimant explained that by this time her

fibromyalgia had started, she was in a lot of pain and could not return to work. The claimant agreed that she filed for and began receiving social security in July 2001 before she had her surgery on her heel and ankle. The claimant agreed that she has been overweight all of her life. The claimant testified that besides fibromyalgia she also suffers from chronic fatigue. The claimant testified that prior to her compensable injury she also suffered from shingles as well as depression and took medications for these problems. The claimant testified that she has not been back to Dr. Hawkins since he released her on April 12, 2002. The claimant agreed that Dr. Hawkins, her surgeon, and Dr. Holder, the physician who set forth her impairment rating, had set forth in their reports in the Spring of 2002 that she could return to work to sedentary type work.

On cross examination by Respondent No. 2, the claimant testified that it was all of her physical problems along with her ankle and heel problems that have caused her to be unable to work. The claimant was asked, "Is one causing more problems than the other?" The claimant responded, "They're all-its all together now. Its just all the same." The claimant agreed that it was her understanding that Dr. Holder had assessed her with a 25 percent impairment rating to her left foot. The claimant agreed that she has been paid her impairment rating.

The medical records set forth that following the claimant's compensable left foot and ankle injuries she received conservative care by Dr. Griffin as well as Dr. Coker where medications and a

weight loss program were recommended. The claimant was eventually diagnosed with having a tear of her posterior tibial tendon and it was recommended that she needed a flexor digitorum longus substitution and an osteotomy of the calcaneus. Dr. Bryan Hawkins saw the claimant on July 11, 2001, for her left foot and ankle problems where it is noted that she has a problem with obesity noting that she weighs over 300 pounds and she has a history which includes hypertension, asthma and has been just diagnosed with fibromyalgia. Dr. Hawkins operated on the claimant's left foot on September 11, 2001. Dr. Hawkins continued with follow up with the claimant subsequent to her surgery and on February 7, 2002, he writes that he would allow her to continue increasing her activities noting that she would do quite well with a sedentary type job although it is apparent that she has obtained social security disability. The claimant underwent a second surgery to remove hardware from her ankle by Dr. Hawkins on March 12, 2002. On March 25, 2002, Dr. Hawkins writes that the claimant has reached maximum medical improvement and gave her permanent restrictions of no standing continually for more than one hour during an eight-hour work period and that she should not do any excessive climbing or other activities on her feet. The doctor writes that she should wear her orthotics at all times when she is wearing her shoes and that any job she should have should be a sedentary type work. Dr. Keith Holder assessed the claimant with a 25 percent lower extremity permanent partial impairment rating on September 13, 2002.

The entirety of the claimant's exhibits deal with the claimant's treatment at the Mulberry Family Clinic and Jenny Findley, a nurse practitioner, at the Mulberry Clinic. These visits and treatment deal primarily with the claimant's fibromyalgia and upper respiratory problems such as pneumonia. Ms. Findley notes on September 5, 2003, that the claimant's fibromyalgia has completely overtaken the claimant's health, noting that since her accident her health has steadily deteriorated.

After review of this entire record and in light of current Arkansas law, I find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. Ark. Code Ann. §11-9-521(g) specifically states that a claimant is not entitled to benefits over and above the schedule except as provided in Ark. Code Ann. §11-9-519(b). This provision only provides for permanent and total disability benefits in limited circumstances. A claimant must have lost "both hands, both arms, both legs, both eyes, or any two thereof" in order to be deemed permanently and totally disabled. The Act does not provide for any other circumstances in which a claimant with a scheduled injury may be permanently and totally disabled. In McDonald v. Batesville Poultry Equipment, Full Commission opinion June 17, 2004, Claim Number E905523, the Commission sets forth that while we recognize that there may be circumstances in which a claimant with only one scheduled injury who does not satisfy the multiple loses set forth in Ark. Code Ann. §11-9-519(b) may be permanently and totally disabled, the Act does not allow for an award for benefits

greater than the schedule. The Commission in the McDonald case further set forth that Ark. Code Ann. §11-9-1001 prohibits them from adding coverage or expanding the scope of the statute; accordingly, they felt that they could not look to other factors beyond the loss of the extremities listed in Section 519(b) in determining whether a claimant with a scheduled injury is permanently and totally disabled. Therefore, based on the facts of the present case in light of Arkansas law, this claim for total disability will be denied.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On March 24, 2000, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to the left ankle and foot on March 24, 2000.

4. The claimant is entitled to a compensation rate of \$194.00 for temporary total disability and \$154.00 for permanent partial disability.

5. Respondents' No. 1 paid temporary total disability from March 26, 2000, through March 29, 2000, from April 30, 2000, through May 21, 2000, and from January 8, 2001, through August 3, 2002.

6. Healing period ended on March 25, 2002.

7. Respondents No. 1 have accepted a 25 percent permanent partial disability to the left foot.

8. Medical expenses have been paid.

9. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. See Ark. Code Ann. §11-9-521(g) and Ark. Code Ann. §11-9-519(b). Also see McDonald v. Batesville Poultry Equipment, Full Commission, June 17, 2004, Claim Number E905523.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. Therefore, this claim for total disability should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE