

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305922

JAMES HARRIS

CLAIMANT

FREZ-N-STOR

RESPONDENT

ARGONAUT INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 6, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by CONSTANCE CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 13, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on August 19, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that they had agreed on the appropriate weekly compensation rates and this figure was inserted into the second stipulation of the pre-hearing order. The claimant also announced that he was seeking temporary total disability benefits only through July 7, 2003, which resulted in an amendment to the first issue. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On April 16, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$247.00 for total disability and \$185.00 for permanent partial disability.
3. On April 16, 2003, the claimant sustained a compensable injury to his left

arm.

4. There is no dispute, at present, over liability for medical services for the compensable injury and these expenses have and are being paid by the respondents.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to temporary total disability benefits from May 30, 2003 through July 7, 2003.
2. Attorney's fees for the claimant's attorney.

In regard to these issues, the claimant contends:

"Claimant had an injury on April 16, 2003, from stacking cases of chicken and pallets where he hurt his left arm, bicep, and elbow."

In regard to these issues, the respondents contend:

"The respondents agree and acknowledge that the claimant sustained a compensable accidental injury to his left arm while in the course and scope of his employment for Frez-N-Stor on April 16, 2003. The respondents provided, and will continue to provide, the claimant with all reasonable, necessary and authorized medical treatment related to that injury. The respondents contend that the claimant was terminated on May 30, 2003, for reasons entirely unrelated to his compensable injury. They contend that the claimant is not temporarily totally or temporarily partially disabled and is not entitled to any TTD or TPD benefits."

## DISCUSSION

\_\_\_\_\_The central issue presented by this claim is the question of whether the claimant is entitled to temporary total disability benefits for the period of May 30, 2003 through July 7, 2003. The burden rests upon the claimant to prove his entitlement to these benefits.

The respondents have stipulated that the claimant received a compensable injury to his left arm on April 16, 2003. As this compensable injury affects a portion of his body that is "scheduled" under Ark. Code Ann. §11-9-521, his entitlement to temporary total

disability benefits is controlled by the provisions of subdivision (a) of this subsection. This subdivision provides that an injured worker is to receive compensation for temporary total and/or temporary partial disability benefits “during the healing period or until the employee returns to work, whichever occurs first”. Thus, the claimant need only prove that he continued within his healing period from the effects of his compensable injury and had not “returned to work” during the period of May 30, 2003 through July 7, 2003.

The issue of the duration of the healing period is a medical question, which must be resolved upon the basis of the greater weight of the credible medical evidence presented. Ark. Code Ann. §11-9-102(12) defines the healing period as:

“That period for healing of an injury resulting from an accident.”

Applicable case law provides that the healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the resolution or improvement of the actual physical damage produced by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, at a point where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

The present medical record discloses that the claimant was initially treated for his compensable injury by physicians at the Northwest Family Care West Clinic, specifically, Dr. Robert Wilson and Dr. William C. Kendrick,. The claimant’s admitted compensable injury was originally diagnosed as left biceps tendonitis and left medial epicondylitis (the initial reports of Dr. Wilson mistakenly give this diagnosis to the right upper extremity). The claimant received various conservative treatment modalities for his compensable injury from Dr. Wilson and Dr. Kendrick. These treatment modalities involved oral medication, various bracing and splinting, and restricting the use of the claimant’s injured arm. On or about May 15, 2003, the claimant was referred by these physicians to Dr. Mark Powell, an orthopaedic specialist, for further evaluation and care.

The claimant was initially seen by Dr. Powell on May 27, 2003. At that time, Dr. Powell diagnosed the claimant's injury as being in the form of a left elbow strain, left lateral epicondylitis, and left distal biceps tendonitis. He provided the claimant additional conservative treatment, in the form of oral medication, various splinting and bracing devices, and restricted use of the left arm. Dr. Powell clearly indicates that these treatment modalities are to continue for at least six weeks following the May 27, 2003 visit. This six week follow up visit was scheduled for July 8, 2003, but was not kept by the claimant.

Clearly, all of the medical evidence presented supports the conclusion that the claimant had not received the maximum benefit of time and medical treatment, in regard to the resolution or stabilization of the actual physical damage caused by his admittedly compensable injury, by July 7, 2003. In fact, all of the medical evidence indicates that the claimant continued under active medical treatment for this purpose through at least July 7, 2003. Thus, the claimant has proven that he continued within his healing period from the effects of his admittedly compensable injury for the period of May 30, 2003 through at least July 7, 2003.

The evidence presented shows that following his admittedly compensable injury, the claimant continued to work for the respondent. However, during this period he was medically restricted from performing employment requiring the use of his injured left arm. On May 30, 2003, the claimant was terminated by the respondent, for cause, which was unassociated with his compensable injury. The claimant immediately began to seek employment elsewhere and ultimately obtained employment for another employer on July 8, 2003, that did not require the use of his left arm.

Thus, the real issue becomes the question of whether the claimant "returned to work", so as to terminate his entitlement to temporary total disability benefits under the provisions of Ark. Code Ann. §11-9-521(a). The facts in this case are strikingly similar, if not identical, with the facts in the case of Farmers Cooperative v. Biles, 77 Ark. App. 1, 69

S.W. 3<sup>rd</sup> 899 (2002). I find the holding in Biles to be controlling in the present claim. Thus, the claimant's continuation of work after his compensable injury does not constitute a "return to work", as that term is defined in Ark. Code Ann. §11-9-521(a). It is important to note that in Biles, the Court made no distinction whether the ultimate termination, for cause, was reasonable or unreasonable or even justified or unjustified. Thus, the claimant has proven by the greater weight of the credible evidence that he had not "returned to work" within the meaning given that term by Ark. Code Ann. §11-9-521(a), during the period of May 31, 2003 through July 7, 2003. The claimant did "return to work" within the meaning of this subdivision on July 8, 2003.

In summary, the claimant has proven the two factors necessary to establish his entitlement to temporary total disability benefits, under the provisions of Ark. Code Ann. §11-9-521(a), during the period of May 30, 2003 through July 7, 2003. Thus, he is entitled to weekly compensation for such temporary total disability at the stipulated rate of \$247.00, during this period. The evidence also shows that the claimant's last day at work for this respondent was May 30, 2003. Thus, he would not be entitled to temporary total disability benefits until May 31, 2003.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 16, 2003, the relationship of employee-employer-carrier existed between the parties.
3. The appropriate weekly compensation rates are \$247.00 for total disability and \$185.00 for permanent partial disability.
4. On April 16, 2003, the claimant sustained a compensable injury to his left arm.

5. There is no dispute, at present, over the claimant's entitlement to the payment of expenses incurred for reasonably necessary medical services necessitated by his compensable injury and all such expenses have or are being paid.
6. The claimant is entitled to temporary total disability benefits, as a result of his compensable injury, for the period of May 31, 2003 through July 7, 2003. He has proven by the greater weight of the credible evidence that during this period he continued within his healing period from the effects of his compensable injury and had not "returned to work", within the meaning of Ark. Code Ann. §11-9-521(a).
7. The respondents have controverted the claimant's entitlement to any temporary total disability benefits.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

#### ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period beginning May 31, 2003 and continuing through July 7, 2003, at the weekly rate of \$247.00.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is to be in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge