

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F011695**

<b>DIANE SALLEE, WIDOW OF EDWARD D. SALLEE, DECEASED EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GRAVES &amp; ASSOCIATES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>ST. PAUL TRAVELERS, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 25, 2006**

Submitted on the records and briefs in lieu of a full hearing before Administrative Law Judge Elizabeth W. Hogan.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

This case was submitted on the record in lieu of a hearing to determine the claimant's entitlement to additional permanent partial disability benefits and attorney's fees.

At issue is whether or not the death of the injured employee bars further payment of benefits pursuant to Ark. Code Ann. §11-9-704(e).

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant and additional benefits are hereby awarded.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on October 4, 2000 at which time the claimant sustained a scheduled upper extremity injury at a compensation rate of \$321.00/\$240.00. Medical expenses, temporary total disability benefits and permanent partial disability benefits totaling \$9,194.34

were paid.

The claimant contends she is entitled to \$69,129.66 in permanent partial disability benefits that accrued prior to the death of the injured employee.

The respondents contend all appropriate benefits have been paid. Further payment of benefits is barred by Ark. Code Ann. §11-9-704(e).

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits along with their briefs on the issue.

The injured employee sustained a compensable scheduled injury on October 4, 2000. The claimant was assessed a 100% impairment rating to the upper extremity by Dr. Safman (see his report of August 16, 2004). The carrier terminated the payment of permanent partial disability benefits once they were notified of his death on June 27, 2005 from cancer. At the time of his death, the respondents had paid \$9,194.34 in permanent partial disability benefits.

### **FINDINGS AND CONCLUSIONS**

An award of benefits after death is governed by Ark. Code Ann. §11-9-704(3)(1)(2) which provides:

(e) Award after Death, (1) No compensation for disability of an injured employee shall be payable for any period beyond his or her death.

(2) However, an award of compensation for disability may be made after the death of the injured employee for the period of disability preceding death.

Disability is defined by Ark. Code Ann. §11-9-102(8):

"Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.

Physical impairment has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. An injured employee is entitled to benefits for anatomical impairment regardless of the effect of the injury on earning capacity. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969).

Even though there is a practical distinction between the terms, “impairment” and “disability”, Foxx v. American Transportation, 54 Ark. App. 115, 924 S.W.2d 814 (1996), and Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993), the Court has held that both “physical impairment” and “earning impairment” are components of disability. Golden v. Westark Community College, 58 Ark. App. 209, 948 S.W.2d 108 (1997). Indeed both impairment and wage loss are paid as permanent partial disability benefits on a bi-weekly basis under the Workers’ Compensation Act.

Even though workers’ compensation benefits are marital property, Goode v. Goode, 286 Ark. 463, 692 S.W.2d 757 (1985), the Court has held that liability for installments of disability payments do not survive the death of the employee, Odom v. Tosco Corporation, 12 Ark. App. 196, 672 S.W.2d (1984), Zuercher v. Emerson Electric Co., 31 Ark. App. 124, 789 S.W.2d 467 (1990) and McCaa Chevrolet v. Bounds, 207 Ark. 1043, 183 S.W.2d 932 (1944). Therefore, I must reject the claimant’s argument that installment payments due after the claimant’s death are owed by the respondents.

In the case at bar, however, there is a problem with the calculation of permanent partial disability benefits. The claimant was assessed a rating of 100%

disability to the upper extremity (see Dr. Safman's letter of August 16, 2004). According to Ark. Code Ann. §11-9-521, the upper extremity is valued at 244 weeks. Pursuant to Ark. Code Ann. §11-9-501(d)(2)(A)(B), permanent total loss of a part of the body is paid at the same compensation rate as temporary total disability benefits. However, based on the computer print out of benefits paid, the respondents were paying permanent partial disability benefits at the incorrect rate of \$240.75 and the carrier was obviously unaware that benefits have been rounded off since 1994 under Arkansas law. The respondents made the following payments of permanent partial disability benefits:

1 pymt @ \$321.00	from 9-28-04 59 10-05-04	\$ 321.00
20 pymts @ \$240.00	from 10-6-04 to 2-16-05	\$4,815.00
1 pymt @ \$481.50	from 2-23-05 to 3-9-05	\$ 481.50
2 pymts @ \$240.75	from 3-9-05 to 3-16-05	\$ 481.50
6 pymts @ \$481.50	from 3-23-05 to 6-22-05	<u>\$2,889.00</u>
_____ 1 pymt @ \$206/34	from 6-22-05 to 6-28-05	\$9,194.34

Permanent benefits should have been paid at the temporary total disability rate of \$321.00. These benefits accrued prior to the claimant's death and are now owed by the respondents.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on October 4, 2000 at which time the claimant sustained a compensable injury at a compensation rate of \$321.00/\$240.00. Medical expenses, temporary total disability benefits and \$9,194.34 in permanent partial disability benefits (from September 28, 2004 to June 28, 2005 at a rate of \$240.75) were paid based on an impairment rating of 100% to the upper extremity.
2. The claimant died on June 27, 2005. The cause of death is unrelated to the compensable injury.

3. The impairment rating was mistakenly paid at the permanent partial disability rate rather than the temporary total disability rate according to Ark. Code Ann. §11-9-501 resulting in an underpayment of benefits which accrued prior to the claimant's death. The respondents are ordered to pay the difference to the claimant's widow.
4. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge