

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F010134

ERMA J. WYNN, EMPLOYEE	CLAIMANT
FAIRFIELD COMMUNITIES, INC., EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 29, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on May 9, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant appeared *pro se*.

Respondent represented by Mr. Michael R. Mayton, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 9, 2005, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this case on April 6, 2005, and a Prehearing Order was filed on April 7, 2005. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to an additional stipulation concerning the applicable compensation rates, as well as respondents' dismissing its affirmative defense concerning the Statute of Limitations as set out below. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" without objection.

At the prehearing conference, it was stipulated that the employment

relationship existed between the parties at all relevant times, including January 31, 2000; that the claimant sustained a compensable injury on said date, respondents accepting and paying benefits related to an injury to the right upper extremity; that respondents paid indemnity benefits at the rate of \$240.00 per week for temporary total disability and \$180.00 per week for permanent partial disability based upon a proposed average weekly wage of \$360.00; and that respondents controverted benefits beyond those previously paid. At the hearing, the parties stipulated that, at the time of the claimant's injury, she earned \$9.25 per hour and that, based upon a forty (40) hour work week, the claimant's average weekly wage was \$370.00, entitling her to compensation rates of \$247.00 per week for temporary total disability and \$185.00 per week for permanent partial disability.

By agreement of the parties, the following issues were presented for determination:

1. The claimant is entitled to additional permanent partial disability benefits as the result of her admitted, right upper extremity injury;
2. respondents' responsibility for additional medical treatment related to the admitted, right upper extremity injury; and,
3. whether the claimant sustained any additional injuries as a result of the admitted incident.

Claimant contended, in summary, that she was entitled to permanent partial disability benefits in excess of the seven percent (7%) impairment to the right upper extremity assigned by Dr. Berry Thompson in an amount to be determined by this Commission. In addition, the claimant maintained that she continued to experience

physical problems with her right upper extremity and should be provided additional and continued, reasonably necessary medical treatment. At the prehearing conference, the claimant also maintained that, in addition to the admitted, right upper extremity injury, she also sustained additional injuries of unspecified nature and kind, but was not prepared to specifically identify what additional benefits she was requesting concerning the alleged, additional injuries. At the hearing, claimant asserted that her primary injury was to her right elbow, but maintained that she also sustained a low back injury while, at the same time acknowledging that the only additional benefits requested concerned the admitted, right upper extremity injury.

As previously pointed out, respondents withdrew its contention that the claim was barred by the Statute of Limitations while declaring that any remaining contentions were properly set out in the Prehearing Order as follows:

1. All benefits to which the claimant is entitled have been paid and have not been controverted.
2. The only compensable injury sustained by the claimant at the time of the accident in question was an injury to her elbow.
3. The respondents controvert and deny any injuries other than the elbow injury on January 31, 2000.
4. The claimant did not sustain an injury to her low back and/or knee at the time of the accident in question.
5. The claimant is not entitled to any additional benefits.
6. The claimant did not sustain any injuries to her wrists, hands or arms. The only injury sustained by the claimant was to her right elbow.
7. The claimant was released to return to full duty employment by her treating

physician, Berry Thompson, on or about June 29, 2000.

8. The claimant is limited to the seven percent (7%) anatomical impairment rating assigned by her treating physician, Berry Thompson, since this is a scheduled injury.
9. The claimant did not sustain cubital tunnel syndrome as a result of the injury in question.
10. The claimant did not sustain carpal tunnel syndrome as a result of the injury in question.
11. The claimant is not entitled to any additional medical treatment as a result of the injury which occurred on January 31, 2000.
12. The claimant's current problems and need for treatment, if any, are related to her pre-existing neuropathy and are not related to her employment or caused by her accident on January 31, 2000.
13. Respondents hereby request a set off for any medical expenses paid by the claimant's group health carrier.

The claimant was the only witness to testify. The record is composed solely of the transcript of the May 9, 2005, hearing containing a joint medical exhibit consisting of seventeen (17) pages.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her 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. The Arkansas Workers' Compensation Commission has jurisdiction over this

claim.

2. On January 31, 2000, the claimant sustained a compensable injury to her right upper extremity which arose out of and during the course of her employment with Fairfield Communities, Inc., at which time she earned sufficient wages to entitle her to compensation rates of \$247.00 per week for temporary total disability and \$185.00 per week for permanent partial disability.
3. The claimant's healing period ended on or before June 29, 2000.
4. The claimant was paid temporary total disability benefits for appropriate dates that she was required to miss work; however, respondents have underpaid the claimant \$7.00 per week during the period of her total disability.
5. The claimant sustained a seven percent (7%) impairment rating to the right upper extremity as assigned by Dr. Berry Thompson, and subsequently confirmed by Dr. G. Thomas Frazier. Respondents accepted and paid a seven percent (7%) impairment to the right upper extremity below the elbow, rather than the appropriate rating of seven percent (7%) to the entire, right upper extremity. Accordingly, the claimant has proven, by a preponderance of the credible evidence, that she is entitled to an additional 4.2 weeks of permanent disability at the rate of \$185.00 per week, as well as an additional \$5.00 per week, representing the underpayment in the permanent partial

disability rate.

6. The claimant has failed to prove that she sustained any additional injuries on January 31, 2000, beyond the admitted injury to her right elbow.
7. The claimant has failed to prove, by a preponderance of the credible evidence, that additional medical treatment is reasonably necessary.
8. Respondents have controverted all benefits beyond those previously paid.

### DISCUSSION

The claimant, Erma J. Wynn, is sixty-three (63) years old. She graduated from high school and has also completed some college courses. In addition, the claimant has vocational training, specifically, secretarial training at Capital City Business College. The claimant sustained an admitted, compensable injury on January 31, 2000, when she slipped on some ice and fell on her right side, sustaining a traumatic injury to her right elbow. The claimant was initially examined and evaluated by Dr. Leibovich who referred her to Dr. S. Berry Thompson, an orthopedic surgeon with OrthoArkansas in Little Rock, Arkansas. Diagnostic studies revealed that the claimant sustained a dislocated right elbow. In addition, x-rays revealed an anterior fracture fragment. Dr. Thompson treated the claimant with a whole arm splint. The claimant returned to Dr. Thompson on February 10, 2000, at which time he removed the splint and placed the claimant's arm in a sling while permitting her to return to work one-handed, if available. Dr. Thompson treated the claimant with physical therapy and medication. Dr. Thompson continued to treat the

claimant through June 29, 2000, at which time he released her as having reached maximum medical improvement, and assigned a seven percent (7%) permanent partial impairment to the right upper extremity which respondents apparently accepted and paid; however, as reflected by the record, respondents accepted and paid a seven percent (7%) impairment to the upper extremity, below the elbow rather than the rating assigned by Dr. Thompson in his final report. (Jt. Ex. A, p.7)

The record reflects that the claimant returned to work for the employer herein, first, performing restricted-duty and later to full-duty and was paid temporary total disability for the appropriate dates. However, as reflected by the stipulations, respondents paid at an erroneous compensation rate of \$240.00 per week rather than the proper rate of \$247.00 per week. Likewise, respondents paid impairment benefits at the erroneous rate of \$180.00 per week rather than the proper rate of \$185.00 per week.

The claimant subsequently, voluntarily terminated her employment with the respondent herein and went to work for UAMS. In addition, the claimant has, at all times, both before and since her injury, held a part-time job as a sales assistant with Dillard's Department Store. After her release by Dr. Thompson, the claimant apparently requested and obtained a change of physicians from Dr. Thompson to Dr. David Rhodes. Dr. Rhodes recommended additional physical therapy which respondents apparently paid. Dr. Rhodes also released the claimant to return on an as needed basis. The claimant has not returned to Dr. Rhodes. Finally, the

record reflects that the claimant requested, and obtained a second opinion from Dr. G. Thomas Frazier. Dr. Frazier performed an extensive evaluation, specifically, to determine whether the claimant had any additional upper extremity conditions such as carpal tunnel syndrome which Dr. Rhodes suggested needed evaluation. A portion of Dr. Frazier's March 3, 2004, report is set out below:

Examination of her right upper extremity shows no obvious swelling or deformity. There is full active range of motion of the elbow, wrist and digits. There is no thenar, hypothenar, or interosseous atrophy of the right hand. Tinel's sign is negative over the median nerve at the right wrist. Phalen's test is negative at one minute. Median nerve compression tests and pronator stress tests are negative. Forment's sign is negative in the right hand. Tinel's sign is negative over the ulnar nerve at the cubital tunnel and cubital groove at the right elbow, as well as over Guyon's canal at the right wrist. Elbow flexion test is negative.

Examination of the right elbow shows no swelling or interarticular effusion. Active range of motion is 15-135° flexion, with passive range of motion of 0-135° flexion. There is no instability with stressing of the medial or ulnar lateral collateral ligamentous complexes. There is no crepitus in the elbow with range of motion.

Grip strength in the right hand is 45 lbs., compared to 60 lbs. in the left hand. Pinch strength is 12 lbs. bilaterally. Two point discrimination is normal at 5 mm in the median and ulnar nerve distributions of the right hand.

Differential grip does not show a normal dumbbell shaped curve in the right hand.

Ms. Wynn was evaluated by Dr. Rutherford after telephone consultation with you, and repeat electrodiagnostic studies were obtained. These studies showed some evidence of mild diabetic neuropathy, but no focal abnormality of the median or ulnar nerves.

Review of Ms. Wynn's medical record includes electrodiagnostic studies by Dr. Kevin Collins done on October 23, 2003. These studies show some evidence of mild median neuropathy or mild carpal tunnel syndrome, as well as early right RE cubital tunnel syndrome. With the repeat studies today being normal, it was my opinion she does not have either of these conditions.

Today I have related to Ms. Wynn my findings, and my recommendations are that

she return to unrestricted activities. I do not believe that she needs surgical treatment and did not have evidence of peripheral compression neuropathy involving either the medial or ulnar nerves of the right upper extremity. I would concur with the previous impairment that has been assigned to her right upper extremity with regard to her right elbow injury. (Jt. Ex. A, pp.16-17) (emphasis supplied)

Rather than conduct a further analysis of the record in this cause, suffice it to say that the claimant has failed to offer any medical evidence to support any alleged back injury. Further, the claimant has failed to prove that she sustained any injury to her right upper extremity, save the admitted injury to the right elbow. Finally, the claimant has failed to prove that continued medical treatment is reasonably necessary. Rather, it appears that the claimant was not properly informed that she will always continue to experience some residuals as the result of the admitted injury which is reflected in the seven percent (7%) impairment to the upper extremity assigned by both Dr. Berry Thompson and Dr. G. Thomas Frazier. Accordingly, claimant's entitlement to additional medical treatment is not reasonably necessary.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is

required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Further, since the claimant has a scheduled injury, and has at all times been gainfully employed, she is not entitled to permanent disability benefits in excess of the seven percent (7%) impairment rating. Under Ark. Code Ann. §11-9-521, the Commission cannot consider a wage earning loss in addition to the functional loss in fixing partial loss or partial loss of use of an extremity. *Anchor Construction Co. vs. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972). Specifically, the rule in Arkansas is that a claimant sustaining a scheduled injury is limited to the applicable allowances set forth in §11-9-522 and the benefits cannot be increased by considering wage-loss factors absent a finding of permanent total disability. *Taylor vs. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).

The record does reflect that the claimant was paid at inappropriate compensation rates for both temporary total disability and permanent partial disability. Further, the claimant is entitled to permanent impairment benefits based upon a seven percent (7%) rating to the upper extremity rather than a seven percent (7%) rating to the extremity below the elbow. Accordingly, I hereby make the following:

AWARD

Respondent, Zurich American Insurance Company, is hereby directed and

ordered to pay, to the claimant, temporary total disability benefits at the rate of \$247.00 per week during the times that she was required to miss work. Specifically, respondents are responsible for an additional \$7.00 per week for the appropriate periods of time.

Respondents are further directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$185.00 per week, beginning June 29, 2000, and continuing for 17.09 weeks, representing a seven percent (7%) permanent impairment rating to the right upper extremity for a total of \$3,074.40. Respondents may claim credit for all permanent impairment benefits previously paid.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

---

DAVID GREENBAUM  
Chief Administrative Law Judge