

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E913192

**LORI A. RAIBOURN,
EMPLOYEE**

CLAIMANT

**FEDERAL EXPRESS CORP.,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

**SEDGWICK CLAIMS
MANAGEMENT SERVICES, INC.,
BENEFITS ADMINISTRATOR**

RESPONDENT NO. 2

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 3

OPINION FILED APRIL 10, 2006.

Pursuant to a hearing conducted January 10, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Silas H. Brewer, Attorney at Law, Little Rock, Arkansas, appearing for the claimant;

Mr. Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1 and No. 2; and

Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas appearing for Respondent No. 3.

STATEMENT OF THE CASE

This was a hearing to consider the extent of permanent disability resulting from a neck injury suffered by the claimant during her employment as a delivery truck driver with Federal Express Corporation.

The claimant began her employment with Federal Express in Texas in June, 1997, eventually transferring to Little Rock in 1998. On October 27, 1999, she injured her neck while lifting a package from a conveyor belt. This injury required extensive medical care, including surgery on four occasions. For example, North Little Rock neurosurgeon Dr. Anthony E. Russell performed three

surgeries, a diskectomy and fusion with placement of an Atlantis plate in 2001, an additional anterior cervical diskectomy and fusion without plating in 2002, and repeat surgery in a few weeks to reposition the graft which had been put in place by the second surgery. After Dr. Russell's retirement, the claimant's final surgery was performed by North Little Rock neurosurgeon Dr. J. Michael Calhoun on July 28, 2004, and involved removal of the Atlantis plate; repeat C4-5 diskectomy and foraminotomy; C6-7 diskectomy and foraminotomy; placement of an Affinity cage at C4-5 and at C6-7; and placement of C4, 5, 6 and 7 plating with Atlantis plates. On February 14, 2005, Dr. Calhoun estimated the claimant's impairment at 16% to the body as a whole, which has been accepted by the respondents.

The claimant has cooperated with vocational rehabilitations services provided by the respondents, including a functional capacities evaluation in September, 2005. The conclusion of the examiner was that the claimant had the ability to work at the light physical demand classification and could perform several possible jobs listed in the report, based upon an automated transferrable skills analysis. The report also suggested a labor market survey of the local economy to identify available jobs in the area. However, the respondents left to the claimant the task of locating such employment.

After failing to find work, the claimant now contends that she should be awarded benefits for permanent total disability or wage loss disability substantially in excess of her anatomical impairment. She also requested an attorney's fee for controversion. Other possible issues were reserved.

Federal Express contended that the claimant has not sustained wage loss disability exceeding her anatomical impairment.

The Death & Permanent Total Disability Trust Fund took no position as to the claimant's permanent disability, but contended that, if the claimant is permanently totally disabled, the employer is not entitled to credit against the \$75,000.00 maximum, described in Ark. Code Ann. §11-9-502(b)(1), for payment of benefits for permanent anatomical impairment, here amounting to 16% to the body as a whole.

The record was closed at the conclusion of the hearing and included documentary evidence, the testimony of the claimant and David Elmore, and the deposition testimony of Dr. Anthony E. Russell

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable neck injury October 27, 1999; an average weekly wage of \$478.50; payment of temporary total disability benefits from July 24, 2002, until July 27, 2005; the healing period ended July 27, 2005; and that the claimant's anatomical impairment as a result of the injury was 16% to the body as a whole.

3. The preponderance of the evidence fails to show that the claimant has been rendered permanently totally disabled but instead shows that, as the result of her compensable injury, the claimant has sustained permanent disability in the total amount of 65% to the body as a whole,

consisting of her anatomical impairment of 16%, together with wage loss disability in the additional amount of 49%.

4. If the claimant should be considered permanently totally disabled by a majority of the Commission on de novo review, the employer is entitled to credit against the \$75,000.00 maximum described in Ark. Code Ann. §11-9-502(b)(1) for payment of benefits for permanent disability, including anatomical impairment, under current law.

5. Respondents No. 1 and 2 have controverted the payment of benefits hereinafter awarded in excess of the claimant's anatomical impairment and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The impact of a compensable injury on the claimant's ability to earn a livelihood is affected by factors such as age, education, work experience, physical condition, motivation, and other matters reasonably expected to affect future earning power. See, eg, Glass v. Edens, 233 Ark. 786 (1961); Ark. Code Ann. §11-9-522.

Here, the claimant is approximately 43 years of age and has a high school education and a history of various employment, generally at a physical demand level which may exceed her current physical capacity.

For example, the record shows that she worked for Crim Tobacco Company in Longview, Texas, as a route driver, doing shipping and receiving and warehouse work. She also worked as a fiberglass machine operator in a boat manufacturing business, and as a sales clerk, in addition to her

employment with Federal Express, which required her to load and unload trucks, as well as drive them on delivery routes.

During the hearing, the claimant was asked if she felt she could use a telephone headset during an employment situation if she was also provided with a clipboard to hold her work material at eye level. The claimant indicated that she would be willing to try such an employment if she could locate it. However, at the time of the hearing, her attempts to find work had not been successful in this area and the respondents, likewise, appeared to be unable to provide her with appropriate employment within her limitations. The headset employment may be available but had not been located by any of the parties at the time of the hearing.

As to limitations, while the respondents have indicated that the claimant may be able to do computer work, Dr. Calhoun indicated in a letter dated August 31, 2005, that the claimant should not hold her neck in a flexion position for more than three to five minutes and would have trouble assembling small objects and working on a computer. He also indicated that the claimant should not stand, especially with her arms up at the shoulder level, for any length of time. The functional capacity evaluation of September, 2005, stated that the claimant demonstrated the ability to perform material handling activities at the light level with an occasional lift or carry of twenty pounds and could frequently walk, push a forty pound cart, balance, crouch, kneel, climb stairs, reach with both hands, sit, and stand. It also stated that she was able occasionally to carry up to twenty pounds, stoop, reach overhead with either arm, and reach with weight.

However, the claimant's evidence in this case shows that she has made good faith efforts to locate work, without success, even though she has done so without professional assistance. Nevertheless, while she has suffered significant physical impairment, she remains willing and

appears to be able to return to the workforce, if at a diminished capacity. Accordingly, when wage loss factors are considered, the preponderance of the evidence shows that she has not been rendered permanently totally disabled but has sustained disability at the level stated above.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge