

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F508014 & F509518

GERTRUDE BROWN, EMPLOYEE	CLAIMANT
QUEBECOR, INC., EMPLOYER	RESPONDENT NO. 1
TRAVELERS PROPERTY & CASUALTY CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 16, 2007

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

Claimant represented by HONORABLE MARK LEDBETTER, Attorney at Law, Memphis, Tennessee.

Respondent No. 1 represented by HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals, and Respondent No. 1 cross-appeals, from a decision of the Administrative Law Judge filed March 15, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims.
2. At all times pertinent, to include June 7, 2004, and June 21, 2004, the relationship of employee-employer-carrier existed among the claimant and respondents #1.
3. The claimant earned an average weekly wage of \$459.10, which yield compensation benefits rates of \$306.00/\$230.00, for total/permanent partial disability.
4. On or about June 7, 2004, the claimant sustained bilateral carpal tunnel syndrome injury arising out of and the course of her employment, which required medical treatment, to include surgeries and rendered her temporarily totally disabled commencing April 11, 2005 and continuing through November 7, 2005, and correspondingly entitled to temporary total disability benefits.
5. The claimant has failed to sustain her burden of proof by a preponderance of the evidence that she sustained a injury to her cervical spine and to her lumbar spine arising out of her employment with respondents #1, pursuant to Ark. Code Ann. §11-9-102 (4) (A) (ii) (b).

6. The claimant reached the end of her healing period on November 7, 2005, relative to her bilateral carpal tunnel syndrome injury.

7. The claimant has failed to sustain her burden of proof by a preponderance of the evidence that she has been rendered permanently and totally disabled as a result to her compensable scheduled injury of bilateral carpal tunnel syndrome.

8. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the claimant's injury of June 7, 2004, and June 21, 2004.

9. Respondents #1 have controverted the payment of all workers' compensation benefits in this claim subsequent to July 6, 2004.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The claimant appealed and the respondents cross-appeals the Administrative Law Judge's opinion filed March 15, 2007. The Administrative Law Judge found that the claimant sustained bilateral carpal tunnel arising out of her employment, which required medical treatment and rendered her temporarily totally disabled from April 11, 2005 through November 7, 2005. As such, the claimant was awarded temporary total disability and medical benefits during that time. However, the Administrative Law Judge also found that the claimant failed to prove by a preponderance of the evidence that she was permanently and totally disabled as a result of her compensable scheduled injury of bilateral carpal tunnel syndrome. Additionally, the Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that she sustained an injury to her cervical spine or to her lumbar spine arising out of her employment.

The respondents have appealed the Administrative Law Judge's opinion. However, the Majority has Affirmed and Adopted the Administrative Law Judge's opinion. I concur that the claimant is entitled to temporary total disability and medical benefits from April 11, 2005 though November 7, 2005. However, I find that the majority erred in finding that the claimant is not permanently and totally disabled. Based upon a de novo review of the record in its entirety, I find the claimant is permanently and totally disabled. As such, I must respectfully concur in part and dissent in part from the Majority's opinion.

History

The claimant has been employed by the respondents since 1977. Respondent is in the printing industry, manufacturing magazines and catalogs. In the course of her work the claimant worked in automated areas around machines. The claimant testified that she performed a variety of jobs and tasks during her employment, and essentially described herself as a "jack of all trades."

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The claimant testified that she was first diagnosed with carpal tunnel syndrome (CTS) in 1981 or 1984. The claimant testified that she had to undergo two surgeries on her right wrist and one surgery on her left wrist for the CTS. The claimant testified that the surgeries were performed by Dr. James Schrantz, who released her to return to full duty work without restrictions. All of the carpal tunnel syndrom surgeries were completed by 1985. Claimant testified that she does not recall receiving and impairment rating as a result of the surgeries, nor did she have a workers' compensation hearing.

The claimant testified that her hands and wrists began bothering her and she notified the Safety and Training Coordinator, Mr. Robert Gray on June 21, 2004. The claimant testified that Mr. Gray sent her to Dr. Lack, the designated medical provider. The claimant asserted that Dr. Lack diagnosed her as having degenerative disease arthritis. The claimant testified that Dr. Lack told her that she did not have CTS, and she was sent back to work. Dr. Lack placed restrictions on the claimant's employment activities,

including no power grip, no lifting, no flexing of the wrists, and no feed pockets. The claimant executed Form AR-N on July 7, 2004. The claimant testified that she was unhappy with the treatment that she received from Dr. Lack because he did not run any tests or any nerve tests. Therefore, she went to her general physician, Dr. McKee.

The claimant testified that Dr. McKee ran several tests and determined that she did in fact have CTS and referred her to Dr. Ricca. The claimant underwent her first surgery for carpal tunnel syndrome by Dr. Ricca on April 11, 2005, and the second one on June 5, 2005. The testimony of the claimant reflects that she was informed by Dr. Ricca that her ulnar nerve required surgery, however she has not had the procedure performed. The claimant testified that she is uncertain if she will have the procedure done, noting that she is "tired of being cut on." The claimant acknowledged that in November 2005, she was released by Dr. Ricca as having reached maximum medical improvement.

The claimant testified that in her present physical condition she is unaware of any kind of work to

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which she could return. The claimant, who is right hand dominate, testified that she has significant trouble using her hands and it is hard for her to do personal things for herself. The claimant testified that she has had to find ways to accommodate for bras, belts, tying shoes, and personal hygiene due to the pain that goes with it. The claimant explained that she has difficulty lifting anything of any substance with her right hand, that she drops things (coffee cups, bowls), and that she is unable to pick up thing quickly. The claimant testified that she does not want to cause herself additional pain.

The claimant testified that she has not looked for a job since June 21, 2004. The claimant further testified that she has not contacted ESD or any kind of rehabilitation service. The claimant testified that she would be willing to go back to work if there was a type of job that she could perform. The claimant is currently receiving Social Security Disability benefits of \$1123.00, per month.

The claimant testified that prior to June 21, 2004, she did garden, however is now unable to do so. The

claimant testified that she does very little cooking. The claimant testified that she has difficulty stirring or mixing with her hands. The claimant's work experience reflects that she has had some work and training in computer and keypunch operation, as well as some experience doing waitress-type work. The claimant testified that she would be unable to do sales or working at a cash register due to back pain and pain in her hands with repetitive motion activities. The claimant testified that she continues to experience numbness in both hands. The claimant also testified that she has a problem in her elbow, although she is uncertain of its status as of June 21, 2004. The claimant testified that she disagrees with the Functional Capacity Evaluation of her ability to perform light duty work. The claimant testified that her ability to perform light duty work would depend on the type of work to be done. The claimant is not currently taking prescription medicines for either her hands, wrist, elbow, back or neck complaints, but rather over-the-counter medicine.

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Dr. Lack's medical records reveal that he examined the claimant on June 21, 2004. Dr. Lack noted that the claimant had worked for the respondents for 27 years. Dr. Lack noted that the claimant experienced pain in both hands with the left worse than the right, and that the pain in her left hand radiated up her left arm. Dr. Lack noted that most of the claimant's pain was at the base of her thumb. Most importantly, Dr. Lack observed swelling. Dr. Lack commented in his records that the claimant suffered from degenerative joint disease and that there was no doubt that work aggravate her thumbs.

The claimant returned to Dr. Lack on July 6, 2004 for follow-up treatment. Dr. Lack noted that the claimant suffered from the same symptoms, but this time diagnosed the claimant as having a finger contusion.

Unhappy with the treatment that she received from Dr. Lack, the claimant went to see her own physician, Dr. McKee. Dr. McKee ordered an EMG/Nerve Conduction Study on September 2, 2004. The EMG revealed:

1....severe entrapment of the right median nerve at the wrist. The findings are compatible with the diagnosis of severe carpal tunnel syndrome.

2....moderate entrapment of the left median nerve at the wrist. The findings are compatible with the diagnosis of moderate carpal tunnel syndrome.

Dr. McKee referred the claimant to Dr. Ricca, a neurosurgeon. On April 8, 2005, Dr. Ricca performed a left carpal tunnel release on the claimant. Dr. Ricca noted that the claimant had a severe amount of scar tissue over the median nerve at the carpal tunnel on the left. Additionally, there was marked neural compression. In a follow-up visit on May 19, 2005, Dr. Ricca noted that the claimant's left hand symptoms had much improved and that she had her "thumb back." Dr. Ricca also noted that the claimant suffered from medial left elbow pain with numbness and tingling in the ulnar distribution of the left hand. Dr. Ricca noted that if her symptoms persist, they would repeat the EMG/NCV and possibly perform an ulnar nerve decompression.

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On June 8, 2005, Dr. Ricca performed a right carpal tunnel release on the claimant. In a follow-up visit on July 26, 2005, Dr. Ricca noted that the claimant complained of her finger tips on the 2nd, 3rd, and 4th digits of her right hand as being numb. Additionally, the claimant complained of pain in her left hand into her forearm and that the last three digits of her left hand felt peculiar. Dr. Ricca diagnosed the claimant as having bilateral hand/wrist pain, left ulnar nerve symptoms with numbness and pain, and the inability to work. Dr. Ricca specifically noted that the claimant was unable to engage in even light duty activities.

On August 1, 2005, another EMG was performed. The EMG revealed:

1. Mild to moderate left median neuropathy at wrist.
2. Mild left ulnar entrapment neuropathy at the elbow. There is no evidence of large fiber polyneuropathy nor radiculopathy and no myopathy.

Dr. Ricca noted that the results of the EMG/NCV confirmed his impression of left ulnar entrapment at the elbow.

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Dr. Ricca also noted that the claimant appeared to suffer from significant depression.

On November 7, 2005, Dr. Ricca noted:

Ms. Brown returns for her follow-up of left hand numbness, tingling, and weakness, and left forearm pain. She reports that her left hand symptoms are still quite marked. She states that they are overall better than they were prior to her left redo CTR on 6/8/05. She states that when she touches things with her left hand, it feels like she is rubbing it against sandpaper. Use of her left hand is difficult because of pain, particularly pain around the left thumb. She also has an aching pain diffusely of the left forearm.

Dr. Ricca diagnosed the claimant as having left hand hyperpathia, weakness, and aching left forearm pain, and that these symptoms prevent her from using her left hand. However, he noted that the claimant had reached maximum medical improvement.

The testimony of Dr. Gregory F. Ricca was obtained by deposition. On October 18, 2004, the claimant was seen by Dr. Ricca with complaints of pain in the wrist, thumbs, forearms, elbow, shoulders and neck. Dr. Ricca did not see

the claimant between December 16, 2004 and April 2, 2005, because the claimant was being treated by Dr. Savu.

Dr. Ricca testified that Dr. Savu was providing the claimant with steroid injections at the spine, which should have helped the claimant's symptoms in her hands. However, the claimant returned to Dr. Ricca when her symptoms became intolerable.

Dr. Ricca performed the operations on both of the claimant's wrists. Dr. Ricca testified that it is possible for people who have had carpal tunnel surgery to have symptoms following the surgery. Dr. Ricca testified that after the surgeries, an EMG was performed, which confirmed that the claimant suffered a left ulnar nerve entrapment. Additionally, the claimant suffered from dysethesia and hyperpathia. Dr. Ricca described dysethesia as an abnormal sensation from the nerves. Dr. Ricca testified that when the claimant would lightly touch things with her left hand, the claimant described it as rubbing her hand against sandpaper. Furthermore, the claimant had difficulty using her left hand due to pain around her left thumb and diffused aching pain

in her left forearm. Dr. Ricca also testified that hyperpathia is an abnormal nerve response where normal sensations like a gentle touch will send pain information to the brain. Dr. Ricca testified that hyperpathia is an excessive abnormal response of nerves. Additionally, Dr. Ricca testified that in September of 2005, the claimant was on the verge of a nervous breakdown.

Dr. Ricca testified that she did not think that the claimant should work due to her carpal surgeries and her recurrent symptoms which required repeat surgery. Dr. Ricca testified that the claimant was at high risk for recurrent problems. Dr. Ricca further testified that even frequent use of the claimant's hands to answer telephones would put her at high risk for another surgery. Therefore, that was the most likely reason why Dr. Ricca recommended against further work.

On July 3rd, 2006, Dr. Ricca issued an Affidavit of Physician stating:

1. the following are my opinions to a reasonable degree of medical certainty which are offered in support of the

workers' compensation claim of Gertrude Brown which arose out of job injuries with Respondent manifested on or about June 7, 2004 and June 21, 2004.

2. Gertrude Brown [DOB:9/17/50] is totally and permanently disabled from working due to these injuries. The AMA Guides to the Evaluation of Permanent Partial Impairment, 4th Ed., support this finding, opinion or rating in Section 1.8, p.1/6, wherein the lack of employability of individuals who are at risk for further injury is treated as an impairment. The disability of Claimant results chiefly from the fact that she now lacks, among other capabilities, the prerequisites of employability. During my assessment of Gertrude Brown's employability, I kept in mind the potential for aggravation of her impairment in further work due to the impaired condition of her median and ulnar nerves in one or more of her arms. This impairment rating is based upon my extensive evaluation and treatment of the claimant. A return to work for Gertrude Brown would be unsafe for her, as she cannot bear any further injury and is susceptible to such due to her prior injuries.

3. Objective findings which corroborate the impairment and disability of Claimant include, without limitation, observations made in surgery and during office consultations, and derived from the following:

- a. X-rays;

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- b. MRI studies;
- c. Nerve conduction tests;
paresthesias; reflex evaluation;
surgical or first-hand observation and
treatment of median nerve impingements
in the RUE and LUE;
- d. repeated symptoms noted in
office visits with similarity of
complaint sufficient to corroborate
accuracy of diagnosis.

4. I performed two carpal tunnel surgeries on Gertrude Brown 2005. She is in need of surgery for ulnar nerve palsy which will cost in today's dollars, approximately \$7,000.00 for surgeon's fees and related clinical and anesthetic care; if she returns to work using her hands, she will likely reinjure herself and further surgery on her median nerves has a very poor prognosis. She will require indefinitely pain medicine, muscle relaxers, ulnar nerve surgery, doctor visits, arising out of her injuries....

On September 28, 2006, the respondents sent the claimant to Dr. Parsioon. Dr. Parsioon's records reveal that the claimant had a positive Tinel sign on the ulnar nerve at the left elbow. Although Dr. Parsioon did not mention reviewing the EMG Nerve Conduction study, he did diagnose

the claimant as having left ulnar neuropathy at the elbow. On December 7, 2006, after reviewing the EMG-NCV and FCE results, Dr. Parsioon wrote a handwritten letter to the respondents, noting that the claimant was not totally disabled and could perform a light duty job.

A November 27, 2006, Functional Capacity Exam, given by Tim Atkinson at Functional Testing Centers, Inc., resulted in an evaluation that determined that the claimant gave a inconsistent effort. Mr. Atkinson noted that the claimant demonstrated the ability to perform work at least at the light physical demand classification.

Discussion

The Majority opined that although the claimant sustained a work related injury, she is not permanently and totally disabled. The Majority erroneously determined that the claimant was not entitled to permanent disability benefits due to the fact that she was not assigned a permanent impairment rating. I find that the claimant is permanently and totally disabled due to the fact that she does not have fully functioning hands and digits and suffers

from ulnar neuropathy, hyperpathia, and dysethesia. Furthermore, neurosurgeon, Dr. Ricca, recommended that the claimant is permanently and totally disabled and should not return to work because any repetitive motion would most likely result in the claimant re-injuring herself which would require additional surgeries.

The Majority erred both as a matter of law and in its interpretation of the evidence when it denied the claimant permanent disability benefits because she had no doctor's opinion assigning her an impairment rating. The precise issue presented in this case is whether the Commission has the authority to assess its own impairment rating in the absence of a physician assigned impairment rating. However, it has been determined by the Court of Appeals that the Commission is authorized to assess its own impairment rating even when no impairment rating has been assigned by a physician. See Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001); Mary K. Jones v. Wal-Mart, ___ Ark. App. ___, ___ S.W.3rd ___, 2007.

The Majority found that in the absence of a physician's report assigning a permanent impairment rating, appellant was not entitled to permanent disability benefits. In so holding, the Majority apparently relied upon the case of Wren v. Sanders Plumbing Supply, 83 Ark. App. 111, 116 S.W.3d 461 (2003). However, in Wren, the Court of Appeals held only that Mr. Wren was not entitled to permanent disability benefits because there was no evidence of a permanent physical impairment.

In Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994), this court remanded on a similar issue where the Commission failed to translate the evidence into a finding of whether the claimant proved entitlement to a rating, when it had cogent evidence before it that could support a finding of permanent, anatomical impairment. In Johnson v. General Dynamics, the Court of Appeals explained:

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the

payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. Id. In the case of Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968), the supreme court stated that the Commission is "not limited, and never has been limited, to medical evidence only in arriving at its decision as to the *amount* or *extent* of permanent partial disability suffered by an injured employee as a result of injury." In fact, it is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. Gencorp Polymer Products v. Landers, 36 Ark. App. 190, 820 S.W.2d 475 (1991). It has also been said that nothing in our law does or should require precise evidence of the precise amount of disability. Bibler Bros. v. Ingram, 266 Ark. 969, 587 S.W.2d 841 (1979). It appears that the court in Bibler was referring to anatomical impairment and/or wage loss disability.

After reviewing the record it is clear that the Commission denied appellant benefits for permanent, partial, *anatomical* loss of the use of her body for the sole reason that there was no numerical rating assigned by a physician. However, the record contains evidence from which reasonable minds could conclude that appellant sustained some degree of permanent impairment.

Relying on Johnson, the Court of Appeals held in Polk County v. Jones, that the Commission was authorized to assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. Specifically, this court in Polk County stated that:

The Workers' Compensation Act of 1993 directed the Commission to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission adopted the *AMA Guides*. Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the *AMA Guides*, whether the claimant met his burden of proof. This being the case, we hold that the Commission can, and indeed, should, consult the *AMA Guides* when determining the existence and extent of permanent impairment, whether or not the relevant portions of the *Guides* have been offered into evidence by either party.

Polk County also contends that the Commission exceeded the scope of its authority when it assessed its own impairment rating rather than relying solely on its determination of the validity of ratings assigned by physicians. We disagree. It is the duty of the Commission to translate evidence

into findings of fact. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In the instant case, the Commission was authorized to decide which portions of the medical evidence to credit, and translate this medical evidence into a finding of permanent impairment using the AMA Guides. Polk County, 74 Ark. App. at 164-65, 47 S.W.3d at 907-08.

Furthermore, in Mary K. Jones v. Wal-Mart, the Court of Appeals relied upon the holdings in Johnson and Polk County, in finding that the Commission was authorized to decide which portions of the medical evidence to credit and translate the medical evidence into a finding using the AMA Guides, as to whether the claimant met her burden of proof. Because the Commission in Mary K. Jones denied the claimant benefits solely because there was no impairment rating assigned by a physician, the Court of Appeals remanded the case.

In the present case, the claimant was not assigned an impairment rating, which is why the Majority denied the claimant permanent and total disability benefits. However, it is apparent that the Majority erred, and the claimant

should be awarded permanent and total disability benefits. The Majority is incorrect for two reasons. First, the claimant's various physical impairments are rateable. As indicated above, the claimant has sustained an injury in the form of carpal tunnel syndrome. While it is true that these conditions were not rated by the claimant's physicians, all of those conditions are rateable under the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Not only do the Guides give an impairment rating for carpal tunnel syndrome, but they assign impairment ratings for median neuropathy at the wrist and ulnar neuropathy at the elbow. The Guides assess a 10% impairment rating for the claimant's right upper extremity from the elbow to the wrist, which includes the carpal tunnel area. Additionally, the Guides assess a 10% impairment rating for the claimant's left upper extremity from the elbow to the wrist, which includes the carpal tunnel area. This rating has been upheld by the Commission on several occasions. See Grams v. Hiland Dairy, Full Commission Opinion filed August 20, 2001 (E909550); Stull v. Pace Industries, Full Commission Opinion filed

May 10, 2001 (E905210). The Guides further assign a 10% upper extremity impairment, equivalent to 6% impairment rating to the body as a whole for mild median neuropathy at the wrist. Additionally, the Guides assign a 10% upper extremity impairment, equivalent to 6% impairment rating to the body as a whole for mild ulnar neuropathy at the elbow. To the extent that the claimant's anatomical impairment is relevant to those conditions, the Court of Appeals has held that it is our duty to convert an anatomical impairment to an impairment rating. See, Johnson v. General Dynamics, 46 Ark. App. 188, 878 S. W. 2d 411 (1994).

Second, there is no need to determine the extent of the claimant's anatomical impairment since the benefits she is seeking are for permanent and total disability. The Connell deals with permanent partial disability in excess of the anatomical impairment, or what we more commonly refer to as wage-loss disability. In the Connell case, the Court held that claimants are not entitled to wage-loss disability unless they have a rateable anatomical impairment. The Court reached that conclusion because Ark. Code Ann. §11-9-526

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(b) (1) specifically states that such benefits must be "in excess of the employee's percentage of permanent physical impairment. . .". However, in the present case, the claimant is requesting benefits for total disability pursuant to Ark. Code Ann. §11-9-519. The language quoted above does not appear in that statute. In fact, Ark. Code Ann. §11-9-519

(A) specifically states:

In cases of total disability, there shall be paid to the injured employee during the continuance of the total disability 66 2/3% of his or her average weekly wage.

(e) (1) states:

Permanent total disability" means inability because of compensable injuries or occupational disease, to earn any meaningful wages in the same or other employment.

Nowhere in this section is there any reference made to an anatomical impairment rating. Obviously, the legislative intent was that claimants who are permanently unable to return to work are entitled to benefits for permanent and total disability. Whether a permanently disabling condition has been rated, or can be, is irrelevant

in deciding if a claimant is permanent and totally disabled. The question is whether this particular claimant is able to return to the work force.

The claimant testified that she has difficulty using either of her hands. The claimant's testimony reveals that she has difficulty performing even simple everyday tasks. The claimant testified that prior to June 21, 2004, she did garden, however is now unable to do so. The claimant testified that she does very little cooking. The claimant testified that she has difficulty stirring or mixing with her hands. The claimant testified that she has had to find ways to accommodate for bras, belts, tying shoes, and personal hygiene due to the pain that goes with it. The claimant explained that she has difficulty lifting anything of any substance with her right hand, that she drops things (coffee cups, bowls), and that she is unable to pick up thing quickly. It is evident that as the claimant has trouble performing even menial tasks, it would be nearly impossible for her to handle even light duty work. The claimant testified that in her present physical condition

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she is unaware of any kind of work to which she could return, however she would be willing to go back to work if there was a type of job that she could perform.

Dr. Ricca's testimony further supports a finding that the claimant is permanently and totally disabled. Dr. Ricca noted that after surgery to her hands, the claimant complained of her finger tips on the 2nd, 3rd, and 4th digits of her right hand as being numb. Additionally, the claimant complained of pain in her left hand into her forearm and that the last three digits of her left hand felt peculiar. Dr. Ricca diagnosed the claimant as having bilateral hand/wrist pain, left ulnar nerve symptoms with numbness and pain, and the inability to work. Dr. Ricca specifically noted that the claimant was unable to engage in even light duty activities.

Furthermore, another EMG was performed, which revealed:

1. Mild to moderate left median neuropathy at wrist.
2. Mild left ulnar entrapment neuropathy at the elbow. There is no evidence of

large fiber polyneuropathy nor
radiculopathy and no myopathy.

Dr. Ricca noted that the results of the EMG/NCV confirmed his impression of left ulnar entrapment at the elbow. Dr. Ricca also noted that the claimant appeared to suffer from significant depression.

Dr. Ricca noted that after the surgeries, the claimant continued to complain of left hand numbness, tingling, and weakness, and left forearm pain. The claimant reported that her left hand symptoms are still quite marked, and when she touches things with her left hand, it feels like she is rubbing it against sandpaper. Use of her left hand is difficult because of pain, particularly pain around the left thumb. She also has an aching pain diffusely of the left forearm. At this point, Dr. Ricca diagnosed the claimant as having left hand hyperpathia, weakness, and aching left forearm pain, and that these symptoms prevent her from using her left hand. Additionally, the claimant suffered from dysethesia. However, he noted that the claimant had reached maximum medical improvement.

Dr. Ricca testified that she did not think that the claimant should work due to her carpal surgeries and her recurrent symptoms which required repeat surgery. Dr. Ricca testified that the claimant was at high risk for recurrent problems. Dr. Ricca further testified that even frequent use of the claimant's hands to answer telephones would put her at high risk for another surgery.

Furthermore, Dr. Ricca issued an Affidavit of Physician stating within a reasonable degree of medical certainty that the claimant is totally and permanently disable from working due to her injuries. Dr. Ricca specifically found:

The AMA Guides to the Evaluation of Permanent Partial Impairment, 4th Ed., support this finding, opinion or rating in Section 1.8, p.1/6, wherein the lack of employability of individuals who are at risk for further injury is treated as an impairment. The disability of Claimant results chiefly from the fact that she now lacks, among other capabilities, the prerequisites of employability. During my assessment of Gertrude Brown's employability, I kept in mind the potential for aggravation of her impairment in further work due to the impaired condition of her median and

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ulnar nerves in one or more of her arms. This impairment rating is based upon my extensive evaluation and treatment of the claimant. A return to work for Gertrude Brown would be unsafe for her, as she cannot bear any further injury and is susceptible to such due to her prior injuries.

Dr. Ricca's medical opinion should be afforded great weight, as he treated the claimant throughout her injury. Additionally, Dr. Ricca feels that any work could aggravate the claimant's condition, causing further injury, which would ultimately result in additional surgeries. Even though Dr. Ricca did not assign an actual impairment rating, he did declare that under the Guides, the claimant is permanently and totally disabled. As such, it is evident that the claimant is permanently and totally disabled.

The respondents have argued that the claimant can perform light duty work. The respondents rely solely on the results of the FCE and Dr. Parsioon's opinion, which they requested only after Dr. Ricca testified that the claimant was permanently and totally disabled. The FCE noted that the claimant gave an inconsistent effort and therefore concluded

that the claimant demonstrated the ability to perform work at least at the light physical demand classification.

Furthermore, Dr. Parsioon met with the patient only once, at the respondents request, and wrote a handwritten letter to the respondents, noting that the claimant was not totally disabled and could perform a light duty job. Interestingly enough, the respondents requested the FCE and evaluation by Dr. Parsioon, which essentially explains why the claimant was told that she could return to light duty work. On the other hand, Dr. Ricca is not being paid by anyone in particular. Rather, Dr. Ricca upheld his medical oath and fairly and accurately testified that the claimant should not even work in a capacity where she frequently answered the telephone. Therefore, I find that Dr. Ricca's opinion that the claimant is permanently and totally disabled should be given much greater weight than that of an FCE or Dr. Parsioon's opinion.

In conclusion, it is evident that the Majority erred as a matter of law in erroneously denying the claimant permanent and total disability after her treating physician

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testified that according to the Guides she was permanently and totally disabled. Not only has the Court of Appeals held that the Commission cannot deny an impairment rating simply because one not assigned by a physician, but the facts of the record as a whole supports a finding that the claimant is permanently and totally disabled. However, I concur that the claimant is entitled to temporary total disability and medical benefits from April 11, 2005 though November 7, 2005. As such, I must respectfully concur in part and dissent in part from the Majority's opinion.

PHILIP A. HOOD, Commissioner