

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F503749**

**EVLYNENE KIRKENDOLPH, EMPLOYEE**

**CLAIMANT**

**DF&A REVENUE SERVICES DIVISION/  
OFFICE OF CHILD SUPPORT ENFORCEMENT,  
EMPLOYER**

**RESPONDENT NO. 1**

**PUBLIC EMPLOYEE CLAIMS DIVISION,  
INSURANCE CARRIER**

**RESPONDENT NO. 1**

**DEATH AND PERMANENT  
TOTAL DISABILITY TRUST FUND**

**RESPONDENT NO. 2**

**OPINION FILED DECEMBER 21, 2007**

Hearing before Administrative Law Judge Barbara Webb on September 26, 2007, in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Bill R. Holloway, Attorney at Law, McGehee, Arkansas.

Respondents No. 1 were represented by Mr. Richard S. Smith, Attorney at Law, Little Rock, Arkansas.

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

**STIPULATIONS**

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on February 17, 2005, when claimant sustained a compensable injury.

3. The claimant's average weekly wage was \$877.60, resulting in an applicable compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability.
4. Respondents No. 1 have paid temporary total disability benefits from 2/22/05 until 4/27/05 and from 6/3/05 until 8/18/05.
5. Respondents No. 1 have paid all authorized and related medical benefits.
6. Respondents No. 1 have accepted and paid a fifteen percent scheduled impairment rating.

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**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.

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**CONTENTIONS**

The claimant contends that she has been rendered permanently and totally disabled as a result of her compensable injuries and is entitled to the maximum benefits under the law.

Respondents No. 1 contend that the claimant is not permanently totally disabled and is not entitled to any additional permanent disability benefits. Respondents No. 1 contend that the claimant had scheduled injuries to the wrists, that she has been released to return to work with restrictions and that her employer was willing to accommodate her; however, the claimant resigned.

Respondent No. 2, the Death and Permanent Total Disability Trust Fund, will defer to the outcome of litigation.

The record consists of a one volume transcript of the September 26, 2007 hearing, consisting of the testimony of Evlynene Kirkendolph and Jeraldine Tucker and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' No. 1 Exhibit No. 1 (Claimant's resignation letter); Respondents' No. 1 Exhibit No. 2 (Catastrophic Leave Policy); Joint Exhibit No. 1 (Index and medical records).

#### **FACTUAL BACKGROUND**

The Claimant is fifty-six (57) years of age (b.d. 7/10/51). She graduated from University of Arkansas at Pine Bluff with a B.A. in Sociology in 1973. She worked for Child Support Enforcement as a quality control reviewer for 27 years and four months. In her job, she reviewed the work of the case workers to verify that the case had been completed correctly and prepared reports on all seventy-five counties. She testified that her job required her to use a computer all day. She began having pain in her hands in 1999. She was treated at St. Vincent Family Clinic with prescription medication and was able to return to work. On February 10, 2005, she again sought treatment due to severe pain and was referred to Dr. Rhodes, a hand specialist. Dr. Rhodes referred her to Dr. Collins. She was diagnosed with carpal tunnel syndrome nerve damage. She underwent surgery for carpal tunnel syndrome in one hand on February 17 and on the second hand on March 19. She was released to go back to work on April 29. She explained that

she could not use the keyboard and was not able to perform her job duties without pain. She was referred to Dr. Kenneth Johnston. She was subsequently referred to Dr. Burba. She treated with Dr. Burba until the worker's compensation insurance carrier stopped paying in 2005. After a mediation, she returned for treatment in 2007 to Dr. Burba. She was referred to Dr. Frazier for another EMG due to the gap of time. She has continued to treat with Dr. Johnson. She testified that she was totally disabled. She cannot use a computer. She explained that she was forced to resign when her Family Medical Leave Act ran out. She received a letter advising her that if she did not return to work by June 30, 2005, she would be fired. At that time, she was out from work under the Catastrophic Leave policy. She explained that she was not offered a position or accommodation from Child Support Enforcement. She testified that she had to go to the Director of DFA to get her job back. She explained that she would have rather been working because she was helping out her supervisor as well as performing her job duties. When she asked for help, she was told by the manager of the department that all of the jobs required the use of her hands. She testified that she continues on medication and will have the problem with her hands the rest of her life. She can not drive long distances due to drowsiness caused by the medication. She has a disabled license plate and had been determined disabled by Social Security.

On cross-examination, she testified that Dr. Burba currently treats her for the pain in her hands and Dr. Johnston treats her for diabetes and hypertension. She admitted she could cook, watch television, use a remote, drive a car, use a

telephone, and write. Her last day to work was June 2, 2005. She testified that she did not make any effort to return to work after that date. She explained that between April 29<sup>th</sup> and June 2<sup>nd</sup>, she returned to work but read newspapers to get through the day. She agreed that the agency made accommodations and there were modifications made for the wrist pad for her computer. She explained that she read newspapers because she had completed her work for fiscal year and had also helped the supervisor do her job prior to her surgery. She was sent home after the employer received a note from her doctor, Dr. Burba. She received a letter on June 30, 2005, telling her that she had used up all of her leave. She explained that she did not believe she could do the job and has no intention of returning to the job or any other type of work because there is no job she believes she physically could perform.

Jeraldine Tucker, the claimant's sister testified. She explained that she was aware of her sister's surgery and limitations since her sister had lived with her after the surgery. She testified that she still needs assistance in dressing and cooking since she cannot lift anything. She observed that her condition has not worsened nor improved. On cross-examination, she agreed that her sister had moved out in 2006, but explained that she was nearby and still required daily assistance to dress and cook.

Medical records reflect that claimant was diagnosed with bilateral severe carpal tunnel by Dr. Rhodes on February 17, 2005, after undergoing a nerve conduction study. She underwent surgery for right carpal tunnel release on her right

wrist on February 23, 2005. On March 10, 2005, she presented for follow-up treatment and stated that she has no numbness in her right upper extremity but continued to have pain and numbness in her left upper extremity. She underwent surgery for left carpal tunnel syndrome on March 29, 2005. On April 11, 2005, she was assessed as doing well on her recovery from her first surgery and was instructed to continue therapy. On April 28, 2005, she was evaluated and was released to return to work with her right upper extremity to full duty and with a 20 pound weight restriction on the left upper extremity. On May 6, 2005, she sought a second opinion from Dr. Kenneth Johnston. He noted possible diabetic neuropathy, thyroid dz, and arthropathy. He referred the claimant for evaluation by Dr. Burba. He noted that she had continued complaints relating to her bilateral carpal tunnel syndrome and that her diabetes was out of control. On May 27, 2005, she returned to Dr. Johnston and reported that she was feeling better. He noted that she was “coasting with light duties” and could not really perform her duties at work. On June 2, 2005, she underwent a second nerve conduction study which resulted in a diagnosis of severe bilateral carpal tunnel syndrome. He placed work restrictions of no flexion or extension of wrist and no keyboard work or sorting with hands indefinitely and ordered bilateral wrist immobilizers. On August 18, 2005, she was evaluated by Dr. John Wilson. He observed that she had

- (1) Bilateral severe carpal tunnel syndrome.
- (2) Diabetes mellitus.
- (3) No evidence of diabetic neuropathy due to the fact that the ulnar nerves are essentially normal, and the median nerves were severely affected. One would expect a smattering of problems with both nerves.
- (4) Stenosing of the left hand and wrist secondary to surgical scarring.

He gave her a 15% permanent impairment rating to the hands, 16% to the upper extremity, or 10% to the body as a whole.

On September 6, 2006, Dr. Johnston reported by letter that the claimant's condition had worsened since surgery and that she was "completely disabled at this time with no expected improvement". On October 6, 2005, the claimant underwent a vocational evaluation. At that time, the claimant was provided with information about vocational rehabilitation. It was noted that the claimant had retired from her job earlier in 2005. The case manager noted that she had difficulty in dressing, household chores, and engaging in normal life activities. She concluded that "It is my opinion that she is not a viable candidate for vocational rehabilitation at this time." However, in her summary, she observes that the claimant has approximately 11 more working years before usual retirement age and that based on her education and work history, she has transferable skills. She notes that if the claimant returned to work, she would be limited to sedentary work, but that her bi-lateral hand limitations would preclude the great majority of all jobs in her local economy, i.e. Lake Village.

On October 20, 2005, she was evaluated by Dr. Silas with continued complaints of weakness, pain, and neuropathy. On October 21, 2005, the claimant was granted a change of physician from Dr. Wilson to Dr. Randy Bindra. He noted that she was able to make a fist with her right hand and move her wrist with full range of motion. He noted that although she stated she could not move her left fingers, he observed her flexing her fingers and was able to pick up paper clips with her eyes closed. He noted that she had "good movement and strength in her right

hand". He recommended a psychological assessment. He observed "There is a possibility that she may be malingering, but that appears unlikely. It is more likely that her loss of function in the left upper extremity is a psychosomatic issue."

On June 5, 2006, the claimant underwent a functional capacity evaluation. During the examination, it was noted that she demonstrated functional range of motion in her upper and lower extremities. It was further noted that she was able to accomplish fine motor activities with both hands and demonstrated excellent handwriting ability. The examiner observed, "Ms. Kirkendolph demonstrated behaviors inconsistent with maximal effort during the evaluation. She demonstrated abilities seemingly beyond her self reported disabilities. Ms. Kirkendolph demonstrated the ability to accomplish **Sedentary Work** as defined by the U.S. Department of Labor's *Dictionary of Occupational Titles*.

Medical records reflect a letter from Dr. Kenneth Johnson dated July 2, 2007, in which he states that "It is Dr. Burba's professional opinion, and my professional opinion, that the patient is unable to work due to her disability and no improvement is expected." He further explains that the claimant suffers from bilateral hand neuropathy secondary to carpal tunnel syndrome and diabetes. Dr. Burba recommended in a letter dated July 10, 2007, that the claimant undergo current electrical studies to provide objective evidence of the status of her condition and noted that he had put her back in a wrist immobilizer and prescribed Lyrica to address her pain. He diagnosed her with failed carpal tunnel syndrome bilaterally, intractable pain, reports of poly neuropathy and mild cognitive impairment, as well

as recently noted left ventricular hypertrophy by her cardiologist. On July 12, 2007, Dr. Burba reports the EMG findings, as follows: (1) right carpal tunnel syndrome, (2) right cubital tunnel syndrome. (3) There is an axonal motor and sensory polyneuropathy in the legs.

**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 February 17, 2005, when claimant sustained a compensable injury.
3. The claimant's average weekly wage was \$877.60, resulting in an applicable compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability.
4. Respondents No. 1 have paid temporary total disability benefits from 2/22/05 until 4/27/05 and from 6/3/05 until 8/18/05.
5. Respondents No. 1 have paid all authorized and related medical benefits.
6. Respondents No. 1 have accepted and paid a fifteen percent scheduled impairment rating.
7. Claimant has failed to prove by preponderance of the evidence that she is entitled to permanent and total disability benefits in that she has transferable skills and has been determined to be capable of performing sedentary work.

## **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 she is unable to earn any meaningful wages in any capacity. Clearly, she has impairment to her hands as a result of her compensable injuries. However, claimant's work-related impairment is limited to her upper extremities and her capabilities far exceed her disabilities. She has a college education and transferrable skills.

The medical reports on the Claimant since April of 2005 have indicated a belief that the Claimant could work in a sedentary work capacity. She is able to speak, hear, and see without impediment. She is able to read and write. She is able to engage in physical activities which are consistent with the types of physical abilities required for at least sedentary work. She drives herself as needed. She performs household chores, including limited cooking.

The claimant testified at the hearing that since 2005, she has made no efforts whatsoever even to look for work that she might potentially be able to do—even part-time. In the present case, the claimant testified that she believed that her physical problems and transferrable skills effectively rendered her permanently and totally disabled, because there was not a readily-available, on-going market for employing her. 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 issue is not whether suitable work exists for the Claimant in Lake Village, Arkansas. Rather, the sole issue in adjudicating his claim for permanent total disability is whether she is capable of earning some meaningful wages in at least some capacity. The evidence demonstrates that she is capable to work in a sedentary capacity and that she has made no efforts to locate suitable jobs or education/retraining programs that might facilitate or expedite her return to the workforce.

Finally, the claimant offers the 2007 opinion of Dr. Johnston, relying in part on Dr. Burba, that she is unable to work due to her disability. However, Dr. Burba notes that due to the length of time, the claimant should undergo nerve testing to determine if her condition has gotten better or worse since 2005. He also noted that the claimant currently suffered from polyneuropathy and mild cognitive impairment as well as recent left ventricular hypertrophy – all conditions which were subsequent to her compensable injury to her hands and diagnosis of bilateral carpal tunnel syndrome. *Federal Compress & Whse. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996) (holding that non-compensable injuries should not be considered by the Commission).

Therefore, based on the preponderance of the evidence of the claimant's age, education, transferable skills, and ability to perform sedentary work, I find that the claimant does not meet the criteria needed for establishing entitlement to permanent and total disability under the Arkansas Workers' Compensation laws.

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.

**ORDER**

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

**IT IS SO ORDERED.**

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**HONORABLE BARBARA WEBB**  
**Administrative Law Judge**