

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F605114

WANDA LOUISE MILLS, EMPLOYEE	CLAIMANT
ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER/TPA	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 12, 2011

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

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

Respondents No. 2 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed March 29, 2011.

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 or about September 23, 2005, when the claimant sustained a compensable injury.
3. This case has been the subject of a prior hearing with an opinion filed by Administrative Law Judge Calaway on October 31, 2007, which was affirmed as modified by Full Commission opinion dated February 20, 2009.
4. The Claimant has failed to prove that she is entitled to receive payment of assessed wage loss without offset for disability-retirement program payments.
5. The reduction in workers' compensation benefits provided for in Ark. Code Ann. § 11-9-411 (a) applies to the wage loss benefits even though the claimant paid for some or a portion of the premiums for the retirement-disability program.
6. The claimant has failed to prove by a preponderance of the evidence that she is entitled to penalties and interest for underpayment of benefits.
7. The claimant has failed to prove by a preponderance of the evidence that she is entitled to attorneys fees.

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.

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.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The main issue in the case at bar is whether the claimant is entitled to payment of wage loss without an offset for her disability retirement benefits. After a de novo review of the record, I find that there should be no offset. Ark. Code Ann. §11-9-411 (Repl. 2002) states:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

The amount of money the claimant receives for retirement/disability is overwhelmingly for retirement. Claimant's Exhibit 1 and 2 show the amount she would receive without disability. The statute applies to only the amount she receives for disability, not for the amount for retirement. The amount for retirement should not be offset because it was earned regardless of disability.

The purpose of the above statute was to prevent a double recovery by a claimant for the same period of disability. The respondent relies partly on Henson v. GE, 99 Ark. App. 129, 257 S.W.3d 908, 914 (2007). In Henson, the Court found that §11-9-411 did not specifically include disability retirement benefits, but awarded the reduction of benefits. The Court held that this was correct because if a disabled employee became eligible for disability retirement due to an injury, and not because of the number of years worked, it constituted a welfare benefit plan as described in §11-9-411. Clearly in an effort to "remedy" this type of error, the Legislature amended Ark. Code Ann. §11-9-411 in 2009 to state:

(2) the reduction specified in subsection (a)(1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

It is abundantly clear that any reliance on Henson is misplaced because it was decided before the Legislature enacted

Act 327, which states if the worker paid for the disability policy there is to be no offset. Here, the claimant paid for her policy. Even if Henson is relied upon, the portion of her benefits she would have received at early retirement without disability must not be considered in the offset of workers' compensation benefits for the "welfare plan".

In enacting Act 327, the Legislature obviously believed a group policy for disability, such as disability retirement benefits, does not constitute a welfare benefit plan if paid for by the worker. In the instant case, the claimant was required to pay 6% of her salary to her retirement plan. The claimant paid her retirement portion of her disability plan; it is not a welfare plan. Therefore, the claimant should not be penalized by an offset on this money. Any offset should only be for the amount of money she receives for disability, not for retirement. The claimant was entitled to retirement benefits before her disability began. Had she taken early retirement rather than retirement disability, she would have received only a small amount less per month than what she receives with the disability added. Yet the PECD offsets on the entire amount. She paid for her retirement plan; therefore, it is not a welfare plan as anticipated by Henson v. General Electric, as discussed above.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner