

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO.: G802123**

FRANCINE MURPHY, Employee	CLAIMANT
ARKANSAS DEPT. OF CORRECTION, Self-Insured Employer	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier/TPA	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION AND ORDER FILED AUGUST 23, 2022

Hearing conducted before ADMINISTRATIVE LAW JUDGE TERRY DON LUCY, in Craighead County, Arkansas.

Counsel for the Claimant: HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Counsel for Respondents No. 1: HONORABLE CHARLES H. MCLEMORE, Attorney at Law, Little Rock, Arkansas.

Counsel for Respondent No. 2: HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

The above-captioned matter came on for a hearing on May 27, 2022, before the undersigned Administrative Law Judge. A pre-hearing Order was entered in this matter on January 26, 2022, which reflected the following stipulations:

- (1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
- (2) The employee/employer/carrier relationship existed at all relevant times, including March 17, 2018, on which date the Claimant sustained compensable injuries to her head and left eye for which certain benefits have been paid by Respondents No. 1; and,
- (3) The Claimant's average weekly wage on the date of injury was sufficient to entitle her to compensation rates of \$579.00 and \$434.00 for temporary total and permanent partial disability benefits, respectively.

The pre-hearing Order also reflected the issues to be adjudicated, as set forth below:

- (1) Whether the Claimant is entitled to benefits for facial disfigurement pursuant to Ark. Code Ann. §11-9-524 in relation to her compensable injuries of March 17, 2018;
- (2) Whether the Claimant is entitled to permanent and total disability benefits in relation to her compensable injuries of March 17, 2018; or, in the alternative, wage loss disability benefits; and,
- (3) Attorney’s fees associated with controverted indemnity benefits.

During preliminary discussions, the Commission’s pre-hearing Order of January 26, 2022, was introduced into the record as Commission’s Exhibit No. 1 without objection. (TR 8) The appearing parties’ respective exhibits were likewise introduced into the record without objection. (TR 8-12) It was also noted during preliminary discussions that Respondent No. 2, as provided in the Commission’s pre-hearing Order of January 26, 2022, had waived its appearance and deferred to the outcome of litigation. (TR 5; Comm. Ex. 1 at 2) Accordingly, references hereinafter to the “Respondents” will pertain to Respondents No. 1 unless otherwise differentiated.

Findings of Fact and Conclusions of Law

- (1) The parties’ stipulations are accepted as findings of fact herein, inclusive of the Commission’s jurisdiction over this claim; and,
- (2) The Claimant has proven, by a preponderance of the evidence, that she has been rendered permanently and totally disabled as the result of her compensable left eye injury of March 17, 2018, and has further proven by a preponderance of the evidence that she is entitled to \$1,500.00 for facial disfigurement pursuant to Ark. Code Ann. §11-9-524.

Applicable Law

The party bearing the burden of proof in a workers' compensation matter must establish such by a preponderance of the evidence. See Ark. Code Ann. §§11-9-704(c)(2) and 11-9-705(a)(3). With respect to the present matter which involves a scheduled injury, Ark. Code Ann. §§11-9-521(a) and (a)(14) state as follows:

(a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule:

(14) Eye enucleated, in which there was useful vision, one hundred five (105) weeks;

Ark. Code Ann. §11-9-521(g) also states that:

(g) Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b).

In turn, Ark. Code Ann. §§11-9-519(b) and (c) require that:

(b) In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.

(c) In all other cases, permanent total disability shall be determined in accordance with the facts.

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

Attendant factors relevant to whether a claimant is unable to earn any meaningful wages include medical evidence, age, education, experience and other circumstances reasonably related to a claimant's earning power. Absent a finding of permanent total disability, a claimant who

has suffered a scheduled injury is limited to the benefits listed at Arkansas Code Annotated section 11-9-521 (Repl. 2002). *Kirkendolph v. Dep't of Fin. & Admin.*, 2010 Ark. App. 786.

In addition, being in a market where jobs are scarce does not render a worker disabled for the purposes of workers' compensation, nor does an award of Social Security Disability benefits, given that the latter's standard is different from that of Arkansas' Workers' Compensation Law with respect to permanent and total disability. (*Id.*) With regard to facial or head disfigurement, Ark. Code Ann. §11-9-524 states that:

(a) The Workers' Compensation Commission shall award compensation for serious and permanent facial or head disfigurement in a sum not to exceed three thousand five hundred dollars (\$3,500).

(b) No award for disfigurement shall be entered until twelve (12) months after the injury.

Finally, it is long settled that the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. (See, for instance, *Yates v. Boar's Head Provisions Co.*, 2017 Ark. App. 133 (2017)). It is further well-settled that determinations of compensability may turn solely upon matters of weight and credibility, particularly when such matters relate to a given claimant's credibility. (See *Yates, supra*. In addition, see *Daniel v. Wal-Mart Stores, Inc.*, 2014 Ark. App. 671 (2014); *Kanu-Polk v. Conway Human Dev. Ctr.*, 2011 Ark. App. 779 (2011); and *Lee v. Dr. Pepper Bottling Co.*, 74 Ark. App. 43 (Ark. App. 2011)). Finally, a claimant's testimony is never considered to be uncontroverted. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786 (2011) (citing *Nix v. Wilson World Hotel*, 46 Ark. App. 303 (1994)).

Testimony

Tanya Rutherford Owen, Ph.D.

Ms. Owen testified that she holds a Ph.D. in Rehabilitation Education and Research, preceded by a Masters' Degree in Counseling Psychology and an undergraduate degree in Philosophy, and has worked either full or part-time since 1990 "in the world of both vocational rehabilitation and life care planning" in two other states including Arkansas. (TR 13) During direct examination, *inter alia*, Ms. Owen offered testimony to authenticate and explain her Labor Market Survey dated February 3, 2022, with respect to Newport, Arkansas, which essentially involved an internet search for available jobs during "a couple of days in February." (TR 14-19)

During cross-examination, *inter alia*, Ms. Owen conceded that she had never met the Claimant and did not have enough information to offer an opinion as to whether the latter could perform any of the jobs identified in her Labor Market Survey dated February 3, 2022. (TR 20)

Ms. Owen also participated in the following exchange during cross-examination:

Q: Okay. As far as your work on this case, you were simply doing the Labor Market Survey. You were not assisting any kind of rehabilitation of the Claimant?

A: That's right.

Q: Okay. You didn't find any kind of rehabilitation programs for the Claimant?

A: I – I did not. I did not do anything more than this Labor Market Survey in this case.

JUDGE LUCY: Well, let me interject, Mr. McLemore. Did the Respondents offer any kind of rehabilitation program to the Claimant?

MR. MCLEMORE: Not that I'm aware of, Your Honor.

JUDGE LUCY: Very well. You may proceed, Sir. (TR 21-22)

Francine Murphy

The Claimant, who was fifty-eight (58) years old at the time of the hearing and, *inter alia*, testified that she is a high-school graduate who attempted vocational training and thereafter became employed in “assisted living” for twelve (12) years, with her duties consisting of “Housekeeping, cooking, and taking care of the elder.” (TR 25-27) Following her departure from such work, the Claimant was immediately hired as a “Food Production Manger No. 1” for Respondent Employer and carried out such role for fifteen years. (TR 27) In essence, the Claimant was a supervisor of the prison kitchen during her shift, with duties that included supervising inmates who worked in the kitchen, keeping hand-written records of various kitchen tools checked out and in by the inmates who worked in the kitchen, as well as helping and teaching them to cook. (TR 28-30) Apart from taking forty (40) hours of on-line classes at work annually in order to maintain her continuing education requirements, the Claimant did no day-to-day work on a computer. (TR 31-32)

On March 17, 2018, during the course and scope of her employment, the Claimant fell and struck the left side of her face on the floor. This event resulted in a significant injury to the Claimant’s left eye, which ultimately required its removal and its replacement with a prosthetic glass eye. (TR 33-34) With respect to her claim for facial disfigurement, the Claimant testified that “Right now this left eye is lower. This eye just doesn’t fit well.” (TR 35) The Claimant also acknowledged that the injury to her left eye was the only one she sustained as a result of the incident of March 17, 2018, and that the Respondents had initially denied “100% loss” of her eye but subsequently accepted such and paid for her prosthetic eye and the treatment associated with it. (TR 36-37)

According to the Claimant’s testimony, she had several restrictions that her employer

could not accommodate and that she eventually filed for Social Security Disability benefits. (TR 38-39) With respect to such filing, the Claimant participated in the following exchange:

Q: What did you tell them your disabilities were?

A: I filed for the loss of my eye.

Q: Okay. And did you list the other – other problems as well: high blood pressure, Grave's disease? Did you list the other things, as well?

A: Yes, I had to list all of that.

Q: Okay. But the other medical conditions that you had, they never prevented you from working; is that fair?

A: No, I worked years with blood pressure problem, Grave's disease. (TR 39-40)

With regard to her present condition, the Claimant essentially testified that she prefers to have someone walk in front of her and that she can drive short distances provided that there is little traffic, is not raining, and is not dark outside. (TR 41-42) The Claimant is able to perform her own shopping at a nearby Wal-Mart for a "couple of items," but relies upon her sister to take her to a Kroger store further away for more extensive grocery shopping. (TR 43; see also TR 46) On the latter occasions, the Claimant's sister helps her navigate the Kroger store:

Q: Okay. And why do you need to have help getting through the Kroger?

A: Well, for one reason I – I have on shades and it's harder for me to see with the shades on. Even though they are prescription, I can see but it's harder, you know, a little dark with 'em on.

Q: Okay. So tell me – you came in here with sunglasses on and you've taken them off.

A: Yes.

Q: Why do you have sunglasses?

A: ‘Cause I’m confined to them, and when my eye was comin’ out – after I had all my surgeries, my eye was comin’ out and I had very low self-esteem and I didn’t want my eye to fall out in front of someone. (TR 44)

In addition, the Claimant testified as follows with respect to vocational rehabilitation:

Q: Okay. Now, your deposition was taken back in January. Do you remember that?

A: Yes.

Q: Okay. And following that – well, before that were you ever offered to be sent to a vocational expert to help you find a job or retrain you for a job?

A: No.

Q: Okay. And following your deposition, did anyone contact you from the Respondents about doing vocational rehabilitation?

A: No.

Q: Okay. Now, they asked you about it in your deposition and you told them that you would agree to do it; is that fair?

A: Yes.

Q: Okay. And it wasn’t offered, but that’s why we hired Tanya Owen to find out what jobs were available in the Newport area.

A: Yes. (TR 49)

The Claimant went on to testify that she can stand for approximately thirty (30) minutes to an hour before her balance is affected. (TR 51) In addition, the Claimant acknowledged that she had reviewed each of the jobs identified by Ms. Owen and that she did not meet the qualifications for any of such. (TR 50-52; 57) Although she had previously performed several activities for her church, such as cooking and cleaning, the Claimant testified that she now only serves as a door greeter for an hour at most. (TR 58)

During cross-examination, *inter alia*, the Claimant acknowledged that she can still read and confirmed that she is limited to driving short distances only. Indeed, the Claimant testified that she believes she is a potential danger to herself and others and has broken two side-mirrors simply backing out of her garage. (TR 63-64; 81-82) The Claimant further acknowledged that she owns a smart phone but primarily uses it to make and receive calls and only texts a “little bit.” (TR 68) With respect to her Social Security and disability retirement benefits, the Claimant receives \$1,344.00 and \$1,094.00 per month, respectively. (TR 70-71)

The Claimant conceded that she had not contacted any of the employers identified by Ms. Owen, nor had she looked for any work since her retirement, due to her physical limitations and owing in part to her fear of “hurtin’ myself and someone else.” (TR 71-72) The Claimant also testified that she is incapable of being trained and is dependent upon her family to conduct her personal business affairs. (TR 74-75)

Upon re-direct examination, the Claimant testified that she has no knowledge of letter writing and has no proficiency in computer business programs such as Word, Excel, Adobe, and Acrobat. (TR 83-84)

Medical and Documentary Evidence

I have reviewed the entirety of the medical and documentary evidence submitted herein, the most salient and relevant of which are discussed below in further detail. Records duplicated by the parties’ respective exhibits will only be cited to one party’s exhibit.

As noted from her testimony, Ms. Owen prepared a Labor Market Survey of the Newport, Arkansas, area dated February 3, 2022. Therein, Ms. Owen identified fifteen (15) then-available jobs which included positions such as cashier, data entry clerk, sales floor associate, call center representative, housekeeper, fast-food worker, manufacturing associate

(which specifically required “close vision, distance, vision, color vision, peripheral vision, depth perception and ability to adjust focus”), early learning teacher, and elder caregiver. (CX1 at 1-4)

With respect to her injury-related medical care, the Claimant presented to the Harris County Hospital Emergency Department on March 3, 2018, with a substantial left eye injury and findings that were “indicative [of] rupture of the left globe.” (CX2 at 10) Despite surgical efforts to salvage the Claimant’s left eye on March 17, 2018, it ultimately had to be surgically removed on April 3, 2018. (CX2 at 19; 37) On August 8, 2018, the Claimant’s primary care provider, Dr. Roger L. Green recorded that the Claimant:

States that she is very stressed and upset due to difficulties with the eye prosthesis that she was fitted with after an accident in which she lost her left eye. She states that the prosthesis falls out easily and her does not close at all at night. She states that she is still seeing the surgeon who removed her eye, and he has prescribed steroids to reduce the swelling. She is not able to drive, she has no peripheral vision and her depth perception is gone. She feels that she needs to see a psychiatrist but she is not able to drive anywhere to see someone. (CX2 at 61)

On October 30, 2018, the Claimant underwent yet another surgical procedure in an effort to improve the fitting of her prosthetic eye. (CX2 at 73) Dr. John Pemberton, one of the Claimant’s operative physicians, noted on December 16, 2019, that “Vision worse than 20/40...in better seeing eye was discussed and driving was not recommended and told it did not meet state standards of visual requirement for driver’s license.” (RX 1 at 16) On this occasion, Dr. Pemberton and the Claimant discussed yet another operation on her left eye. (*Id.*) Subsequently, on November 23, 2021, the Claimant’s primary care provider opined that the former was “disabled due to the loss of her left eye.” (CX2 at 83-84)

Mr. Michael D. Kaczowski, of Real Life Faces, noted on February 24, 2020, that the Claimant’s left “inferior lid has dropped dramatically moving prosthesis inferiorly ½ center.”

(RX1 at 25) Discussion of Respondents' Exhibit No. 2 is not germane to the findings of fact herein reached.

Adjudication

Permanent Total Disability

I note from the outset that I found the Claimant to have been an entirely credible witness. Accordingly, I specifically find her testimony with respect to her physical limitations, which is not contradicted by any of the medical evidence cited above, to be worthy of belief.

Rather than discuss each of the jobs identified by Ms. Owen's Labor Market Survey in detail, I note that they include requirements such as long periods of standing, proficiency in business software, frequent walking and standing, occasional lifting of up to fifty (50) pounds, specific vision requirements, considerable driving, and various other requirements that the Claimant's credible testimony establishes that she cannot perform.

To the extent that the Claimant resides in a potentially scarce job market, as discussed in *Kirkendolph, supra*, I note that the instant matter is distinguishable given that the Claimant in *Kirkendolph* possessed a college degree and was not visually impaired. The Claimant herein does not possess a college degree, has no proficiency with computers or business software, can only drive very limited distances and stand for very limited periods of time. The medical records noted above establish that the Claimant essentially has no peripheral vision or depth perception – the latter of which would make working on a computer rather difficult even if the Claimant previously had proficiency with computers.

I further note that the Claimant had worked in elder care for twelve (12) years and for Respondents No. 1 for fifteen (15) years prior to her compensable injury of March 17, 2018, and therefore see no reason to question her motivation to work -- particularly given that Respondents

No. 1 have done nothing to facilitate such following a rather substantial injury. In sum, I specifically find that the Claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled as a result of her compensable injury of March 17, 2018.

Facial Disfigurement

Having had an opportunity to observe the Claimant without her sunglasses on during the hearing, and bearing in mind Mr. Kaczkowski's notes of February 24, 2020, I specifically find that the Claimant is entitled to an additional \$1,500.00 for facial disfigurement pursuant to Ark. Code Ann. §11-9-524.

ORDER

Based on the foregoing discussion, including my observation of the witness and her testimony, review of the documentary evidence supplied by the parties, and application of the statutory and case law cited above, I specifically find the Claimant has proven, by a preponderance of the evidence, that she is permanently and totally disabled as a result of her compensable injury of March 17, 2018, and is also entitled to an additional \$1,500.00 for facial disfigurement.

Respondents No. 1 are ordered and directed to pay benefits consistent with the findings of fact made herein. All accrued sums shall be paid in lump-sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. §11-9-809. Pursuant to Ark. Code Ann. §11-9-715, the Claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. One-half of this fee shall be payable by the Respondents, and one-half shall be payable by the Claimant from the indemnity benefits awarded herein. Respondents No. 1 are ordered and directed to pay the Court Reporter's fee within thirty days of billing for such if they have not already done so.

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IT IS SO ORDERED.

TERRY DON LUCY
Administrative Law Judge