

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F413300

CATHY EVANS, EMPLOYEE

CLAIMANT

BEMIS COMPANY, INC., EMPLOYER

RESPONDENT NO. 1

**FIDELITY & GUARANTY INSURANCE COMPANY/
SEDGWICK CLAIMS MANAGEMENT SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT NO. 1

**DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 2

OPINION FILED JULY 23, 2008

Hearing before Administrative Law Judge Barbara Webb on April 24, 2008, in Monticello, Drew County, Arkansas.

Claimant represented by Mr. Marvin "Chip" Leibovich, Attorney at Law, Benton, Arkansas.

Respondents No. 1 represented by Mr. Guy Alton Wade, Attorney at Law, Friday, Eldredge & Clark, Little Rock, Arkansas.

Respondent No. 2, The Death and Permanent Total Disability Trust Fund represented by Ms. Judy W. Rudd, Attorney at Law, AWCC Special Funds, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 24, 2008, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on February 14, 2008. 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 are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including December 14, 2004, when claimant sustained a compensable wrist injury.
3. The claimant's wages were sufficient to entitle her to a compensation rate of \$453.00 for temporary total disability and \$340.00 for permanent partial disability benefits.
4. The claimant reached maximum medical improvement and the end of her healing period on August 10, 2006.
5. Respondents No. 1 have accepted and made payments towards a 30% impairment rating to claimant's right hand.

By agreement of the parties, the issues to be determined are as follows:

1. Claimant's entitlement to continued medical benefits.
2. Claimant's entitlement to permanent total disability benefits
3. Controversion and attorneys fees.

The record consists of a one volume transcript of the April 24, 2008 hearing, consisting of the testimony of Cathy Evans, Sarah Carter, Charles Davidson, 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 (medical records); and Respondents' No. 1 Exhibit No. 2 (list of cases); Respondents' No. 2 Exhibit No. 1 (letter). 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) Claimant's Post-Hearing Brief filed May 7, 2008
- (2) Respondents No. 1's Post-Hearing Brief filed May 6, 2008
- (3) Respondents No. 1's Post-Hearing Reply Brief filed May 22, 2008

FACTUAL BACKGROUND

The Claimant is forty-four (44) years of age (b.d. 6/19/63). She began working at the age of sixteen in fast food restaurants. After graduating from high school, she worked in management of two fast food restaurants. She worked for ten years at the Monticello Country Club, initially as a waiter and bartender. She was promoted to management and worked as the Manager for two years. She next worked in sales and office management at Drew Plaza Mobile Homes for five years. She co-owned a restaurant called "The Hub" at the Best Western in Monticello for two years. After the Hub, she continued to work in restaurants and bartended at the country club for special events. She began working for Bemis on August 12, 2002, in the palletizing department. She also worked as an Assistant Tuber Operator, a job involving lifting, pushing, and tightening.

In December of 2004, she was assigned to fill in on a job putting waste bags and paper in a baler. She testified that she was on a forklift and opening the door on the baler when the hinge popped and fractured her right wrist. She initially was

taken to the company doctor, Doctor Garcia, for x-rays and a drug test. She was later taken to the emergency room. Her wrist was reset and put in a cast by Dr. Go. She returned to light duty work in two weeks. She remained in a cast for thirteen weeks. After the cast was removed, she underwent a functional capacity evaluation with Debbie Balch. She subsequently was treated by Dr. Michael Moore. She explained that she continued to work at Bemis using her left hand until Moore performed surgery on January 20, 2006. She explained that she was diagnosed with RSD from her knuckles to her elbow after the cast came off. She continued treatment with Doctor Moore, Rosenzweig, and Rutherford. Her medical treatment included therapy and nerve blocks. She explained that the therapy did not help. She had some improvement after the initial injections, but her condition continued to worsen. Dr. Rutherford recommended that she undergo another FCE. She explained that her mother accompanied her because she couldn't drive in Little Rock. She was examined by Mr. Davidson. She explained that the exercises caused her hand to burn worse and that she became nauseous from the pain. She explained that the right hand exercises caused the pain. She testified that she could do the left hand exercises because she had been working with her left hand. After the exam, she explained that she cried all the way home and ended up in bed for several days. She testified that she did the best she could but could not lift with her right hand. After the exam, Moore released her. At that time, she was taking Neurontin and the wrist was burning and stinging. She requested a change of physician to Dr. Reinhart after Dr. Rutherford and Moore gave her no further treatment options. Reinhart is her primary care physician. She treated with

Reinhart once a month and received Neurontin, and pain medication. She was referred to Dr. Broughton, a psychiatrist, and was prescribed anti-depressants. She was also referred to Dr. Khaleel, a neurologist. She testified that she currently sees Dr. Khaleel every three months because the nerve damage is moving up her arm. She is currently on five different medications.

She testified that she has not gone back to work since the surgery. She has not applied for a job or worked anywhere since the surgery. She has applied for social security disability.

She described why she had not returned to work :

My hand doesn't work. Even just getting up and moving around, I do what I have to do; but if I do too much, I end up in bed with it stinging further up my arm. The more I do, the worse it stings and the further it goes. I have insomnia, can't sleep. Nothing can touch these knuckles right here or it just feels like the nerves are coming to the top. It's a different pain every day. I have stabbing pains and cramps in it, but it's the continuous burning of it.

She testified that she can not work with her left hand because the pain increases in her right arm. She testified that she would love to go back to work if she didn't have RSD. She agreed with Dr. Reinhart and Khaleel who opined that her disability is indefinite and that she would unlikely be able to work in any meaningful capacity.

Evans testified that she does not have an average day. She explained that the burning and stinging pain between her knuckle and wrist is constant and that the pain goes up her arm and she ends up in the bed hurting and crying when she tries to do things. She also explained that humid, wet, and cold weather causes increased pain. She explained that the pain eases when she sits in a tub of really

hot water. She has to have a lot of help from her son and mother to do household chores. She tries to do weight-bearing work and uses her left hand and upper arm. She is able to do the laundry. She explained that if she does any activity in the yard, she has to go back in the house after 30 or 40 minutes.

She explained that she currently lives with her mother and father who support her in addition to the \$96.00 per week child support. She last paid rent to her father in August of 2007, when her PPD ran out. She submitted receipts for medications but respondents denied payment. She paid some of the medication with her partial disability and has relied on her mother for payment of medications after August. She testified that she also had used Outreach America, which helps with payment of her medications.

She testified that prior to her surgery, she worked one-handed and worked as much overtime as she could get. When her cast came off, she went back to Bemis and was driving a forklift and palletizing, but did not go back to lifting or shafting. She was referred to Rutherford, a neurologist, by Moore because she had RSD.

She explained that she has not looked for work since leaving Bemis. She has not interviewed or applied for any jobs. She explained that her concentration is not as good as it used to be due to the pain, but she can read. She has used a computer but described herself as "computer illiterate" and chooses to stay that way. She can drive around town but does not drive in Little Rock or Pine Bluff since she has to use only her left hand. She does what she can to keep house and continues to do the exercises that she learned at physical therapy. She didn't

believe she could be retrained since her mind does not concentrate or focus and she never knows if she is going to be able to get out of bed in the morning due to the unpredictability of her symptoms. She talked to Bemis about returning to work but was told that she would have to return to lifting shafts and knew she couldn't do the work. She explained that she worked at Bemis for a year after she got the cast off prior to her surgery. She did not believe she could go back to doing paperwork or go into management of restaurants or the country club, because she has not learned to write left-handed and cannot control her right hand. She explained that she will push herself five days a week and be down in bed two days a week.

Sarah Carter, the claimant's mother testified for the claimant. She explained that the claimant had worked both away from home and at home since she was sixteen. She testified that it drove her daughter crazy that she couldn't work since she developed RSD. She explained that she used to be cheerful but now was always stressed. She testified that her daughter was not able to focus and was often anxious. She explained that she accompanied her daughter to the FCE. Her daughter testified that the claimant got sick and was shaky and pale after the examination.

Charles Davidson testified that he is President of Occupational Assessments, Inc. He previously ran the sports medicine program at Martin, Bowen, Hefley Orthopedics. He also worked as the return-to-work coordinator for Central Arkansas Rehabilitation Services where he performed functional capacity evaluations and managed the day-to-day operations of the program. He testified that he conducted a functional capacity evaluation of the claimant. He determined from her results

that she could work in a light duty capacity based on Department of Labor Standards. He explained that the prior functional capacity evaluation of the claimant performed one year earlier showed that she could work in the sedentary category. He explained that his results showed that she was only one pound away from working at the medium level capacity. He also explained that in light of her unreliable efforts and observed problems with consistency during the examination, it was possible that she could function in a higher capacity.

Medical records reflect that the claimant was initially treated for a fractured right wrist at the Ashley County Medical Center emergency room with a closed reduction and short-arm fixation. She continued under the care of Dr. Go and Dr. Spires. She continued to work light duty. Due to continuing complaints of pain, stiffness, and swelling, on September 6, 2005, she was referred for treatment by Dr. Michael Moore, a hand specialist. He recommended further evaluation and a bone scan. A triphasic bone scan was performed on October 10, 2005, and did not reveal any evidence of reflex sympathetic dystrophy ("RSD"). He recommended a right wrist arthroscopy to evaluate articular cartilage at the radiocarpal joint. On January 20, 2006, Moore performed right wrist arthroscopy, right distal radius malunion, open reduction, internal fixation with iliac crest bone grafting, and right wrist TFCC repair. On February 7, 2006, Moore indicated that the claimant could perform light duty work. This was again noted on February 23, 2006. On March 9, 2006, after removal of the cast, the claimant was sent for another bone scan and released to light duty work. On March 13, 2006, Dr. Rutherford noted that the claimant's bone scan revealed findings suggestive of right RSD. He noted existing

treatment with stress loading and neurontin and recommended a series of nerve blocks and a clonidine patch. Dr. Rosenzweig performed the first block on March 20, 2006. On April 3, 2006 and April 19, 2006, the claimant reported improvement after the first several injections. On May 3, 2006, clinic notes of Dr. Rosenzweig indicated that the claimant had a relapse after the fourth injection. On May 10, 2006, Dr. Rutherford noted that the claimant's condition was not improving and depression was becoming problematic. On June 2, 2006, another bone scan indicated that the RSD had "improved". On August 10, 2006, Dr. Moore opines that the claimant would not benefit from further surgical treatment and that she reached maximum medical improvement. On August 22, 2006, Dr. Moore assigned a 30% impairment of the right wrist and hand based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He noted with the motion in her right hand, she could improve during the next several months and the impairment would be less.

On June 22, 2006 until June 28, 2007, the claimant continued to treat with Dr. Reinhart. On June 28, 2007, he notes that she is unable to work and referred her to Dr. Kahleel. On August 1, 2007, Reinhart referred the claimant to Dr. Broughton, a psychiatrist, for evaluation and treatment of disorders based on RSD. On November 21, 2007, Dr. Kahleel notes that the claimant's RSD condition

has poor prognosis and she would not be able to use her right hand to earn a meaningful livelihood as she is a right hand dominant person. I would strongly recommend her for approval of complete disability to help her have a decent life as she would not be productive for even menial jobs due to her current handicap.

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 at all relevant times, including December 14, 2004, when claimant sustained a compensable wrist injury.
3. The claimant's wages were sufficient to entitle her to a compensation rate of \$453.00 for temporary total disability and \$340.00 for permanent partial disability benefits.
4. The claimant reached maximum medical improvement and the end of her healing period on August 10, 2006.
5. Respondents No. 1 have accepted and made payments towards a 30% impairment rating to claimant's right hand.
6. Respondents controvert claimant's claim for permanent total disability benefits.
7. Claimant has proven by a preponderance of the evidence that she is entitled to continued medical benefits.
8. Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent and total disability benefits in that she has failed to prove that she is unable to earn any meaningful wages in any capacity.
9. Claimant has failed to prove by a preponderance of the evidence that she is entitled to attorney's fees.

DISCUSSION

The claimant contends that after being awarded a change of physician, respondents have not paid for claimant's treatment with her treating physician (including a one-time treatment in December that the respondents agreed to pay prior to the Change of Physician order). The claimant contends that respondents have not paid for the claimant's medical prescriptions since March 2007. The claimant was referred to Dr. Khaleel and Dr. Broughton by Dr. Reinhart, and the respondents have not paid for those doctor visits. The claimant contends she is permanently totally disabled as a result of the reflex sympathetic dystrophy she developed as a result of her compensable injury. Respondents No. 1 contend that the claimant was treated and released at maximum medical improvement by treating physicians Dr. Michael Moore and Dr. Reginald Rutherford. The claimant requested and was granted a change of physician to Dr. Reinhart. After an evaluation, Dr. Reinhart wanted the claimant to see another hand specialist and have a psychological evaluation done by a physician unknown to respondents. Respondents do not believe that an evaluation by another hand specialist is reasonable or necessary since the claimant has been seen and treated by Dr. Moore. Instead of simply denying the request for a psychological evaluation, respondents offered a compromise and suggested it be performed by Dr. Judy White-Johnson as recommended to respondents by Dr. Rutherford. This has apparently been refused by the claimant. The respondents contend that the claimant is not entitled to any permanent total disability benefits. The Death and

Permanent Total Disability Trust Fund contends that pursuant to A.C.A. § 11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. § 11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits. 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.

Respondent No. 3, Second Injury Fund, was dismissed from the action by Order dated March 31, 2008.

Continued Medical Benefits

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed

procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In this case, all of the claimant's treating doctors agree that the claimant continues to suffer from RSD in her right wrist and hand and needs ongoing medical treatment in the form of pain management. In addition, Dr. Reinhart and Dr. Broughton have recommended further treatment for the psychological disorders associated with her RSD in the form of medications. This treatment is also consistent with the diagnosis of Dr. Rutherford that the claimant was exhibiting symptoms of depression. Therefore, I find that the preponderance of the medical evidence demonstrates that the claimant's on-going medical treatment with Dr. Reinhart, Dr. Kahleel, and Dr. Broughton, is reasonably necessary and related to her work-related compensable injury.

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 significant impairment to her right wrist and hand. However, claimant’s impairment is limited to her right extremity and her capabilities far exceed her disabilities. Significantly, the claimant continued to work for Bemis without using her right hand until her surgery in January of 2006. Once the claimant healed from that surgery, her physical capabilities were better than before the surgery (when she was admittedly able to work).

Dr. Moore’s medical reports on the Claimant since February of 2007, have all indicated a belief that the Claimant could work in a light duty work capacity. In addition, the functional capacity evaluation of Mr. Davidson in June of 2006 concluded that the claimant was capable of performing work at least within the light duty category. The claimant is young and has no other medical problems or impairments in her left upper extremities, her lower extremities, back and neck. She is able to speak, hear, and see without impediment. She is able to read. She is able to engage in physical activities which are consistent with the types of physical abilities required for at least sedentary and light duty work. Although she does not

feel comfortable driving in larger cities, she drives herself in her community as needed. She has an extensive past work history, including numerous managerial jobs. She demonstrated her physical ability to work of over a year performing one handed jobs with Bemis. Moreover, Respondents point to her extensive use of both hands when testifying to demonstrate and describe her condition.

Respondents point to the claimant's conduct as demonstrating a lack of interest in working. The claimant testified at the hearing that since 2006, she has made no efforts whatsoever even to look for work that she might potentially be able to do—even part-time.

Based on the preponderance of the credible evidence, I am more persuaded by the testimony of Moore and Davidson as to the claimant's ability to work than the opinion of Dr. Reinhart and Kahleel that the claimant is not capable of working in any capacity. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

_____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.

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).

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. 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.

AWARD

For the reasons discussed herein, Respondents No. 1 are directed to pay continuing reasonable and necessary medical treatment for the claimant. All other claims for permanent and total disability and attorney's fees must be, and hereby are, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge