

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F300403

NANCY CLAY	CLAIMANT
ILPEA, INC.	NO. 1 RESPONDENT
ROYAL & SUNALLIANCE CO. INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	NO. 3 RESPONDENT

OPINION FILED DECEMBER 9, 2005

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents No. 2 represented by AMY HUFFMAN, Attorney, Little Rock, Arkansas.

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

Respondent No. 3 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 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 April 6, 2005. 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 November 6, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to both her upper extremities.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$244.00 for temporary total disability and \$183.00 for permanent partial disability.

6. All temporary total disability has been paid.

7. The claimant's healing period ended on January 12, 2005.

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

1. Is the claimant permanently and totally disabled?
2. Second Injury Fund liability.
3. Claimant's impairment rating.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is totally permanently disabled, or alternatively entitled to wage loss over and above any anatomical impairment which may be awarded to her hands. There is Second Injury Fund liability as a result of pre-existing back injury and related surgery occurring approximately 15 years ago. There is also liability for the Death and Permanent Disability Fund.

In regard to the foregoing issues Respondents No. 1 contend that on November 6, 2002, the claimant reported pain in her right fingers, hand and elbow. Respondents No. 1 contend that the

claimant sustained bilateral carpal and cubital tunnel syndrome, which they accepted as compensable injuries, paying medical and TTD benefits. Respondents No. 1 contend that the claimant is not entitled to wage loss benefits pursuant to Ark. Code Ann. §11-9-522, as the claimant has suffered scheduled injuries. In the alternative, Respondents No. 1 contend that the Second Injury Fund is liable for wage loss benefits, as the claimant sustained bilateral carpal tunnel syndrome injuries in 1996. Respondents No. 1 further contends that the claimant is not totally and permanently disabled, as she has not lost the use of both upper extremities.

In regard to the foregoing issues Respondent No. 2 contends that the claimant is still employed by Respondent No. 1 and, therefore, she is not entitled to an award of functional disability. Claimant cannot demonstrate she is permanently and totally disabled. Claimant has failed and refused to participate in any program of rehabilitation, retraining, or job placement, as she does not want to resign from her current position with Respondent No. 1. Finally, pursuant to Ark. Code Ann. §11-9-411, the claimant should be required to disclose the identity of any person or entity which has paid benefits to the claimant; if this is not done, the Commission should determine this amount and order the carrier to hold said sum in reserve for five years.

In regard to the foregoing issues Respondent No. 3 contends that pursuant to Ark. Code Ann. §11-9-525(b)(1), Second Injury Fund must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. If the Second

Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits. Respondents No. 1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits. Additionally, Respondents No. 1 are not entitled to credit against its \$75,000.00 maximum for payment of the claimant's permanent partial anatomical ratings for the compensable injury. The Death and Permanent Total Disability Trust Fund will further state its contentions upon completion of discovery.

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

DISCUSSION

The claimant testified that she is fifty years old and had worked for the respondent for eighteen and a half years. The claimant testified that she still considers herself an employee of the respondent although she has not been able to return to work. The claimant agreed that she has not received any notification that she has been terminated. The claimant testified and it has been

stipulated by Respondents No. 1 that she sustained compensable injuries to both her upper extremities while working. All medical expenses as well as temporary total disability benefits have been paid. It has further been stipulated by the parties that the claimant's healing period ended on January 12, 2005. The claimant testified that while working for the respondent she was a material handler, explaining that she kept other employees stocked with parts which they needed to make gaskets. The claimant testified that as a result of her compensable injury she was treated by Dr. Heim, Dr. Moore and Dr. Kelly. The claimant testified that she has undergone five surgeries on her left upper extremity and three on her right.

The claimant testified that currently she has problems holding onto things with either one of her hands noting that items just fall out of her hand. The claimant testified that in order to carry a gallon of milk, she has to cradle it in her arms in order to keep control of it. The claimant testified that she has no control with her left hand and even simple tasks like dressing can be a problem. The claimant testified that it took her forever to learn to tie her shoes and that she can button buttons only if the hole is loose, noting that if the button holes are tight she just does not wear the item. The claimant testified that all buttons give her problems and she has grown use to just buying pullovers or elasticized waist pants. The claimant testified that she has problems driving because her hands go to sleep and then they begin to cramp if she holds onto anything too long. The claimant

testified that she has false teeth and when she takes them out to brush them she has often dropped them in the sink, noting that she has even chipped one.

The claimant testified that if there is anyway possible she would like to go back to work for the respondent. The claimant noted that she had worked there so long, her work and the people she worked with were like family. The claimant testified that she cannot think of any job that she could do because of her arms and her back. The claimant testified that she does have a high school diploma but no other education past high school. The claimant testified that her work experience has been as a house wife and mother then doing factory repetitive type work. The claimant testified that her youngest daughter and her family have moved in with her because the claimant's husband is disabled. The claimant stated that her daughter helps care for the both of them. The claimant testified that her daughter does the cleaning and cooking. The claimant testified that she is currently taking Neurotin for pain, Amitriptylines, Ultram and another nerve pill. The claimant testified that these medications make her sort of spaced out and she does a lot of sitting and staring. The claimant testified that her medications make her dizzy.

The claimant testified that in the early 90s she had an injury to her back and underwent back surgery. The claimant testified that Dr. McDade performed this surgery. The claimant testified that her back still bothers her and if she sits for very long it is difficult for her to get up and it is difficult for her to walk.

The claimant testified that currently because she sits so much, her back is giving her more problems than it had when she was able to work every day.

On cross examination by Respondents No. 1, the claimant again agreed that she underwent back surgery performed by Dr. McDade in 1999 for the repair of two herniated discs. The claimant testified that she did not go through physical therapy after her surgery but that Dr. McDade did assess her with permanent restrictions of no lifting over ten pounds. The claimant testified that she had bilateral carpal tunnel surgery in 1996 and underwent physical therapy following this surgery. The claimant testified that when she was released she was able to return to work. The claimant testified that after her various surgeries after 2002 she underwent physical therapy as well as work hardening programs. The claimant agreed that she underwent a functional capacity evaluation and agreed that the therapist assessed her with being able to do light work but with no repetitive use of her arms. The claimant agreed that she can do some light house duties such as dusting and mopping but she does have trouble picking items up. The claimant explained that she has to use both hands to pick up items. The claimant agreed that she possibly could work as a receptionist if she could use a headset and did not have to pick up the telephone or dial all day long. The claimant testified that she would also need to be able to stand because her back becomes painful if she sits too long. Again, the claimant testified that being as inactive as she has been since she quit working has made her back worse.

On cross examination by Respondent No. 2, the Second Injury Fund, the claimant agreed that following her back surgery she was off work for eight months. The claimant also agreed that following her carpal tunnel surgeries, she was released with no restrictions and returned to full activity. The claimant testified that in retrospect she wishes she had never undergone any of the surgeries for her arms because it seemed to just lead to more problems. The claimant testified that due to her inactivity, she has put on weight which probably has attributed to her increase in her back pain. The claimant testified that until the respondent terminates her or tells her she no longer is an employee, she considers herself an employee of the respondent, therefore, she has not looked for work elsewhere. The claimant testified that she has applied for social security but has not been approved to date. The claimant agreed that she would consider retraining if there was anything offered to her that she could possibly do. The claimant testified that she has not looked into retraining because she is still an employee of the respondent.

On redirect examination, the claimant testified that she has problems writing and at present she just scribbles and it is very difficult to read. The claimant testified that she has problems holding onto a pin and her daughter even signs her checks to pay her bills.

On recross examination by Respondents No. 1, the claimant agreed that she has been treated since July 2002 for back pain by

Dr. Rickey. The claimant testified that she has undergone some epidural steroid injections for her back.

The medical records in this case set out the treatment for this claimant's compensable injuries. The claimant underwent a functional capacity evaluation on January 6, 2005, as well as October 14, 2004. Dr. James Kelly writes on January 12, 2005, that he has seen the claimant for follow up of her left and right ulnar nerve neuritis noting that she has undergone a functional capacity evaluation that sets forth that she is capable of light duty activities with a twenty-pound weight restriction and no repetitive pushing, pinching, flexation or extension of her wrist on either left or right side. Dr. Kelly notes that these will be made permanent restrictions. On February 14, 2005, Dr. Kelly assessed the claimant with a 15 percent impairment to her left upper extremity and 15 percent impairment her right upper extremity due to her moderately severe ulnar nerve entrapment of the elbows. Dr. Kelly also assessed some loss of range of motion impairment as well indicating that a combination of all these figures gives her a 30 percent whole body impairment. Dr. Kelly lastly writes on April 8, 2005, that he has treated the claimant for some time for an intractable ulnar neuritis of the left and right elbows noting that they have tried releases and submuscular transpositions but little has been of any benefit to the claimant. Dr. Kelly writes that the injuries to the claimant's arms, in his opinion, does not make her totally disabled. The doctor writes that due to the claimant's work experience and age, in his opinion, she might be totally

disabled as to retraining and employment because she cannot do any repetitive heavy labor anymore.

Based on Dr. Kelly's note of February 14, 2005, I find that the claimant is entitled to a 15 percent impairment rating to her left upper extremity and a 15 percent impairment rating to her right upper extremity based on her moderately severe ulnar nerve entrapment. The claimant testified and the medical records set forth that the claimant did undergo a partial hemilaminectomy at the L5 level. The claimant has testified that she continues to have symptoms as a result of this back surgery. Based on the A.M.A. Guides, Forth Edition, at Table 75 found at Page 113 a single level decompression with residual signs and symptoms in the lumbar area is entitled to a 10 percent impairment rating. Therefore, I find that the claimant is entitled to a 10 percent impairment rating for her previous back surgery. Using the A.M.A. Guides, Forth Edition, Table 3 found at page 20 setting forth the relationship of impairment of the upper extremity to impairment of the whole body, the claimant would be entitled to an 18 percent whole body impairment for her bilateral upper extremity impairments. Then using the combined values chart found in the A.M.A. Guides, Forth Edition, at Page 322, the claimant would be entitled to a 26 percent whole body impairment rating for her various injuries. I find that the respondents should pay to this claimant 15 percent impairment to her right upper extremity and 15 percent impairment to her left upper extremity as a result of her compensable injuries. I find that the claimant has failed to prove

by a preponderance of the evidence that she is permanently and totally disabled. The claimant has testified that she still considers herself an employee of the respondent and a functional capacity evaluation has determined that she is capable of doing sedentary type work. I do find, however, that the claimant has proven by a preponderance of the evidence that she is entitled to wage loss over her whole body impairment of 26 percent in the amount of an additional 20 percent. This determination is based on the claimant's education, limited transferable job skills, physical restrictions, impairments and age. I do find that there is Second Injury Fund liability in this case in that the combination of the claimant's compensable upper extremity injuries along with her back injury causes her wage loss to be greater than it would be based on her upper extremity problems alone. I am aware that there can be an argument made that since the claimant's compensable injuries were scheduled injuries she would not be entitled to wage loss unless she was found to be permanently and totally disabled. However, in reading Ark. Code Ann. §11-9-525 I find no language of excluding wage loss to a claimant who has compensable scheduled injuries as well as a prior impairment which combines to entitle them to wage loss.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On November 6, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to both her upper extremities.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$244.00 for temporary total disability and \$183.00 for permanent partial disability.

6. All temporary total disability has been paid.

7. The claimant's healing period ended on January 12, 2005.

8. The claimant is entitled to impairment ratings for her upper extremities in the amount of 30 percent, 15 percent for each arm. See discussion above.

9. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. See discussion above.

10. The claimant is entitled to wage loss in excess of her impairment ratings for her upper extremities based on a combination of her compensable injuries and a previous back injury. I find that this claimant has sustained wage loss in the amount of 20 percent to the body as a whole. See discussion above.

11. I find that there is Second Injury Fund liability in this matter in that the claimant's disability is greater due to her previous back problems than it would be based on her compensable injuries alone. See discussion above.

12. The respondents have controverted this claimant's entitlement to an impairment rating for her upper extremities and wage loss.

13. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that she is entitled to permanent partial disability to her upper extremities in the total of 30 percent which Respondents No. 1 should pay.

This claimant has failed to prove that she is permanently and totally disabled.

The claimant has proven by a preponderance of the evidence that she is entitled to wage loss in the amount of 20 percent to the body as a whole over her impairment ratings.

There is Second Injury Fund liability in this matter in that the claimant's prior back problems combined with her compensable injuries to entitled her to a greater degree of disability than what she would be entitled to for her compensable injuries alone. Therefore, the Second Injury Fund should pay the 20 percent wage loss to this claimant.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE