

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E508014**

<b>LYNDA G. RUDD, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>A.L. TENNEY TRUSTEE, EMPLOYER</b>	<b>RESPONDENT</b>
<b>STATE FARM FIRE &amp; CASUALTY CO., CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED JULY 20, 2005**

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents and cross-appeal by the claimant from a decision filed by an Administrative Law Judge on September 20, 2004. The Death and Total Disability Trust Fund is joined as a party in this matter to the extent that it is liable for benefits should it be found by the Full Commission that the claimant is totally and permanently disabled as a result of her compensable injury. The respondent appeals that portion of

the Administrative Law Judge's decision wherein she found that the claimant has proven by a preponderance of the evidence that she has sustained a 50% wage loss due to her compensable injury of 1991. In addition, the respondent appeals the Administrative Law Judge's finding that it is not entitled to an offset for the benefits received by the claimant under a long term disability insurance policy. The claimant appeals that portion of the Administrative Law Judge's decision wherein she found that the claimant has failed to prove by a preponderance of the evidence that she is totally and permanently disabled as a result of her compensable injury of 1991.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss benefits of 50%. That portion of the Administrative Law Judge's decision should therefore be modified to reflect a 5% wage loss. Moreover, the claimant has failed to establish that she is totally and permanently disabled as a result of her compensable injury, and that portion of the Administrative Law Judge's decision should be affirmed. Finally, the respondent has failed to prove that it is entitled to an offset for the claimant's long term

disability benefits and that portion of the Administrative Law Judge's decision should also be affirmed.

The claimant sustained an admittedly compensable injury to her neck and lower back when she fell from a ladder into some shelving in November of 1991. As a result of that injury, the claimant underwent a fusion and diskectomy at C5-C6 and C6-C7 on May 15, 1995. Approximately one year later, on June 12, 1996, the claimant underwent a second spinal surgery related to her compensable injury, this time a right laminectomy and diskectomy at L4-L5. A third injury related surgery, namely a right anterior scalenomy, was performed on the claimant's neck on December 12, 1997, and an anterior cervical diskectomy with fusion at C4-C5 and anterior plating was performed on March 6, 1998. The claimant underwent a fifth and final injury related surgery on September 7, 2000, namely an anterior cervical diskectomy with fusion at C3-C4. In addition, the claimant has undergone IDET procedures at multiple levels of her lumbar spine.

The claimant returned to work with the respondent employer following each of her first four surgeries. After the fifth surgery, however, the claimant's healing period extended past the twelve months allowed by company policy,

and her employment was therefore terminated. The claimant has not returned to work. The claimant currently receives long term disability benefits, social security benefits, and permanent partial disability benefits based upon a 26% permanent physical impairment, as accepted by the respondents.

The claimant maintains that she is permanently and totally disabled as a result of her compensable injury. Because the claimant's injury occurred prior to the effective date of ACT 796 of 1993, the Administrative Law Judge was correct in considering the odd-lot doctrine when making a determination of the claimant's degree of physical impairment. Under the odd-lot doctrine, an employee who is injured to the extent that she can perform services that are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist may be classified as totally disabled. Lewis v. Camelot Hotel, 35 Ark. App. 212, 816 S.W.2d 632 (1991). The odd-lot doctrine recognizes the obvious severity of some injuries may combine with other factors to preclude the employee from obtaining employment in any reasonably stable market, although the worker is not altogether incapacitated from work. Id. The factors that may combine with the obvious

severity of the employee's injury to place him in the odd-lot category are the employee's mental capacity, education, training, and age. Id. If the claimant makes a prima facie showing that he falls in the odd-lot category, the respondents have the burden of proving "some kind of suitable work is regularly and continuously available to the claimant." Id. The Administrative Law Judge correctly found that the claimant's age, mental capacity, training, and work experience preclude her from falling within the odd-lot category for permanent and total disability. More specifically, the claimant, who was 55 years old at the time of her hearing, has a high school diploma, one year of college, and one year of business school along with the completion of a computer class. In addition, the claimant has vast clerical experience, and worked as a claims manager at the time of her compensable injury earning in excess of \$53,000.00 per year. Moreover, contrary to Dr. William Ackerman's belief that the claimant would not be able to return to gainful employment, Dr. Thomas Kiser has suggested that the claimant should be able to ease back into a full-time sedentary position. In support of this opinion, the claimant cares for her disabled granddaughter on a full-time basis. Finally, still pictures and surveillance videotape

showing some of the claimant's daily activities support Dr. Kiser's opinion that the claimant is at least capable of light to sedentary type work. Based upon the above and foregoing, the Administrative Law Judge did not err in finding that the claimant has failed to prove that she is entitled to permanent and total disability benefits.

Because the claimant has failed to prove that she is permanently and totally disabled, it is not necessary to address the issue of liability on the part of the Death and Permanent Total Disability Trust Fund concerning this matter. However, the Administrative Law Judge found that the claimant is entitled to 50% wage loss above her permanent physical impairment rating. This finding is not supported by the greater weight of the credible evidence. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning capacity is impaired. In addition to medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors such as the worker's age, education, work experience, and any other matters which may affect the worker's future earning capacity, including degree of pain

experienced by the workers. Ark. Code Ann. §11-9-522 (1987); See also, Tiller v. Sears, 27 Ark. App. 159, 767 S.W.2d 544 (1989). In the present case, the claimant has failed by her own actions to prove that she is entitled to 50% wage loss benefits. As previously mentioned, the claimant is bright and educated with vast and, based upon her prior earning capacity, obviously valuable clerical skills. Moreover, the record reveals that the claimant expressed a desire to do volunteer work at Children's Hospital. In a report dated September 20, 2001, Dr. Kiser wrote:

Functionally, she is staying fairly active managing her home and driving. Getting out of the house to go do aquatic therapy has been good for her. She is interested in doing volunteer work at Children's Hospital, which I think is a big step and would be a good idea. As far as working in the future, I think she has good upper and lower extremity strength. The main focus would be in pain management and setting up a work station where she could have good posture and limited cause for neck movement and to take frequent rest breaks. ... Once she has successfully done some volunteer work, looking at paid employment would be the next step.

A surveillance tape made in May and June of 2003, clearly demonstrates that the claimant is capable of a variety of activities that are common to the type of work for which she has been approved. Moreover, the claimant

testified that she is the sole custodian and care giver of her young, handicapped granddaughter. She also testified that although she would prefer to work, she considers herself "disabled" at this time.

A vocational assessment conducted by vocational case manager, Chelle Williams, revealed that the claimant has transferrable clerical skills which easily lend themselves to the category of work recommended for the claimant by Dr. Kiser. Using the claimant's transferrable clerical skills as a basis for her search, Ms. Williams conducted a labor market survey of the areas surrounding the claimant's home and found "numerous" suitable job opportunities. Ms. Williams forwarded this employment information to the claimant. In contradiction to the claimant's testimony, Ms. Williams stated that, to her knowledge, the claimant did not pursue any of these employment opportunities. When questioned about possible "barriers" to the claimant's return to employment, Ms. Williams testified that the claimant's financial situation acted as a disincentive for her to return to work.

Well, one thing would be her financial situation. In General, people that don't have a financial incentive to return, don't have an incentive to return to work if their needs are being met monetarily otherwise.

Ms. Williams further testified that the claimant's responsibility of caring for her granddaughter served as a barrier to her returning to work outside of her home. In contradiction to the claimant's testimony, Ms. Williams expressed doubt as to whether the claimant's daily pain medication interfered with her ability to return to work. "I'm assuming that it doesn't," stated Williams, "if she's driving to Jacksonville back and forth every day." Finally, Ms. Williams confirmed that the claimant's daily activities are considered "normal activities in life." In addition to the jobs that Ms. Williams had notified the claimant about at the time of her assessment, Ms. Williams testified that she later forwarded information to the claimant concerning other job opportunities. According to Ms. Williams, the packet that she mailed to the claimant concerning these jobs was returned as "undeliverable" by the postal service.

Based upon the above and foregoing, the claimant has failed to prove that she is entitled to 50% wage loss above her permanent physical impairment. It is more likely than not that the claimant could return to light, sedentary type employment, but that her current financial situation combined with her full-time responsibility of caring for her granddaughter serves to dissuade the claimant from seeking

employment at this time. The claimant's last reported income from employment was in excess of \$53,000.00 per year. The claimant's current total combined income, which includes social security disability benefits for herself and for her granddaughter, is well over \$65,000.00 per year. Given, however, that the claimant has had five surgeries, is 55 years of age, has some college education, and numerous transferable clerical skills, we find that she has sustained a reasonable amount of wage loss as a result of her original compensable injury. With all things taken into consideration, the claimant has sustained a 5% wage loss disability above her permanent physical impairment rating. Therefore, the claimant's 26% permanent physical impairment rating, as was previously accepted by the respondents, combines with her 5% wage loss disability to total a permanent partial disability rate of 31% to the body as a whole.

Lastly, the respondent contends that the Administrative Law Judge erroneously denied its right to a credit against the amount awarded for long term disability benefits that have been paid to the claimant. More specifically, the respondent claims that it is entitled to credit for the \$2,800.00 per month that the claimant

receives in long-term disability benefits. In support of her position to deny the respondent such an offset, the Administrative Law Judge cited Southwestern Bell Telephone Co. v. Siegler, 240 Ark. 132, 398 S.W.2d 531 (1966), which the respondent asserts has been expressly superseded by enactment of Act 796. In Southwestern Bell, supra, the State Supreme Court found that payments made pursuant to a disability plan were not "advance payment of worker's compensation benefits." The "Plan" under which the claimant was paid benefits was a unilateral plan, put into effect by the employer, and administered solely by a committee appointed by the employer. Even though the "Plan" had been recognized in the Collective Bargaining Agreement, employees made no contribution to it. In so finding, the Court concluded that the payments made to the claimant under the "Plan" were "benefits" and were not "advance payments of compensation." The Court noted that the burden of proof was on the employer to establish that the payments received by the claimant through the "Plan" were "advance payment of compensation for his permanent partial disability." Id.

In support of its argument, the respondent cites Dooley v. Automated Conveyor Systems, Inc., 84 Ark. App. 412, 143 S.W.3d 585 (2004), which states:

In the pre-1993 cases, no offsets were allowed for payments made from private insurance or plans unless the employer could establish clearly that the claimant had received payments from insurance provided by the employer and that sums paid to the injured employee were intended to be advance payments of compensation.

The respondent further asserts that reliance on pre-1993 cases is misplaced because "they are simply no longer controlling." Id. This assertion is incorrect for the following reasons. First, in Dooley, the Court of Appeals stated that the appellant/claimant, Dooley, had erroneously relied upon case law which preceded the 1993 amendment of worker's compensation law. More specifically, the Court stated:

The case law relied upon by appellant in support of his position preceded the 1993 amendment to our worker's compensation law, and, in particular, preceded the enactment of section 11-9-411(a). He relies upon pre-1993 cases, i.e., those decided prior to the enactment of section 11-9-411 as part of a comprehensive revision of the Arkansas worker's compensation laws.

According to the Effective Dates of our Worker's Compensation Acts as provided for in the 2003 Edition of the Arkansas Worker's Compensation Laws and Rules Annotated, the provisions of Act 796 of 1993 "shall apply only to injuries

which occur after July 1, 1993." The claimant in the present case was injured prior to Act 796 of 1993. Therefore, the Administrative Law Judge was correct in relying upon pre-1993 case law in determining that the respondent is not entitled to a setoff for the long term disability benefits paid to the claimant. Moreover, even though the respondent paid for the long term disability policy and its premium, which was a "pure benefit to the claimant," the respondent has failed to meet its burden of proof in establishing that the disability payments received by the claimant pursuant to this policy were an advance of worker's compensation benefits. Therefore, the respondent is not entitled to an offset for the benefits paid to the claimant pursuant to a long term disability plan provided by her employer.

Based upon the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that she is totally and permanently disabled as a result of her compensable injury, and this portion of the Administrative Law Judge's decision should, and hereby is affirmed. Furthermore, the respondent has failed to prove that it is entitled to an offset for the long term disability benefits paid to the claimant under an insurance policy, and this portion of the Administrative Law Judge's decision should,

and hereby is affirmed. The claimant has failed, however, to prove by a preponderance of the evidence that she is entitled to 50% wage loss above her permanent physical impairment. We find that the claimant sustained a decrease in her wage earning capacity equal to 5% to the body as a whole. This 5% wage loss disability combines with the claimant's previous 26% permanent physical impairment rating, which the respondents have accepted, to total a 31% total permanent partial disability to the body as a whole.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.