

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F108775

SHIRLEY LEAVER, EMPLOYEE

CLAIMANT

WILLIAM AND MARTHA BURRELL,
D/B/A EAGLE NEST LODGE,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 19, 2003

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in
County, Arkansas.

The claimant was represented by FREDERICK "RICK" SPENCER, Attorney at
Law, Mountain Home, Arkansas.

The respondents failed to appear.

OPINION AND ORDER

A hearing was held in this matter on May 21, 2003. A prehearing
conference was conducted on April 1, 2003, and a prehearing order was filed
on that same date. A copy of the prehearing order has been marked as
Commission Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following
stipulations:

1. An opinion and order previously filed in this matter is now a
final order and *res judicata*

During the prehearing conference, the parties also agreed that the
issues to be litigated at the hearing were limited to the following:

1. What, if any, benefits the claimant is entitled to receive under the

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Arkansas Workers' Compensation Law.

From a review of the record as a whole, to include the testimony of the claimant, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim;
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact;
3. A preponderance of the evidence establishes that the claimant is entitled to temporary total disability compensation for the period extending from December 16, 2002 through March 17, 2003;
4. A preponderance of the evidence establishes that the claimant is entitled to compensation for a fifty percent (50%) permanent physical impairment to her lower extremity;
5. A preponderance of the evidence establishes that the claimant is permanently and totally disabled as a result of her compensable injury;
6. A preponderance of the evidence establishes that the claimant has received reasonably necessary medical treatment totaling \$24,930.06, that is the respondents' liability;
7. The respondents are liable for the costs associated with reporting and transcribing both of the hearings conducted in this matter;

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8. The respondents controverted this claim in its entirety and are liable for an attorney's fee, to be calculated in accord with the Arkansas Workers' Compensation Law.

DISCUSSION

Since the claimant's injury occurred after July 1, 1993, the provisions of Act 796 of 1993 are applicable to this claim. However, Act 796 did not change the basic law regarding temporary total disability compensation. In this regard, temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers only a decrease in his capacity to earn the wages that he was receiving at the time of the injury. Id. The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(6) (Cumm. Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve

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that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities.

In the present claim, the claimant continued to be paid until December 15, 2003, despite the fact that she remained significantly disabled. However, subsequent to that date, I find that she remained totally incapacitated and within her healing period until March 17, 2003, when an impairment rating was assigned. Accordingly, I find that a preponderance of the evidence establishes that the claimant is entitled to temporary total disability compensation for the period extending from December 16, 2002 through March 17, 2003.

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 1999), provides that "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" means more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence." Ark. Code Ann. § 11-9-102(14). Ark. Code Ann. § 11-9-522(g) directed the Commission to adopt an impairment rating

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guide to be used in assessing anatomical impairment, which guide could not include complaints of pain as a basis for impairment. The Commission thus established Rule 34 as an impairment rating guide:

To accomplish this purpose, the Arkansas Workers' Compensation Commission hereby adopts *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) published by the American Medical Association exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine.

To the extent that the *Guides* allow the use of subjective criteria for establishing an impairment rating, the *Guides* must yield to the statutory definition of anatomical impairment as defined by the Arkansas General Assembly. Rizzi v. Sam's Wholesale Club, Arkansas Workers' Compensation Commission, opinion filed April 1, 1999 (W.C.C. E515370 & E112991). In addition, Act 796 of 1993 provides that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1) (Supp. 1999). Ark. Code Ann. § 11-9-102(16) provides: (A)(i)"Objective findings" are those findings which cannot come under the voluntary control of the patient.

In the present claim, the claimant's treating physician has opined that the claimant sustained a fifty percent (50%) impairment to her lower extremity as a result of her compensable injury. Consequently, I find that a preponderance of the evidence establishes that the claimant is entitled to

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compensation for a fifty percent (50%) permanent physical impairment to her lower extremity.

An award for a scheduled injury is limited to the benefits provided in the statute for that scheduled injury, absent a finding of permanent and total disability. See, e.g., Anchor Construction Co. v. Rice, 252 Ark. 460, 479 S.W.2d 573 (1972); Springdale Farms v. McGarrah, 260 Ark. 483, 541 S.W.2d 928 (1976); Moyers Brothers v. Poe, 249 Ark. 984, 462 S.W.2d 862 (1971); Taylor v. Pfeiffer Plumbing & Heating, 8 Ark. App. 144, 648 S.W.2d 526 (1983); Rash v. Goodyear Tire and Rubber Co., 18 Ark. App. 248, 715 S.W.2d 449 (1986); Haygood v. Belcher, 5 Ark. App. 127, 633 S.W.2d 391 (1982). In addition, an injury scheduled under Ark. Code Ann. § 11-9-521 is payable without regard to subsequent earning capacity. Consequently, an award for a scheduled injury cannot be increased by considering wage loss factors, unless the claimant proves that she is permanently and totally disabled. See, e.g., Rice, supra; McGarrah, supra; Taylor, supra; Rash, supra; Haygood, supra.

In the present claim, the claimant has undergone a total knee replacement as a result of her compensable injury, and her impairment rating establishes that this injury and subsequent surgery has resulted in a very significant impairment. She testified that she experiences severe pain regularly and that she essentially experiences pain continuously. She further

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testified that this pain and other related problems drastically limit her physical abilities, and she testified that her ability to sit or stand is significantly limited. Although she was able to continue working for the respondent for a period of time, she was only able to do so because she was allowed to lie down and take frequent naps. She was 59 years old at the time of the hearing, and she has a high school education. In addition to working as a manager for the respondents, the claimant has worked as an administrative assistant in a nursing home as well as other employment at a nursing home.

After considering all evidence submitted into the record at the hearings conducted in this matter, I find that a preponderance of the evidence establishes that the claimant is permanently and totally disabled as a result of her compensable injury.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (1987). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, Feb. 17, 1989 (Claim No. D612291). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze

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both the proposed procedure and the condition it is sought to remedy.

Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, Dec. 13, 1989 (Claim No. D511255).

In the present claim, the claimant has submitted evidence establishing that she has received medical treatment totaling \$24,930.06. I find that the claimant has received reasonably necessary medical treatment totaling \$24,930.06, that is the respondents' liability.

ORDER

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein, along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809 (Cumm. Supp. 1997).

IT IS SO ORDERED.

C. Michael White
Administrative Law Judge