

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503749

EVLYNENE KIRKENDOLPH, EMPLOYEE	CLAIMANT
DF&A/REVENUE SERVICES DIVISION/ OCSE, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED APRIL 30, 2010

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

Claimant represented by the HONORABLE SHEILA F. CAMPBELL, Attorney at Law, North Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed December 21, 2007. The administrative law judge entered the following 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 a 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.

After reviewing the entire record *de novo*, the Full Commission opines that the administrative law judge's opinion is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed. We find that the administrative law judge's findings of fact are correct and are, therefore, adopted by the Full Commission.

The claimant asserts that the Commission abused its discretion in "denying motion to reopen claim for new evidence," i.e., a purported anatomical impairment rating of 46%. Yet the Arkansas Court of Appeals has

already held that the Commission did not abuse its discretion in denying the claimant's motion to reopen her claim. See *Kirkendolph v. DF&A Revenue Services Division*, CA 08-668 (Sept. 30, 2009).

We therefore affirm and adopt the December 21, 2007 opinion of the administrative law judge, including all findings and conclusions therein, as the decision of the Full Commission.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion denying the claimant permanent total disability benefits. I would award permanent total disability benefits to the claimant. I concur with the majority's finding that the Court of Appeals has previously decided the issue of our denial of the claimant's motion to

reopen her claim, in Kirkendolph v. DF&A Revenue Services Division, CA 08-668 (Sept. 30, 2009).

The claimant sought permanent total disability benefits based upon the loss of use of both her hands, preventing her re-entry to the workforce. I find that the claimant has proven by a preponderance of the evidence that she is entitled to permanent total disability benefits.

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. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Rutherford v. Mid-Delta, 102 Ark. App. 317, 319, 285 S.W.3d 248 (2008), citing Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). An employee who suffers a scheduled injury is not entitled to compensation in excess of the amount of his or her permanent physical impairment as scheduled, except in the case of permanent total disability. Ark. Code Ann. Sec. 11-9-521(g). Permanent total disability is defined as the "inability because of compensable injury or occupational disease, to earn any meaningful wage in the

same or other employment." Ark. Code Ann. Sec. 11-9-519(e)(1); See Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Workers' Compensation Act provides that permanent total disability "shall be determined in accordance with the facts," and relevant factors include medical evidence, age, education, experience and other circumstances reasonably related to a claimant's earning power. Ark. Code Ann. § 11-9-519(c); Rutherford, supra, citing Perry v. Mar-Bax Shirt Co., 16 Ark. App. 133, 698 S.W.2d 302 (1985).

The claimant testified that she was 56 years of age at the time of the hearing. She had a degree in sociology from the University of Arkansas at Pine Bluff. She worked for the respondent employer for almost twenty-seven and a half years, using a computer constantly to review files and prepare reports. She developed hand pain in 1999, and she was referred to a hand specialist in February 2005. Her doctors tried surgery for her bilateral carpal tunnel syndrome, but she did not get any better. After surgery, she returned

to work, but touching the keyboard was painful. She could not perform her job, even though she wanted to return to work. She had to stay with her sister for over a year after her surgery.

The claimant testified that she had surgery on February 20, 2005, and did not return to work until April 29, 2005. When she went back to her job in April, she read books and newspapers, because she was not able to use the computer, even with a modified keyboard. She stayed on the job until June 2, when she was sent home after the doctor said she could not work anymore. She does not have the option of going back to that job, because the doctor said she could not do it. She does not believe she can do that job, and she has no intention of going back to it. The claimant testified that without carpal tunnel syndrome, she was able to do her job well, but with carpal tunnel syndrome, she could not do her job at all. Her job could not be performed without a computer. There were no other jobs with her employer that did not require the use of her hands.

The claimant testified that she is totally disabled. The claimant pointed out that her hands are twisted. She is unable to use computer. Even if she used one finger to operate the keyboard, her hands "burn

real bad," despite having a special keyboard for carpal tunnel syndrome. She could not do it. She had a restriction from Dr. Burba to do no keyboarding or hand sorting.

The claimant stated that she can drive her 2002 Cavalier automobile with an automatic transmission, but only in Lake Village, because it is a small town. She cannot drive to Little Rock or long distances. When she attempted to return to work, her son had to drive her. She used to be able to drive by herself. She has a disabled tag for her car.

The claimant explained that she lives alone. She pays people, like the children of friends and neighbors, to come help her. A disabled nephew does chores for her. The claimant testified that she does not carry out her garbage or dust. She cannot put a fitted sheet on her bed. The claimant testified that she can cook, by putting an empty pot on the stove and adding ingredients to it. She does not read, but she watches television and is able to use the remote control. She can use a telephone and write, although she cannot write for a long time.

The claimant testified that she is going to have these problems with her hands for the rest of her

life. She has to take medication for her hands, which makes her drowsy, affecting her ability to drive. She also testified that her nerve condition makes her "forget" sometimes. She has not tried to find work: "I cannot do it... Any type of work." She explained that she could not be a receptionist, because receptionists have to operate computers and telephones. Her heart problem does not prevent her from working. As for her diabetes, the claimant pointed out that she was diagnosed when she was 30 years old and was able to work with it.

The claimant's sister, Jeraldine Tucker, testified that the claimant used to work all of the time and that she enjoyed it. Tucker thought that the claimant would rather be able to return to work. The claimant had to live with Tucker after her surgery, for a long time, but she moved out of Tucker's home in in 2006. The claimant lives around the corner from Tucker. Tucker still helps the claimant dress:

Just about every day I'm there. Not just to help clean and dress her every day, no. But I do have to assist her in helping her get dressed, because she can't fasten her bra, she can't put her earrings on, she can't fasten her bracelets. I have to assist her in those things... I'm in and out, in and

out, because we're just right around the corner.

Tucker stated that the claimant's wrist had not improved: "Not any at all, because she still - she can't even dress herself. Because when we get ready to go to church, I have to put her earrings in, I have to buckle her shoes, and help her to dress herself."

Tucker testified that she cooked, because the claimant could not hold anything in her hand or lift anything. The claimant broke many of Tucker's drinking glasses, because she could not hold onto them. Tucker observed that the claimant's condition is not getting worse or better.

On May 27, 2005, Dr. Johnston noted that, post surgery, the claimant was unable to perform her work duties. On June 2, 2005, Dr. Burba limited the claimant, "indefinitely," to no flexion or extension of her wrist and no keyboard or sorting with her hands. On August 18, 2005, Dr. Wilson gave the claimant a 15% permanent anatomical impairment rating to the hands. Shortly thereafter, on August 30, 2005, Dr. Burba wrote a letter, noting that the claimant has severe bilateral carpal tunnel syndrome, and that "[a]ny flexion, extension, keyboard work or sorting will make this

worse. Since her job requires her to do these things, she has been unable to work." On September 6, 2005, Dr. Johnston wrote a similar note, that the claimant has severe bilateral carpal tunnel syndrome, which worsened despite surgery. He stated that the claimant is "completely disabled at this time with no expected improvement."

The claimant underwent an initial vocational evaluation on October 6, 2005. The claimant explained her condition and activities at that time to the vocational specialist, reporting that she was limited in her daily activities, including dressing, housework, cooking and driving. She had lost much of her independence. She was no longer able to engage in her hobbies, shopping at the mall and eating out with friends, as often. She related that her pain was in her hands, at an eight on a scale of one to ten, with the left worse than the right.

The vocational evaluation report states that the claimant would have had, at that time, eleven working years left before the usual retirement age, and that she possesses transferable skills, based upon her education and work history. The report states "[h]owever, due to her injury and current restrictions,

she has lost the physical ability to utilize most of the skills she possesses." The report notes that Dr. Johnston and Dr. Burba have opined that the claimant is unable to work at this time due to severe carpal tunnel syndrome. The claimant's condition would limit her to sedentary work, which is what she performed prior to her injury, "but severe bi-lateral hand limitations would preclude the great majority of all jobs in her local economy." The conclusion of the vocational evaluation was that "at this time, [the claimant] is not a viable candidate for vocational rehabilitation services."

The claimant was seen by Dr. Bindra pursuant to a change of physician order on November 21, 2005. She reported to Dr. Bindra that she could not use her left hand at all, that she had difficulty dressing, and that her sister helped her with meals. Dr. Bindra noted that her current symptoms were difficult to assess because "she has a lot of functional overlay and, hence, it is difficult to state the level of functionality this lady has although she states she cannot use her left hand whatsoever. There is evidence during the examination that she does have movement in these fingers. This lady has developed a chronic pain problem." Dr. Bindra felt that a psychological

assessment was in order, and that psychiatric care and pain management were appropriate. He stated that the "prognosis for her is poor as she does have evidence of functional overlay." He did not expect surgery to improve her condition. He felt it was unlikely that her limitations were voluntary. Dr. Bindra stated that her loss of function was likely a "psychosomatic issue."

The claimant underwent a functional capacity evaluation on June 5, 2006, in which she reported limitations in her activities of daily living, consistent with her prior reports. The conclusion of the FCE was invalid, because of signs of symptom magnification and inconsistencies in effort.

The claimant returned to Dr. Bindra on June 12, 2006, reporting that she requires outside help for her household activities and that her main problems are tingling in her fingers, abnormal sensations and swollen fingers. Dr. Bindra released her, because he felt there was nothing further to offer her, as surgery would not relieve her current problems.

Dr. Johnston wrote a letter on July 23, 2007, stating that the claimant is "completely disabled from bilateral hand neuropathy which has caused her to lose much of the use of both her hands." He noted that

surgery failed to correct the claimant's carpal tunnel syndrome, and that she is unable to work. He stated that she has bilateral hand neuropathy secondary to carpal tunnel syndrome and that diabetes was a possible contributor, as well.

The claimant has proved by a preponderance of the evidence that she is unable to earn any meaningful wage in her employment with the respondent employer or in other employment, because of her compensable carpal tunnel syndrome. The claimant credibly testified that she is not capable of doing the job she held with the respondent employer, and that the respondent employer did not, in fact, have a position which she could perform. The claimant could not operate a keyboard, even one specifically designed for carpal tunnel syndrome. She was limited in her ability to drive due to her medication for the compensable injury which caused drowsiness. The medical records show that the claimant has been declared disabled by Dr. Johnston and Dr. Burba. The vocational rehabilitation specialist stated that the claimant had lost the use of her transferable skills with the loss of use of her hands and that she was not a candidate for vocational rehabilitation due to her carpal tunnel syndrome. The

greater weight of the evidence shows that the claimant has lost the use of her hands to the extent that she cannot use a computer, cannot perform sorting or other repetitive activities with her hands, and cannot perform many activities of daily living.

Dr. Bindra did not give an opinion on the claimant's disability status. He expressed concern that there was a psychological layer to her disability and pain, stating that she had functional overlay. Dr. Bindra did not conclude that the claimant was malingering or was in any way limiting herself voluntarily. He did state that, as a result of her compensable injury, she had developed a pain syndrome that could better be addressed from a psychological standpoint or a pain management standpoint. The Commission has dealt with overlay in the past, in Herron v. Medicalodge Progressive Care, Full Commission Opinion filed July 28, 2009 (WCC No. F213823):

The Full Commission acknowledges that part of the claimant's compensable injury may be "overlay," as the claimant's mode of expressing pain includes crying, shaking and moaning. "Overlay" is defined in DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, Edition 28, as: an increment; a later addition superimposed upon an already existing mass, state or condition. Also from DORLAND'S,

psychogenic overlay is defined as: the emotionally determined increment to an existing organic symptom or disability. However, one cannot suffer "overlay" without an underlying condition, and "overlay" is not severable from the underlying condition. Here, the underlying condition is the claimant's compensable back injury. Any "overlay" stems from, and is part of the compensable injury.

As in the Herron claim, the present claimant has an existing organic disability, carpal tunnel syndrome with bilateral failed surgeries. I find that the potential presence of a functional overlay, of a psychological component to her disability, is insufficient to prevent a finding of permanent total disability.

The Herron claimant was 53 years of age and no longer able to perform her previous job. In fact, she was unable to walk without a four-wheeled walker. She suffered from severe pain and from the side effects of the pain medications she used daily. The Commission found that these facts, coupled with her treating physician's opinion that she was disabled, and the Functional Capacity Evaluation indicating that the claimant is unable to perform any work activities, were sufficient proof of permanent and total disability. The

present claimant is unable to perform her prior job or any job available in her community. She is unable to perform many activities of daily living at all. She takes daily medication for her bilateral carpal tunnel syndrome which makes her drowsy, affecting her ability to drive and to function. Two physicians have opined that she is completely disabled, and no physicians have opined that she is not disabled. Her vocational rehabilitation specialist determined that she was not a viable candidate for vocational rehabilitation.

In fact, the record is devoid of support for a finding that the claimant is not completely disabled. As discussed above, the potential overlay is a component of her compensable injury. The results of the functional capacity evaluation are consistent with Dr. Bindra's opinion that overlay was present. There is no other evidence, medical or otherwise, to suggest that the claimant is not permanently and totally disabled due to her compensable bilateral carpal tunnel syndrome.

I find that the claimant has proven by a preponderance of the evidence that she is permanently and totally disabled.

For the foregoing reasons, I must respectfully dissent, in part, from the majority opinion denying

medical benefits to the claimant. I would award permanent total disability benefits. I concur with the majority's finding that the Court of Appeals has previously decided the issue of our denial of the claimant's motion to reopen her claim, in Kirkendolph v. DF&A Revenue Services Division, CA 08-668 (Sept. 30, 2009).

PHILIP A. HOOD, Commissioner