

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F014051

CARROLL DEAL, EMPLOYEE

CLAIMANT

SEA ARK MARINE, INC., EMPLOYER

RESPONDENT NO. 1

**FREMONT INDEMNITY COMPANY
c/o ARKANSAS PROPERTY & CASUALTY
GUARANTY FUND, INSURANCE CARRIER**

RESPONDENT NO. 1

**DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 13, 2007

Hearing before Administrative Law Judge Barbara Webb on June 15, 2007, in Little Rock, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Jeremy Swearingen, Attorney at Law, Roberts Law Firm, P.A., Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on June 15, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on May 18, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed on or about December 7, 2000, when claimant sustained a compensable injury to his left foot, ankle, and left leg.

3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$183.00 for temporary total disability and \$154.00 for permanent partial disability benefits.

4. Respondents No. 1 have accepted and paid related medical benefits and temporary total disability benefits. Respondents No. 1 have accepted and made payments towards the 49% anatomical impairment rating to the left foot.

5. Respondents controvert claimant's claim for permanent total disability benefits.

6. Claimant's last healing period ended on August 31, 2004.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Claimant's entitlement to permanent total disability benefits.
2. Whether claimant has unreasonably refused to participate with job placement assistance.

3. When the claimant reached the end of his healing period for purposes of permanent and total disability benefits if the claimant is found to be permanently and totally disabled.

4. Controversion and attorney's fees.

The record consists of a one volume transcript of the June 15, 2007 hearing, consisting of the testimony of Carroll Dear, Bob White, and Heather Taylor (formerly Naylor), and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Claimant's Exhibit No. 2 (medical records); Claimant's Exhibit No. 3 (medical records); Claimant's Exhibit No. 4 (medical records); Claimant's Exhibit No. 5 (medical and vocational rehabilitation records); Respondents' No. 1 Exhibit No. 1 (medical records, deposition transcript, and vocational rehabilitation records); and Respondents' No. 1 Exhibit No. 2 (curriculum vitae of Heather N. Taylor). In addition the following documents have been blue-backed and are fully incorporated by reference and made a part of the record of this proceeding:

- (1) Letter brief of Claimant received July 13, 2007
- (2) Respondent No. 1's Post-Hearing Brief received June 21, 2007
- (3) Respondent No. 2's Brief received July 2, 2007
- (4) Respondent No. 1's Reply Brief received July 16, 2007
- (5) Claimant's Reply Brief received July 31, 1007
- (6) Full Commission Opinion and Order (E400490)(November 4, 1997)
- (7) Correspondence and Notice of Constitutional Challenge to Arkansas Attorney General

CONTENTIONS

The claimant contends that he has been rendered permanently and totally disabled as a result of his compensable injury sustained on December 7, 2000, and is entitled to permanent total disability benefits, as well as attorney's fees. The claimant reserves all other issues.

Respondents No. 1 contend that the claimant cannot prove that he is unable to earn meaningful wages in the same or other employment as a result of his compensable injury. Alternatively, respondents No. 1 contend that the claimant is not entitled to any permanent disability benefits in excess of his permanent impairment rating because the claimant unreasonably refused to participate and/or cooperate in the vocational rehabilitation retraining program and job placement assistance offered to him by Respondents No. 1. Respondents No. 1 further contend that it is entitled to a credit for any permanent partial disability benefits paid prior to August 31, 2004. Respondents No. 1 contend in the alternative that Ark. Code Ann. § 11-9-519(f) prohibits consideration of any evidence concerning dependability of the claimant, quality of his work or availability of suitable work in the claimant's geographic area (e.g. odd-lot factors) in adjudicating the question of permanent total disability under Ark. Code Ann. § 11-9-519(c).

Respondent No. 2 contends that if permanent and total disability benefits are awarded, respondents No. 1 are not entitled to credit for payment of such benefits until the day after the healing period ended on August 31, 2004, pursuant to Death and Permanent Total Disability Trust Fund v. Legacy Insurance, ___ Ark. App. ___

(2006). Respondent No. 2 has deferred to the outcome of the litigation as to the remaining issues.

FACTUAL BACKGROUND

The Claimant is twenty-eight (28) years of age (b.d. 12/12/78). He graduated from Fountain Hill High School in 1998. He had difficulties in his early schooling years, repeated the third grade, and required remedial classes until high school. He transferred high schools in the hopes of graduating and ultimately completed “general” courses there at the high school. His grades in those courses included failing grades in English and average grades in courses like history, geometry, and science. He excelled, however, in the more hands-on technical courses such as agricultural engineering, clothing, and shop.

Following high school, the Claimant found work doing odd jobs as a handyman’s helper, fixing fences, painting, and other tasks. He worked as a meter reader for the water company, where he would go door-to-door and call out meter readings to his co-worker following in a car.

On July 10, 2000, the Claimant became employed as a “rigger helper” with the Respondent Employer, Sea Ark Marine, helping to build large coast guard boats. He worked in that capacity for nearly six months until he was injured in an explosion at work on December 7, 2000.

The explosion was significant, killing one of the claimant’s co-workers and injuring another. Deal and two co-workers were applying insulation to the hull of a 40-foot cabin cruiser. The other employee, who was in the hull of the boat at the

time of the accident, imprudently decided to use his cigarette lighter. The flame from the cigarette lighter caused the residual fumes from the insulation glue to ignite and explode with such force as to propel the boat, which weighed approximately 15,000 pounds, through the 26-foot high roof of the rigging department. Deal suffered a severe right leg injury, essentially to his right ankle and lower leg, which had numerous bones crushed by the explosion.

The claimant was taken for treatment and came under the care of the orthopedist, Dr. Allan Pollard, who performed an initial surgery within days after the accident to try to pin the Claimant's ankle and save it from amputation. Within weeks, the Claimant underwent a second surgery with Dr. Pollard, who fused the ankle and foot. Unfortunately, the foot fused in a mis-aligned position, turned inward, making it difficult for the Claimant to walk. For some time, he used crutches or a cane.

After the Claimant healed from his second injury, he was able to return to sedentary duty work as a switchboard operator for Sea Ark. The Claimant's work was essentially clerical. He answered phones and transferred calls. He was able to sit or stand as needed. During that time, Respondents No. 1 paid the Claimant permanent disability benefits pursuant to a 49% impairment rating assessed by Dr. Pollard.

Due to the difficulties caused by his in-turned foot, the claimant underwent a third surgery on July 3, 2003, whereby Dr. Pollard corrected the foot misalignment and fused the foot back into the correct position, making it easier for the claimant

to walk and maneuver. The claimant worked for Sea Ark at his sedentary phone job until the day before he had that final, third surgery.

Following the surgery, the Claimant entered a second healing period, and Respondents No. 1 paid him temporary disability benefits. The Claimant again reached maximum medical improvement from the third surgery on August 31, 2004, and was released by Dr. Pollard back to sedentary duty work. The Claimant inquired about returning to work for Sea Ark. At that time, his former sedentary duty job no longer existed, and Sea Ark did not have suitable work available for him. The claimant did not seek employment elsewhere.

The third and final surgery was successful, and the claimant was able to walk without the assistance of any crutch or cane. He was also able to drive as needed. Within weeks of his third surgery in July 2003, Respondents No. 1 arranged for the vocational consultant Heather Naylor to conduct vocational assessment and provide rehabilitation/job placement assistance for the claimant. Over the course of the next months, she made numerous attempts to contact the claimant in writing and by phone, but her efforts were unsuccessful. Finally, in December of 2003, she was able to make contact with the claimant and later met with him on January 9, 2004, when she conducted a vocational evaluation interview and administered written testing to the claimant. The claimant's personal injury attorney became aware of Naylor's involvement and sent documentary information for her review and consideration pertaining to high school grades, post-high school testing scores (from vocational school entrance exams), and information from a rehabilitation

program analyzing those prior scores. Naylor completed a vocational evaluation report on January 12, 2004, discussing the information obtained through the claimant's interview, medical records, and documents received from the claimant's attorney. Naylor found that the Claimant could return to sedentary work duties with a sit-stand option and recommended adult education and/or retraining. Respondents No. 1 approved her recommendations, and the claimant was set up for adult education on February 2, 2004. The claimant did not attend that testing.

Instead, he sought the services of a vocational consultant, Robert White, hired in conjunction with the personal injury case. White interviewed the claimant, but did not administer any testing and did not have the opportunity to observe the claimant personally until the made-whole hearing before the United States District Judge in conjunction with the personal injury settlement. On February 2, 2004, White completed his report based on his vocational one hour telephone interview of the Claimant and suggested two scenarios: (1) that the Claimant could return to the labor force on a part time basis performing sedentary unskilled work at minimum wage or (2) that the Claimant was permanent and totally disabled due to various factors including no skills to offer an employer and competitive nature of the labor market and employer preference to hire physically capable employees.

On February 9, 2004, claimant's attorney wrote Naylor and expressed displeasure at the content of her vocational evaluation report and advised Naylor that he had instructed the claimant to have no further contact with her. Accordingly, the claimant refused all further contact and interaction with Naylor.

No efforts were made by White to provide any kind of job placement assistance, to identify other sedentary duty jobs, or to provide recommendations for other adult education or retraining. The claimant subsequently received a substantial sum of money as settlement from his personal injury case and was also approved for and received Social Security Disability benefits. Although he admittedly has no other physical limitations or problems other than his ankle, he has made no efforts to locate suitable jobs or education/retraining programs that might facilitate or expedite his return to the workforce. He uses a home computer from which he is able to access the Internet, but has not used it to look for work or to further his education. Despite the fact that his wife is a literacy coach and teacher, the claimant has admittedly not sought her assistance in furthering his literacy skills in the hopes of facilitating any kind of return to the workforce.

Instead, the claimant testified that he bought a new truck, a fishing boat, a four-wheeler and purchased an annual hunting lease. He is able to mow his yard in the summer months using a riding lawnmower. He performs household chores which do not involve carrying heavy weights. The claimant admitted that during the years that followed his 2003 surgery, he has been able to fish from his boat and hunt for turkey and deer on his lease. His deer hunting activities involved shooting both a rifle and a 60-pound-pull compound bow from one of two deer stands (one elevated five steps off the ground). He has been able to travel to and from his stands by four-wheeler across ravines and through wooded terrain.

The claimant has continued with follow-up visits with Dr. Pollard once or twice a year. The claimant testified that he still has some pain and swelling in his leg, but he nevertheless is able to manage without prescription medication.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on or about December 7, 2000, when claimant sustained a compensable injury to his left foot, ankle, and left leg.
3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$183.00 for temporary total disability and \$154.00 for permanent partial disability benefits.
4. Respondents No. 1 have accepted and paid related medical benefits and temporary total disability benefits. Respondents No. 1 have accepted and made payments towards the 49% anatomical impairment rating to the left foot.
5. Respondents controvert claimant's claim for permanent total disability benefits.
6. Claimant's last healing period ended on August 31, 2004.

7. Claimant has failed to prove by preponderance of the evidence that he is entitled to permanent and total disability benefits in that he has been released to return to light duty work.
8. Claimant has unreasonably refused to participate with vocational rehabilitation and job placement assistance
9. Ark. Code Ann. § 11-9-521(f) precludes consideration of factors such as dependability of the Claimant, quality of his work and local availability of suitable work in determining whether the Claimant is permanently totally disabled;
10. Claimant has failed to meet his burden of proof by a preponderance of the evidence that Ark. Code Ann. § 11-9-521 denies him equal protection or is in any other way unconstitutional.

DISCUSSION

Permanent and Total Disability

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

According to Ark. Code Ann. § 11-9-519(e)(1), "Permanent total disability means inability, because of compensable injury or occupational disease, to earn

any meaningful wages in the same or other employment.” The question of whether an employee with a single scheduled injury is permanently totally disabled must be “determined in accordance with the facts,” under Ark. Code Ann. § 11-9-519(c). If scheduled injury employee is able to earn some meaningful wages in at least some capacity, then he or she is not entitled to permanent disability benefits beyond those benefits set out in the schedule of Ark. Code Ann. § 11-9-521.

The Claimant in this case has failed to prove by a preponderance of evidence that he is unable to earn any meaningful wages in any capacity. Clearly, he has significant impairment to his ankle, limited education, and limited transferrable skills. However, claimant’s impairment is limited to his lower extremity and his capabilities far exceed his disabilities. Significantly, the claimant worked for Sea Ark doing receptionist work until the day before his third surgery on July 3, 2003. That surgery corrected the misalignment of his foot that impaired his ability to walk. Once the claimant healed from that surgery, his physical capabilities were better than before the surgery (when he was admittedly able to work). Significantly, the claimant testified at the hearing that if his receptionist job had remained available for him after he healed from his third surgery, then he probably would have continued working at that job.

Dr. Pollard’s medical reports on the Claimant since August 31, 2004, have all indicated a belief that the Claimant could work in a sedentary work capacity. There is absolutely no medical evidence whatsoever suggesting the Claimant is totally unable to work. He is young, well groomed and dressed, and has no other

medical problems or impairments in his upper extremities, back and neck. He is able to speak, hear, and see without impediment. He is able to read and write, albeit slowly and carefully. He is able to engage in physical activities which are consistent with the types of physical abilities required for at least sedentary work. He drives himself as needed. He is able to ride a four-wheel ATV through wooded, uneven terrain. He mows his yard. He performs household chores. He is technologically competent and able to take computer classes.

Vocational Rehabilitation

The Respondents contend that the claimant refused the vocational assistance offered by Respondents No. 1 based instructions by his personal injury attorney to refuse the assistance, his doubt of his own ability to work or be hired by prospective employers, and his lack of motivation to return to work or be retrained.

If an employee unreasonably waives rehabilitation or job placement assistance, the injured employee will not be entitled to any permanent benefits in excess of the anatomical impairment. Ark. Code Ann. § 11-9-505(b)(3). Ark. Code Ann. § 11-9-505(b)(3) specifically provides that:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings. Ark. Code Ann. § 11-9-505(b)(3).

The Claimant's initial refusal of vocational assistance offered by Naylor occurred because his personal injury attorney instructed the claimant not to have anything further to do with Naylor as of February 9, 2004, due to her alleged total failure to consider his academic history, including the school and testing records supplied by claimant to Naylor. However the evidence demonstrates that Naylor considered the documentary evidence provided to her. Her January 12, 2004 Initial Vocational Evaluation reports comments:

Mr. Deal graduated from high school in 1998 from Fountain Hill High School in Fountain Hill, AR. Up until the tenth grade, he was taking resource classes. He said that when he got in high school, he stopped taking resource classes and began taking regular classes. Mr. Deal described his high school performance as in the C and D, average level.

After high school, Mr. Deal said he was interested in attending Forrest Echoes Vocational School in Crossett in 1998. He took their entrance exam but was unable to pass it. He said he had difficulty with the reading comprehension section of the entrance exam.

(RX:198).

Mr. Gibson's decision to refuse vocational assistance was unreasonable in light of the fact that Naylor's report comments on the claimant's academic history and inability to pass the Forrest Echoes entrance exam—specific knowledge she obtained from the documents provided by claimant's attorney.

The evidence further demonstrates that claimant's refusal of vocational rehabilitation assistance was unreasonably based on his belief that he was neither able to work, nor an employable job candidate. At the hearing, the claimant repeatedly asserted that he did not think he could do any work and did not believe any employer would hire him in his condition. His personal belief was contrary to the opinion of Dr. Pollard, who opined the Claimant could work in a sedentary capacity, and the vocational expert, Heather Naylor,

who also recommended the Claimant could work in an unskilled sedentary work capacity, or perhaps in an even greater capacity if educated or trained further.

The present case is analogous to the facts in *Ashcraft v. Headlee's Industrial Co., Inc.*, Full Commission Opinion filed February 16, 2005 (F012942)(affirmed 2005). In *Ashcraft*, the claimant was offered rehabilitation and job placement assistance which was initially accepted but then rejected. In *Ashcraft*, the claimant dismissed these efforts as unnecessary because of a personal belief that no employer would hire him on account of his injury. In *Ashcraft*, the claimant doubted he was physically capable of pursuing further education.

In another interesting parallel to the present case, *Ashcraft* had also hired vocational consultant Bob White, who opined that *Ashcraft* had "no skills to offer an employer," the same exact language Mr. White employed with the present claimant. Further in *Ashcraft*, Mr. White reported, "...while theoretically Mr. *Ashcraft* may be able to perform some type off [sic] work, in reality I seriously doubt he is employable." Mr. White gave virtually the same testimony in the present case.

Deal, based on advice of his personal injury attorney, unreasonably halted all attempts for vocational rehabilitation offered by Respondents No. 1. The preponderance of the evidence demonstrates that Deal has continued his refusal of vocational assistance by not cooperating and availing himself of the rehabilitation services offered by Respondents No. 1.

Respondents further contend that the unreasonableness of the Claimant's refusal of vocational assistance is further compounded by his complete lack of motivation to seek

suitable work or to further his education or training to facilitate his re-entry to the workforce. They argue that although the Claimant may contend that he made a last-ditch effort during his 2007 deposition to advise he was now willing to accept vocational assistance, he made no efforts whatsoever to follow up in seeking such assistance and never mentioned the assistance again until the hearing where he asserted his claim of permanent total disability. Respondents point to the claimant's conduct during the three years prior to the hearing as demonstrating a lack of interest in working.

The claimant testified at the hearing that since 2004, he has made no efforts whatsoever even to look for work that he might potentially be able to do—even part-time. The claimant further testified since 2004, he has made no efforts whatsoever to look into other retraining or rehabilitation programs, nor contacted Naylor or White to see what additional assistance might be available. The claimant testified that he had not availed himself of even the most available resources, his computer with internet access or his wife, who works as a literacy coach who educates teachers on how to teach children to read. Despite having such an invaluable resource living underneath the same roof with him, the Claimant admitted he had made no efforts to seek literacy assistance from his wife.

To the contrary, the evidence demonstrates that claimant has pursued other activities such as fishing, turkey hunting, deer hunting with a rifle, deer hunting with a bow, riding his four-wheeler and enjoying company of friends at his hunting lease. The Claimant has used his financial resources to pursue his hobbies: buying a four-wheeler; buying a fishing boat; buying a truck to pull the boat and carry the four-wheeler; paying for a hunting lease yearly, rather than pursuing avenues of re-employment or re-education. In light of

these activities of the Claimant consistently pursued over the past three years, his unwillingness to work or seek education and his refusal of vocational assistance appear all the more unreasonable.

Finally, Respondents contend that Ark. Code Ann. § 11-9-521(f) precludes consideration of factors such as dependability of the Claimant, quality of his work and local availability of suitable work in determining whether the Claimant is permanently totally disabled.

Odd-lot factors such as consideration of the dependability of the Claimant, quality of his work and the availability of suitable work may not be considered in adjudicating the Claimant's claim for permanent total disability benefits. Ark. Code Ann. § 11-9-521(f) provides: "In considering a claim for permanent total disability, the commission and the courts shall not consider the odd-lot doctrine."

The odd-lot doctrine was eliminated by Act 796 of 1993. It formerly provided for permanent total disability benefits for an employee who was injured to the extent that the only services he could perform were so limited in quality, dependability or quantity that a reasonably stable market for them did not exist. *Patterson v. Ark. Dep't of Health*, 70 Ark. App. 182, 15 S.W.3d 701 (2000). In those prior, albeit limited, circumstances, the injured employee had the burden of making a prima-facie showing that he fell within the odd-lot doctrine based upon the factors of permanent impairment, age, mental capacity, education, and training. *Id.* Once he made that showing, the burden shifted to the employer to show that some kind of suitable work was regularly and continuously available to the employee. *Id.*

In the present case, the claimant testified that he believed that his physical problems and limited education and transferrable skills effectively rendered him permanently and totally disabled, because there was not a readily-available, on-going market for employing him. The claimant offered the testimony and reports of Bob White who, much as he testified in the *Ashcraft* case, *supra*, stated that he was familiar with the job market around the claimant's locale, and that work such of such limited availability that the claimant would not be competitive against non-disabled job applicants. The reason— because the claimant could not promise a level of dependability or quality of work that would make him a viable candidate for the purportedly few suitable jobs available.

The claimant's argument was essentially not that he was *unable* to perform sedentary work with a sit-stand option (he admitted on cross-exam that he probably could do such work at least part-time), but rather that odd-lot factors precluded him from obtaining such a suitable job. The claimant further tried to shift the burden to Respondents No. 1 by looking to them to identify what specific, locally-available jobs were regularly and continuously available to him over the past few years.

The claimant's odd-lot, burden-shifting approach is expressly prohibited by Ark. Code Ann. § 11-9-521(f). The issue is not whether suitable work exists for the Claimant, or whether he would be competitive for it. Rather, the sole issue in adjudicating his claim for permanent total disability is whether he is capable of earning some meaningful wages in at least some capacity. The evidence, including the claimant's own admissions, demonstrates that he is capable.

Ark. Code Ann. § 11-9-521 does not violate the Equal Protection Clause.

The claimant contends that the prohibition against the consideration of wage loss disability over and above the injured's workers' permanent physical loss is unconstitutional. The claimant argues that the Court of Appeals has requested input on the issue, relying on the decision in *Calvin Green v. Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d 746 (1996). On remand, the Commission found that the claimant in Green lacked standing to challenge the constitutionality of Ark. Code Ann. § 11-9-521 (1987) in light of the fact that the claimant failed to prove he sustained any permanent impairment to his earning capacity as a result of his compensable injury. *Green v. Smith & Scott Logging*, 1997 AWCC 364 (E217823 filed September 10, 1997). In the instant case, although the preponderance of the evidence does not establish that the claimant is permanently and totally disabled, I do find that the claimant, unlike *Green*, has demonstrated that he has suffered a partial loss in earning capacity as a result of his compensable injury and therefore has standing to raise this constitutional question.

The claimant's constitutional challenge to Ark. Code Ann. § 11-9-521 has already been addressed by the Arkansas Workers' Compensation Commission. See *Conway Thompson v. State Highway & Transportation Dept.*, Full Commission Opinion filed November 4, 1997(E400490). A copy of the decision has been blue-backed and made a part of the record in this case. In that case, the claimant argued that Ark. Code Ann. § 11-9-521 violated the Equal Protection Clause of the 14th Amendment of the United States by precluding permanent disability benefits in excess of the schedule, unless the claimant was

permanently and totally disabled. The Commission carefully analyzed Thompson's constitutional challenge, yet upheld the statute.

An award for a scheduled injury is limited to the benefits provided in the statute for that scheduled injury, absent a finding of permanent and total disability. See, e.g., *Anchor Construction Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972); *Springdale Farms v. McGarrah*, 260 Ark. 483, 541 S.W.2d 928 (1976); *Moyers Brothers v. Poe*, 249 Ark. 984, 462 S.W.2d 862 (1971); *Taylor v. Pfeiffer Plumbing & Heating*, 8 Ark. App. 144, 648 S.W.2d 526 (1983); *Rash v. Goodyear Tire and Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986); *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

In addition, an injury scheduled under Ark. Code Ann. § 11-9-521 is payable without regard to subsequent earning capacity. The rationale for limiting a claimant to the disability benefits provided for in § 11-9-521 was discussed by the Arkansas Supreme Court in *Anchor Construction Co. v. Rice*, *supra*, where the Court, quoting Larson, stated:

These [scheduled] payments are not dependent on actual wage loss...The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at claimant's earning record for some relatively short temporary period preceding the hearing. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effects of the impairment on claimant's earnings each time claimant contends that his earnings are being adversely effected. To avoid this protracted administrative task, the apparently cold blooded system of putting average-price tags on arms, legs, eyes, and fingers has been devised.

252 Ark. at 463; 4 Larson, *Workers' Compensation Law*, § 58 (1997).

The underlying premise and purpose of the schedule is to place statutorily-presumed values for permanent disability benefits on the respective scheduled injury. The scheduled values include permanent disability for both impairment and wage loss. Rather than have potential scheduled injury wage-loss claims determined on a case-by-case basis from the facts presented, the General Assembly made the decision to facilitate judicial economy by legislatively assessing permanent disability values through the schedule.

The equal protection clause of the Fourteenth Amendment is not violated simply because the Workers' Compensation Act treats claimants with scheduled injuries differently than those with injuries to the body as a whole. The question is whether the classification of injured workers with scheduled injuries bears a rational relationship to a legitimate state objective. "The classification will be upheld if any state of facts reasonably may be conceived to justify it." *Peterson v. Garvey Elevators, Inc.*, 850 P.2d 893 (Kan. 1993).

The receipt of Workers' Compensation benefits is not a fundamental right. Thus, the rational basis test applies in determining whether injury classifications for providing benefits violate the equal protection guarantees of the constitution. *Industrial Claims Appeals Office of the State of Colorado v. Ramaro*, 912 P.2d 62 (Col. 1996).

The Supreme Court of Iowa addressed whether the different treatment of claimants with scheduled injuries and injuries to the body as a whole was constitutional. *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 402 (Iowa 1994). The claimant in *Gilleland* argued that an employee who does not suffer a scheduled injury is able to obtain recovery from loss of earning capacity while an employee who suffers a scheduled injury is not. The Iowa

Supreme Court noted that in the application of the rational basis analysis, the claimant in

Gilleland:

Must first demonstrate beyond a reasonable doubt that the scheduled injury classification [of the Workers' Compensation Act] den[ies] him equal protection. He must indicate with particularity how this denial occurs. To meet this heavy burden, he must negate every reasonable basis which may support this classification.

Id.

The Iowa Court noted that although the claimant was correct in that a disparity existed between the compensation for scheduled and non-scheduled injuries, such disparity was not unconstitutional. The Court stated:

Non-scheduled permanent partial disabilities are compensated by the industrial disability method which takes into account the loss of earning capacity. Scheduled permanent partial disabilities, on the other hand, are 'arbitrarily' compensated according to the classification of [the Workers' Compensation Act] without regard to loss of earning capacity. Determining disability in this fashion, looking only to the impairment of the employee's body function—is referred to as the functional disability method. By using the functional disability method of [the Workers' Compensation Act], 'we are not concerned with the question of the extent of disability. The compensation in this event is definitely fixed according to the loss of use of the particular member. The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies.'

Id.

Since a rational basis existed, i.e., "reduction of controversies through certainty of compensation," the Iowa Supreme Court held the scheduled injury provisions of their Workers' Compensation Act to be constitutional.

The same rational basis applies with respect to the Arkansas statutory distinction between scheduled and unscheduled injury claimants. Scheduled injury claimants are

limited to permanent disability benefits provided for in the Ark. Code Ann. § 11-9-521 schedule, because that schedule provides certainty of compensation while reducing controversies concerning issues of wage loss, unless the claimant can prove permanent and total disability. Although this result may be harsh, the Commission and Courts are bound to follow the law as previously passed by our legislature and as interpreted by our courts. *International Paper Co. v. Remley*, 256 Ark. 7, 505 S.W.2d 219 (1974).

Scheduled injury claimants are not left with less of a remedy under the statute. In each scheduled injury section of Ark. Code Ann. § 11-9-521, wage loss is legislatively taken into account. The practice of excluding additional wage loss over and above the schedules is rationally related to the legitimate governmental objective of protecting employees and employers. The schedules specifically protect employers from liability for the loss of the ability to earn wages when the injured employees have already been compensated for such loss. *Cook v. Aluminum Co. of America*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

It must also not be forgotten that the schedules are not wholly exclusive. A claimant who is permanently and totally disabled is entitled to such benefits. Moreover, claimants are entitled to rehabilitation benefits when they prove by a preponderance of the evidence entitlement to such benefits. Thus, the scheduled injury provision does not eliminate entitlement to greater benefits if a claimant can meet his burden of proof to establish his right to either permanent and total benefits or rehabilitation benefits.

The claimant's argument mistakenly assumes that scheduled injury claimants are completely precluded from any kind of compensation for wage loss unless they are

permanently and totally disabled. The claimant's argument fails to consider that scheduled injury claimants with permanent impairment actually do receive wage-loss compensation which has been legislatively presumed and accounted for in the statutory schedule. Unlike claimants with unscheduled permanent impairment, there is no requirement that scheduled injury claimants (with permanent impairment) prove an actual loss of earning capacity. The loss of earning capacity for scheduled injury claimants is presumed by the statute. The underlying premise and purpose of the schedule is to place statutorily-presumed values for permanent disability benefits on the respective scheduled injury. The scheduled values include permanent disability for both impairment and wage loss.

Thus, the only difference between the treatment of scheduled injury claimants and unscheduled injury claimants is that the latter must actually prove a wage loss, while the former is compensated for permanent impairment and wage loss according to the prescribed statutory value. Scheduled injury claimants are arguably in a more favorable position than unscheduled injury claimants, because the scheduled injury claimants do not have to put on additional evidence to support their wage-loss claim. If scheduled injury claimants have permanent impairment, then their wage loss is statutorily presumed.

The claimant argues that, "There is no legitimate governmental interests being served by the limitations of Ark. Code Ann. § 11-9-521." However, the claimant ignores the legitimate governmental interests of facilitating judicial economy by the reduction of controversies through certainty of compensation. Rather than have scheduled injury wage-loss claims determined on a case-by-case basis from the facts presented, (which would likely double the wage-loss litigation before the Commission), the General Assembly made

the decision to facilitate judicial economy by legislatively assessing permanent disability values through the schedule. The statutory presumption of set values for wage loss within Ark. Code Ann. § 11-9-521 has a rational basis in preserving judicial economy while ensuring that the wage-loss claims of scheduled injury claimants still have an adequate remedy at law.

Credit For Permanent Partial Disability Benefits Paid

Because I have determined that the claimant is not permanently and totally disabled, it is not necessary for me to address the issue of whether Respondents No. 1 are entitled to credit, against the \$75,000.00 cap, for permanent partial disability benefits paid prior to the Claimant's last healing period.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge