UTAH LABOR COMMISSION

BARBARA J. COOKE, **Petitioner,** **vs.** **AMERICAN RED CROSS UTAH BLOOD SERVICES and NATIONAL FIRE INSURANCE OF PA.,** **Respondents.**	**ORDER MODIFYING ALJ'S ORDER AND AFFIRMING AWARD FOR BENEFITS** **ORDER OF REMAND** **Case No. 2003559**

American Red Cross Utah Blood Services and its insurance carrier, National Fire Insurance of PA., (referred to jointly as "Red Cross") ask the Utah Labor Commission to review Administrative Law Judge Marlowe's award of benefits to Barbara J. Cooke under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Cooke claims benefits from Red Cross for a work accident that occurred on February 10, 1999, injuring her left arm. Following an evidentiary hearing, Judge Marlowe referred the medical aspects of the case to a medical panel. Judge Marlowe adopted the panel's findings and awarded benefits.

In its motion for review, Red Cross argues that (1) Ms. Cooke is not entitled to permanent total disability benefits; (2) the weekly rate of compensation was miscalculated; (3) the order should not have provided an offset for permanent partial disability compensation; (4) the order should have provided offset for temporary total disability compensation previously paid; and (5) the order for medical benefits was inappropriate because Ms. Cooke never made such a claim.[1]

FINDINGS OF FACT

The Commission adopts Judge Marlowe's findings of fact as they are consistent with this decision. The facts relevant to the motion for review are as follows:

Ms. Cooke severed the ulnar nerve in her left arm when she was 12 years old. As a result, she no longer has feeling in her last three fingers. In January 1998, Ms. Cooke began working for Red Cross as a phlebotomist. That same month she injured her right arm at work and her doctor, Dr.

[1] The Commission has reordered Red Cross' arguments.

Arena, noted tendinitis of the right elbow and shoulder. Following some conservative treatment, she underwent several surgeries. In the meantime, on February 10, 1999, Ms. Cooke was at work when she tripped and fell on her left hand. She has since undergone several surgeries due to this injury, including an extensive left wrist surgery, trigger finger release, and, later, left wrist fusion.

By 2002, Ms. Cooke's surgeon, Dr. Burrows, released Ms. Cooke to light duty with permanent restrictions of no lifting over five pounds and no repetitive hand motion in both hands. He assessed a 28% whole person impairment for the left arm and a 1% whole person impairment for the right arm. Drs. Moress and Knoebel, Red Cross's medical consultants, examined Ms. Cooke in December 2003, reviewing only the February 1999 work injury to Ms. Cooke's left wrist. They assessed an 18% whole person impairment related to the work injury and an 18% whole person from other non-work related injury; she was restricted from any repetitive left wrist motions.

Based on conflicts in the medical opinions, a medical panel was appointed. The medical panel reviewed the medical records, examined Ms. Cooke, and then assessed a 24% whole person impairment for the left wrist and finger problems caused by the February 1999 work injury, as well as a 1% whole person impairment for her right elbow pain. The panel concluded that only Ms. Cooke's right elbow condition and left wrist and hand condition were caused by her work. The panel restricted Ms. Cooke to sedentary work.

Ms. Cooke last worked on April 19, 1999. At the time of the February 1999 injury, she was 51 years old and was working 20 hours a week, at $12.24 an hour, for an average weekly salary of $245; thus, her disability compensation would be $163 per week. Ms. Cooke's work history has generally been in the medical profession. Prior to her employment as a phlebotomist for Red Cross, Ms. Cooke worked as a paramedical examiner for 15 years. Before that she had worked as a medical assistant and received a Medical Assistant Certificate. Ms. Cooke testified that due to lack of dexterity in her fingers and her physical restrictions, she can no longer perform the work she was previously qualified to do, such as drawing blood, taking vital signs, and manipulating the equipment. She attempted to participate in the state's vocational rehabilitation program but, after a series of testing, she was told nothing could be done to help her.

DISCUSSION AND CONCLUSION OF LAW

Permanent total disability award. The first issue to be resolved is whether Ms. Cooke is entitled to permanent total disability compensation. To establish a claim for permanent total disability, § 34A-2-413 of the Act requires Ms. Cooke to prove that (1) she has a significant impairment or a combination of impairments as a result of her work injury; (2) she is permanently and totally disabled, which is further determined by a four-part test outlined under subsection 413(c); and (3) the work injury was the direct cause of this disability. Red Cross argues Ms. Cooke failed to show the last two of these elements, i.e., that she is permanently and totally disabled and the work injuries are the direct cause of her disability.

To support its contention that Ms. Cooke is not permanently and totally disabled, Red Cross

argues that (1) Ms. Cooke can return to the work activities she was qualified for up until the accident and (2) she can perform other work reasonably available taking into consideration her age, education, past work experience, medical capacity, and residual functional capacity. See § 34A-2-413(c)(iii)-(iv.). However, Ms. Cooke has a five pound lifting restriction and cannot perform any repetitive motion with her hands. Ms. Cooke's previous duties in the medical fields, including work as a phlebotomist and a paramedical examiner for 15 years before that, required her to draw blood and take other vital signs by manipulating medical equipment. The Commission finds that these facts show that Ms. Cooke can no longer perform the work duties she was doing before her work accident. Ms. Cooke's work injuries have also left her with a 25% whole person impairment for her right and left arm and she is restricted to sedentary work. Ms. Cooke testified about her unsuccessful attempts to find work through the state's vocational rehabilitation program as well as her general limitations caused by her impairments. The Commission also finds that Ms. Cooke cannot perform other work reasonably available taking into account all the necessary factors outlined above and therefore she is permanently and totally disabled.

Red Cross also contends that Ms. Cooke's work accident did not directly cause her permanent total disability, the third element required to be entitled to permanent total disability compensation. Red Cross argues that Ms. Cooke had significant injuries and impairments that pre-dated the February 1999 accident, including problems with her right elbow and ulnar nerve condition in the left arm. Rather than being persuasive in showing Ms. Cooke's other, non-work injuries are the real cause of her disability, this argument demonstrates that Ms. Cooke, even with these significant impairments, was still able to work through these impairments. It was only after the February 1999 accident to her left wrist that she was no longer able to return to work. The Commission finds that Ms. Cooke's work accident was the direct cause of her disability and that Ms. Cooke is entitled to a preliminary finding of permanent total disability compensation.

Weekly compensation rate for benefits. Judge Marlowe ordered subsistence payments at $337 per week. However, both parties agree that Ms. Cook was only working 20 hours a week at $12.24 per hour for an average weekly wage of $245. Therefore the appropriate weekly rate of compensation would be $163 and the Commission will modify the order accordingly.

Order for medical expenses. Red Cross argues that Judge Marlowe's order for medical expenses should be stricken since they were not requested in Ms. Cooke's application. However, the Commission notes that there is no current dispute over medical expenses. Hence, should any issue arise later over Red Cross's liability to pay reasonable sums for medical expenses necessary to treat the work injury, the Commission will order further benefits provided by law.

Offset of permanent total disability compensation for disability payments already paid. Red Cross argues that Judge Marlowe's order should not have ordered permanent partial disability compensation and that it failed to credit temporary total disability payments previously paid to Ms. Cooke. Judge Marlowe's order for permanent total disability compensation reads as follows:

> IT IS HEREWITH ORDERED THAT the respondents . . . pay the petitioner subsistence benefits in the amount of $337.00 per week beginning April 19, 1999 less credit for permanent partial compensation paid and shall continue until further order of the Commission.

The Commission notes that Judge Marlowe did not order Red Cross to pay permanent partial disability compensation, but only to credit such amounts if they were paid against the total award for disability compensation. However, as Red Cross has not previously paid any permanent partial compensation nor does Ms. Cooke seek such compensation, the Commission will modify the award to exclude mention of credit for any permanent partial compensation paid.

Red Cross also argues that Judge Marlowe's order failed to account for temporary total disability compensation it has already paid to Ms. Cooke. Therefore, the Commission will further modify the order to provide that the subsistence benefits shall be offset by **any** disability compensation Red Cross has already paid.

ORDER

The Commission affirms Judge Marlowe's order for benefits, including a preliminary order for permanent total disability compensation, with the following modification:

> The American Red Cross will pay Ms. Cooke's subsistence benefits at **$163.00** per week beginning April 19, 1999, less credit for any compensation already paid.

The Commission remands the matter to Judge Marlowe for further proceedings necessary to complete the adjudication of Ms. Cooke's claim for permanent total disability compensation under § 34A-2-413(6). It is so ordered.

Dated this 24th day of December, 2008.

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Sherrie Hayashi
Utah Labor Commissioner

IMPORTANT! NOTICE OF APPEAL RIGHTS FOLLOWS ON NEXT PAGE.

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.