

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F107306

DEENA SPENCER, EMPLOYEE

CLAIMANT

WESTERN SIZZLIN, EMPLOYER

RESPONDENT

**AMERICAN CASUALTY COMPANY OF
REDDING, PA., CARRIER**

RESPONDENT

OPINION FILED OCTOBER 8, 2003

The hearing was conducted on August 28, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Monticello, Drew County, Arkansas.

The claimant was represented by Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

The respondent was represented by Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 28, 2003, in Monticello, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. Temporary total disability and permanent partial disability compensation rates are not issues.
3. The claimant sustained a compensable injury in April, 2001, to her left upper extremity.
4. An 18% permanent impairment rating to the left upper extremity was accepted by respondent. (T-14)

The issues to be litigated at the hearing were as follows:

1. Is claimant entitled to temporary partial disability from October 2, 2001, to February 19, 2002, and a penalty of 18% on the unpaid temporary partial disability amount? (Respondent alleges that the claimant was offered limited duty within her restrictions from October 2, 2001, to February 19, 2002, and therefore no temporary partial disability is due the claimant.)

2. Is claimant entitled to temporary total disability from June 18, 2002, to September 25, 2002, and an 18% penalty on the temporary total disability amount for that period? (Respondent alleges that light duty was offered and available to the claimant within her restrictions during that period of time, but claimant moved out of town to Hamburg, Arkansas.)

3. Is claimant entitled to temporary total disability from September 26, 2002, through January, 2003? (Respondent alleges the same defense as stated in #2 above.)

4. Claimant alleges that she began receiving permanent partial disability benefits in September, 2002, when she should have been receiving temporary total disability benefits. Therefore, the claimant seeks the difference in the amounts of temporary total disability benefits and permanent partial disability benefits, along with a penalty on the difference in the amount she should have been paid. Respondent alleges that claimant is not entitled to temporary total disability benefits because work was available for her within her restrictions, and, therefore the permanent partial disability benefits were proper at the time they were paid.

5. Is the claimant entitled to unpaid medical mileage of \$100.80, and a

penalty on the unpaid medical mileage?

6. Is claimant entitled to an attorney's fee?

The claimant testified that she had worked at Western Sizzlin Restaurant in Stuttgart, Arkansas for ten years. She primarily worked as a waitress. Her husband, Scott Spencer, worked at the same Western Sizzlin Restaurant as the manager. She was paid \$8.00 per hour for a 40 hour work week. The claimant testified regarding her injury in April, 2001:

“A. Okay. I was going out the back door and it was, there was water on the floor and I slipped and fell and when I fell, I landed on my left elbow or on my left side really, but much of the pressure was on my left elbow and that was how. I got up and then I went to Scott and we went to the doctor.”
(T-22)

The claimant went to the doctor experiencing pain and numbness in her finger, down her elbow, and up to her shoulder. She experienced a sharp pain when she lifted or grabbed anything with her left arm. The claimant returned to work for a short period of time after the injury, but continued to have problems. She was sent to see Dr. Marcia Hixson, a hand and upper extremity specialist in Little Rock, Arkansas.

Dr. Hixson performed left upper extremity surgery on the claimant on June 22, 2001. She was off work for a period of time, during which she received temporary total disability. The surgery was not successful, and therefore claimant had a second surgery on the left upper extremity in September, 2001. According to the claimant she received \$676.00 every two weeks for temporary total disability benefits.

The claimant returned to work on light duty on October 1, 2001. She was restricted from performing any work with her left hand. The claimant testified that she

performed one-handed work by getting drinks and taking orders at the Western Sizzlin Restaurant. The claimant testified that she worked from October 8, 2001, through February 18, 2002 (19 weeks). She testified that she worked an average of 29.5 hours per week during that period of time. The claimant testified she was working less because of the restrictions with her left arm. She testified she was paid \$5, 481.64 in a gross amount, which was less than what she was making before for the compensable injury. She testified that she told an adjuster with the respondent/carrier that she was making less , and she was paid \$250.00 for the amount of temporary partial disability.

The claimant testified that February 18, 2002, was her last day on the job in light duty, because on February 19, 2002, she had a third surgery on her left upper extremity. The claimant received temporary total disability subsequent to that surgery until June 18, 2002. The evidence showed that neither she nor her husband ever asked the owner of the restaurant whether the claimant could work light duty at the restaurant. The evidence shows that from June 18 until the end of July, 2002, the claimant did not attempt to return to work at the restaurant. The claimant and her husband moved from Stuttgart to Hamburg, Arkansas around that period of time, and she has not worked since. The claimant testified as follows:

“Q. During the period from June 18th, 2002 to the end of July, 2002, what was your husband’s position at Western Sizzlin?”

A. He was not, after July 1st he was not at Western Sizzlin anymore.

Q. Okay. Between June 18th and July 1st, what was his position?

A. He was the manager.

Q. Manager?

A. Correct.

Q. Was he also the manager in October of '01 until February of '02, when you were working light duty?

A. Yes.

Q. And as manager, was he the one who determined schedules?

A. Yes.

Q. Did Mr. Bailey ever express any negative comments about you working light duty between October '01 and February '02?

A. Not that I can recall.

Q. As far as you know, it was okay with him that you worked light duty during that period of time?

A. Yes.

Q. And did you ever hear Mr. Bailey say that you could not work light duty, one handed light duty for the period of June 18th, 2002 until July 1, 2002?

A. No, he just said for me not to be up there.

Q. And that, we have already discussed that that was a period of time where you were recuperating from your surgery when you were up there not working, but visiting with your husband.

A. Right.

Q. Okay, and you didn't ask Mr. Bailey, "Can I come back doing light duty again," after that time?

A. No.
(T-54, 55, 56)(Emphasis added.)

The claimant testified that on September 26, 2002, she received her first permanent partial disability check. The evidence reflects that she received a permanent impairment rating from Dr. William Ackerman on September 20, 2002.

The claimant had her fourth surgery on January 2, 2003. She received

some temporary total disability, which ended in February, 2003. By a letter dated February 25, 2003, the claimant, through her attorney, requested the owner of the restaurant to allow her to return to work with the restriction of not using her left arm in any way. Respondent Exhibit #4 is a letter from the general operating partner, Mike Bailey, stating that Western Sizzlin of Stuttgart, Arkansas had light duty available for the claimant that required the use of only her right hand from the time she was released to light duty until the date of the letter. The letter also states, "It is our understanding, that after the employee voluntarily quit, she then moved to another city." By a letter of March 7, 2003, the attorney for respondent sent a letter to the attorney for claimant stating, "It is the position of Ms. Spencer's employer that it has continuously had light duty work within Ms. Spencer's restrictions during the entire time of her injury. This would include one hand work." (Rx-5)

The claimant testified that she began receiving permanent partial disability benefit checks on March 3, 2003.

The claimant testified that she has never been released to full duty and still has problems with her left upper extremity. She has a Tens Unit, which she uses, according to the claimant.

The claimant is requesting the correct payment for milage used for travel to treatment from doctors based on June 18, 2002, October 10, 2002, November 5, 2002, and December 5, 2002.

The claimant called Scott Spencer, the claimant's husband, as a witness. He testified that he was the manager of the Western Sizzlin of Stuttgart, Arkansas. He testified that subsequent to the second surgery, from late 2001 to early 2002, the

claimant worked one handed, and performed light duty jobs. He testified that he never asked Mike Bailey, the owner of the restaurant, if he could have the claimant work light duty. He denied that he and Mike Bailey had a conversation regarding returning the claimant to light duty work. He testified that around July, 2002, he moved out of the Stuttgart, AR area and began working somewhere else.

According to claimant's husband, Western Sizzlin did not have light duty for the claimant where she could work one handed from June to September. He testified as follows (regarding the light duty work claimant admitted working from October, '01 through February, '02.)

“ JUDGE CURDIE: Okay. But you testified that you don't remember her working any light duty during that time.

THE WITNESS: If she was on the schedule, I didn't know nothing about light duty. Nobody never informed me about her going on light duty.”
(T-74, 75)

William C. Gray testified that he worked for Hub Enterprises, and took a video-tape of the claimant performing daily activities. The video-tape was admitted into evidence as Respondent's Exhibit #3, and was viewed in its entirety. The respondent also introduced as evidence, Respondent's Exhibit #2, which is the surveillance report written by Mr Gray.

Mike Bailey testified that he is the co-owner of Western Sizzlin of Stuttgart. He testified that he did not go to the Stuttgart restaurant everyday, but he did go by the restaurant at least once a week. He recalled claimant's injury. After a period of time, the claimant worked from October, 2001 through February, 2002, in a light duty capacity. He testified as follows:

“ JUDGE CURDIE: Okay. You did not authorize the light duty, yourself?

THE WITNESS: I was instructed whenever she came off of her second surgery that she was available for light duty and I told him to schedule them as she is needed.

JUDGE CURDIE: Told?

THE WITNESS: Mr. Spencer.

JUDGE CURDIE: Okay.

THE WITNESS: The manager.

JUDGE CURDIE: Okay.

WITNESS: And that is when she started back to work.”
(T-106)(Emphasis added.)(This is October, '01 through February, '02.)
.....

“ JUDGE CURDIE: Okay, I guess what I was trying to figure out was, this first light duty that she was on, how did that transpire? In other words, how did that, how did that come about? **Who asked who about the light duty, the time that she was actually on it?**

WITNESS: Ms. Spencer asked me.

JUDGE CURDIE: Okay. Was it one day when you were in the store?

WITNESS: Yes, sir.

JUDGE CURDIE: Okay, and what did you tell her?

THE WITNESS: I said whenever she felt like she was able to go back on, you know, on duty, you know, it was, you know, at her discretion whenever she could come back.

JUDGE CURDIE: But you told her there was light duty?

THE WITNESS: Yes, sir.”
(T-107, 108)(Emphasis added.)
.....

“ JUDGE CURDIE: How did you find out that she no longer worked light duty?

THE WITNESS: Well, whenever I found out that she was having the surgery, of course, her hours stopped coming in on the payroll sheets that we receive and from that date until they moved from Stuttgart, she didn't work any hours during that period of time.

JUDGE CURDIE: Okay. So the communication as to, "Look, I can't work any more light duty. I'm going to have surgery." That was not with you. That was with Mr. Spencer?

THE WITNESS: Yes, sir.

JUDGE CURDIE: Okay. So after that, your testimony is, my understanding – tell me if this is right or not – is that **had she contacted you for light duty at any time after that, you would have authorized it?**

THE WITNESS: **Yes, sir. I would have.**

JUDGE CURDIE: Okay. Did her husband ever contact you? I know you testified to this but I just want this chronologically where I can see it –

THE WITNESS: Correct.

JUDGE CURDIE: **Did her husband ever contact you and say, "Deena's finished with surgery. She is doing this. She is doing that. How about we let her back on light duty?" Anything like that?**

THE WITNESS: **No, sir.**

JUDGE CURDIE: Okay. Did she ever call you about that?

THE WITNESS: No, sir.

JUDGE CURDIE: Did you at any other time, for whatever purpose, talk to her husband and say, "Oh, by the way, if Deena ever gets to the point where she can do it, we'll take her back on light duty."

THE WITNESS: No, sir. I did not."
(T-109, 110, 111)(Emphasis added.)

.....

"Q. And I thought I heard you tell the Judge that you specifically had a conversation with both Mr. and Mrs. Spencer at different times with regard to scheduling Deena on light duty. Is that your testimony to that?"

A. No, sir. **I said whenever she was available to come back to work, it was at their discretion, that she could come back.**

Q. **Who did you tell that to?**

A. **I told both of them.**

Q. When did you tell that to them?

A. Exact dates, I could not tell you.”
(T-111, 112)(Emphasis added.)

The claimant and her husband moved away from Stuttgart in the summer of 2002. Mr. Bailey testified that if the claimant, in June, 2002, had sought one-handed light duty work, it would have been made available for her.

Respondent's Exhibit #3 was a video-tape made of the claimant during the dates of March 19, 2003 through March 27, 2003. On March 19, the claimant is seen lifting a bag of groceries with both arms, pushing a grocery cart and driving an automobile. On March 20, the claimant is seen gesturing freely with her left hand, driving her automobile, and pulling a door closed with her left hand. On March 23, the claimant is seen on the tape carrying a heavy box with both arms at waist level. She lifts a box with both arms from the ground to her automobile. She uses her left hand and arm to move items into her car. She uses both arms and hands equally at low and high levels. She does not appear to favor her left arm. She is seen lifting a heavy bag with her left hand to her automobile. She appears to demonstrate a flexible left wrist and hand, and carrying items on her left arm. She opens her car door with her left hand and holds her phone with her left hand. She is able to push a cart and hold her purse with her left arm. On March 24, the claimant is seen lifting and pulling a canoe with both hands. On March 26, the claimant is seen lifting items with both hands. On March

27, the claimant is seen carrying, pushing, and lifting items with her left arm. The tape primarily shows that the claimant does not favor her left arm when it comes to any daily activities, as shown on the tape.

Claimant's Exhibit #1, the medical records, reflect that the claimant was given light duty restrictions by Dr. Marcia Hixson on May 21, 2001. Her light duty restrictions involved no use of her left arm. The claimant was returned to work, once again, by Dr. Hixson, effective July 30, 2001. She was diagnosed as having an ulnar nerve injury to her left elbow. A note dated August 1, 2001, indicates that the claimant was taken off work. She apparently had surgery in September, 2001, and was removed from work. The claimant was released to work, part time, in a light duty capacity on October 8, 2001. On February 5, 2002, she was released to return to work with "minimal use of left hand." The claimant was once again allowed to return to work using her right hand only on March 28, 2003. On April 4, 2002, the claimant was taken off work, and Dr. Hixson stated that claimant told her that she was unable to use her left arm. The claimant was seen on June 18, 2002, by Dr. William Ackerman, a pain management specialist and orthopaedic surgeon. She complained that she is unable to work and that she had no sensation in her ring or little finger. A nerve conduction study was normal. Dr. Ackerman stated:

"Some consideration will need to be addressed toward maximum medical improvement. If she has no improvement pharmacologically, it is my medical opinion that she may be nearing maximum medical improvement. She exhibits no signs or symptoms of reflex sympathetic dystrophy." (Cx-1, P. 17)

The claimant was returned to work with the restrictions of no lifting over 10

pounds with her left hand and no pushing or pulling.

There is a note dated **July 29, 2002**, that states:

"I reviewed the video submitted to me by HUB Enterprises. The dates were from August 2001 to last month. The patient's activities of daily living were not compatible with significant impairment or disability.

Based on my initial history and physical examination, and my review of the video as well as a re-review of the medical records, it is my medical opinion that this patient has reached maximum medical improvement. No further treatment is indicated."

(Cx-1, p. 19) (It is noted that the above-mentioned videotape was not introduced into evidence, as reflected by the 1993 dates shown on the videotape which was Respondents Exhibit #3.)

The claimant saw Dr. Ackerman on July 30, 2002. He stated that the claimant was at maximum medical improvement. He recommended a paraffin bath and range of motion, along with continuation of her medications. He stated, "There is no reason for her to return back to this office."

A note dated September 10, 2002, from Dr. Marcia Hixson indicated that she defers to Dr. Ackerman for the date of maximum medical improvement. The only treatment she offered the claimant was additional pain management. She stated that during the surgery she saw the claimant had visible irritation of the nerve.

On September 20, 2002, the claimant received a permanent impairment rating of 18% for the upper extremity (qualifying for a 12% impairment to the body as a whole). In October, the claimant was complaining of numbness in her left elbow and in the small and ring fingers. She was again removed from work by Dr. Hixson. A November, 2002 EMG/NCV (nerve conduction) report indicated a normal left ulnar nerve. Dr. Hixson stated that she would perform an additional surgery on the claimant,

but was not sure it would be successful. She took the claimant off work in January, 2003. During the January 28, 2003 surgery, Dr. Hixson found an irritable nerve and scaring. She recommended one-handed work for the claimant. The claimant continued to complain of pain in February, 2003. Claimant's Exhibit #2 is a letter from the claimant's attorney stating that she had been released to return to work with no use of her left arm, and requested from the respondent/employer right handed light duty work. The respondent/employer, on March 5, 2003, stated that there has been light duty work available for the claimant that required the use of only her right hand from the time she was returned to light duty work (Rx-4.) A note from Dr. Hixson dated April 14, 2003, reflects that she saw a video-tape taken of the claimant in March, 2003 (apparently Respondent's Ex. 3.) It was her opinion that the video-tape clearly showed that the claimant had full range of motion of the wrists and digits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. Temporary total disability and permanent partial disability compensation rates are not issues.
3. The claimant sustained a compensable injury in April, 2001, to her left upper extremity.
4. An 18% permanent impairment rating to the left upper extremity was accepted by respondent. (T-14)
5. The preponderance of the evidence reflects that the claimant is entitled to temporary partial disability for the dates October 2, 2001 to February 19,

2002, and a penalty of 18% on the unpaid temporary partial disability amount.

Respondent is entitled to a credit for the amount of temporary partial disability benefits paid to the claimant.

6. The preponderance of the evidence reflects that the claimant is not entitled to temporary total disability benefits from June 18, 2002, to September 25, 2002, or from September 26, 2002 through January, 2003, or to a penalty of 18% on the unpaid amounts. The preponderance of the evidence reflects that light duty was available to the claimant within her restrictions during this period of time.

7. The preponderance of the evidence reflects that the claimant received permanent partial disability benefits when the evidence reflects she was entitled to receive them, and therefore no difference in the benefits paid is due, nor is any penalty on any unpaid or improperly paid benefits.

8. The preponderance of the evidence reflects that the claimant is entitled to \$100.80 in unpaid medical mileage and an %18 penalty on that unpaid amount.

9. The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee for controversion of the above-mentioned, awarded amounts

DISCUSSION

1. MILEAGE OWED FOR TRIPS TO SEE THE DOCTOR

The claimant testified that she was paid \$100.80 for medical mileage, and she should have received \$201.60. A calculation was made indicating that \$.28 a mile should have been paid on separate occasions for \$201.60. (T-44, 45) Four trips of 180

miles indicated, according to the calculations, a \$201.60 medical mileage amount. The preponderance of the evidence reflects that the claimant is owed \$100.80 since she was paid \$100.80, and was owed \$201.60. The preponderance of the evidence reflects that the respondent did not pay the correct amount and was not controverting the medical treatment which claimant testified about. There is no argument that the medical treatment which necessitated the mileage was not reasonably necessary or related to the claimant's compensable injury. It appears that the respondent just failed to pay the correct amount. Prior to Act 796 of 1993, the statutory penalty for late payment of compensation installments did not extend to the late payment of medical bills. However, Act 796 of 1993 amended the Arkansas Workers' Compensation law to provide that medical bills are payable within 30 days after receipt by the respondent, unless disputed as to compensability or amount. (A.C.A. § 11-9-802(d) (Repl. 2001). The preponderance of the evidence in this case reflects that the claimant is entitled to medical mileage in the amount of \$100.80 and an 18% penalty payable to the claimant pursuant to A.C.A. § 11-9-802 and Arkansas Workers' Compensation Rule 30. See: Barkley v. Kagle Heat & Air Conditioning, Claim # E316820, Full Arkansas Workers' Compensation Commission Opinion filed January 10, 1995.

2. TEMPORARY PARTIAL DISABILITY FROM OCTOBER 2, 2001 TO FEBRUARY 19, 2002, AND A PENALTY FROM THE UNPAID TEMPORARY PARTIAL DISABILITY

The claimant testified that she worked in a light duty capacity from October 2, 2001 through February 19, 2002. She claims temporary partial disability and a penalty on the unpaid temporary partial disability. The respondent alleges that limited duty within the claimant's restrictions was available from October 2, 2001 through

February 19, 2002, and that the claimant is not entitled to temporary partial disability. The claimant testified that after her second surgery, in the fall of 2001, she went back to work on a limited basis. She worked one-handed at Western Sizzlin in Stuttgart, taking orders and getting drinks. She testified that she was restricted in the number of hours she could work because she could not do all of the things that she could do before her compensable injury. She reviewed the records that she received from Western Sizzlin regarding her work hours. She testified that from October 8, 2001 through February 18, 2002, (19 weeks), the average hours worked per week during that period was 29.5 hours. (T-27). She testified that during that period of time her gross pay was \$5,481.64, which was less than she was making before the compensable injury. She was paid \$8.00 per hour. According to the claimant, Ms. Mary Hall, the adjuster for the respondent, sent the claimant \$250.00 for permanent partial disability, which was supposed to make up the difference for the amount of money she was making before and after the injury. The claimant testified that she was getting paid \$285.19 per week. She testified as follows:

“Q. Now, you said that you had calculated your average weekly hours with a period of October, '01 to February, '02 and you came up with like 29 hours of something like that?

A. Uh-huh.

Q. Do you have the individual weekly hours that you used to calculate that?

A. Yes, sir.

Q. Can you tell those to me, what the dates are and what the numbers are?

A. Yes.

Q. If I may?

A. Sure.

MR. DENNIS: If I can find those, just a moment, Your Honor.

MR. DENNIS: (Continuing)

Q. Now, I see a mark here on this paper. Would that have been when you began your calculation?

A. Probably.

Q. Okay.

A. She just faxed me that, the whole sheet that she had.

Q. And the week of 12/21 through, for the two week period from 12/8 to 12/21 shows zero hours, zero hours there?

A. Correct.

Q. Do you know whether you included those two weeks in your calculation, the number that you used to divide into the total number of hours?

A. I have no idea because this was done by the girl that does the payroll. She calculated the hours.

Q. She calculated the hours? She did the mathematics for you to determine it was 29 hours, the average?

A. Yes.

Q. So you didn't make that calculation yourself.

Q. Well, I went back over, we went back over it. No, she wrote everything down here for me.

Q. Okay. You have not personally added up the hours and divided by the number of weeks then, yourself?

A. No.

Q. Okay, and you don't know if she included that two week period where there was no hours to determine whether the 29 hours was the average?

A. Right.

Q. And you agree with me that, if there was a period where you did not work and did not have the hours and you used those two weeks as what you divide the hours by, then that is going to skew the average hours work per week, is it not?

A. Right.”
(T-52, 53, 54)

An injured employee is entitled to temporary partial disability compensation during the period that she is within her healing period and suffers only a decrease in her capacity to earn the wages that she was receiving at the time of the injury. The healing period is defined as the period necessary for the healing of an injury resulting from an accident. The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying conditions causing the disability become stable and when nothing further will improve that condition, the healing period has ended and the claimant is no longer entitled to receive temporary partial disability compensation.

The claimant testified that she worked less hours during the above mentioned period of time. The preponderance of the evidence in this case reflects that the claimant was paid a total of \$5,481.64 for 19 weeks of work during which her average number of hours per week was 29.5 hours. The claimant testified that she worked during that time less than she did before her injury because of the limitations. The respondents paid the claimant an additional \$250.00 after the 19 weeks of work were completed as, apparently, the balance of the temporary partial disability that was owed. (T-29). The preponderance of the evidence reflects that the claimant is entitled to 19 weeks of temporary partial disability based on an average number of hours per

week of 29.5 hours. The respondent shall be entitled to a credit of \$250.00 from the amount owed to the claimant based on the calculations.

The claimant requests a penalty of 18% on the temporary partial disability which was underpaid. A.C.A. § 11-9-802 supports the claimant's request that the temporary partial disability was not timely paid. Therefore, an 18% penalty shall be assessed on the unpaid amount of temporary partial disability.

3. TEMPORARY TOTAL DISABILITY FROM JUNE 18, 2002 TO SEPTEMBER 25, 2002, AND FROM SEPTEMBER 26, 2002 TO JANUARY, 2003. IS CLAIMANT ENTITLED TO A PENALTY OF 18% ON THE UNPAID AMOUNT OF TEMPORARY TOTAL DISABILITY?

The respondent alleges that the temporary total disability should not be awarded because light duty was available within the claimant's restrictions. The respondents assert that the claimant's failure to accept light duty work within her restrictions precluded the payment of temporary total disability benefits. A.C.A. § 11-9-526 (Repl. 2001) states: "If any injured employee refuses employment suitable to her capacity offered to or procured for her she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the workers' compensation commission the refusal is justifiable."

Mr. Mike Bailey, a co-owner of the Western Sizzlin in Stuttgart, Arkansas testified that the claimant worked light duty in October, 2001 to February, 2002. During that time the claimant could train, assist co-workers, delegate duties, and assist customers coming in to get their drinks, and anything that she could do with one arm. He recalled that the claimant had some additional surgeries. At no time, subsequent to the first light duty (ending February, 2002,) did claimant come and ask to be returned to

light duty again. Additionally, neither did her husband, who was the manager of the restaurant, ask for light duty for claimant. Had the light duty been requested it would have been made available. Claimant even testified that after her third surgery, she was not seeking light duty work (T-51.) Mr. Bailey testified that he employs an individual who does have one arm in one of his Western Sizzlin restaurants. That person performs light duty work. He testified that he is the one who determines whether light duty is available and not the manager of the restaurant. He testified that when the claimant finished her second surgery and was available for light duty, he told her husband to schedule her for light duty - (October, 2001 through February, 2002.) He testified that when claimant was scheduled for another surgery (the third one,) her hours stopped coming in on the payroll sheets. He testified that when the claimant was available to come back to work, "It was at their discretion, that she could come back." (T-111, 112). Claimant admitted that she and Mr. Bailey discussed her returning to light duty, but she never asked to return to light duty (T-56.) Claimant's husband's testimony was confusing because he stated that he didn't ever remember his wife, the claimant, working light duty when he was the manager (T-75.)

The preponderance of the evidence in this case reflects that Mr. Bailey instructed the claimant's husband to arrange for light duty for the claimant after her second surgery. The claimant worked light duty until February, 2002. She had a third surgery and received some temporary total disability until June, 2002. The testimony in the case reflected that in July, 2002, the claimant and her husband moved from Stuttgart to Hamberg, AR for different work. The preponderance of the evidence reflects that the claimant and Mr. Bailey had an agreement that light duty was offered to

her after the third surgery just like it was offered to her after the second surgery. Bailey told both of the Spencers that whenever claimant was available to return to work, it was at the Spencers' discretion whether she could have light duty (T-111,112.)

Respondent's Exhibit 4 is a letter from Mike Bailey reflecting that the claimant was offered light duty at all times after she was released to light duty by her doctor.

Respondent's Exhibit 5, the letter from respondent's attorney, indicated that the employer continuously had light duty work within claimant's restrictions during the entire time of her injury that would have included one handed work. The preponderance of the evidence in this case reflects that the claimant was offered light duty work within her restrictions and therefore she is not entitled to temporary total disability for the above mentioned dates. Adding to the preponderance of the evidence is the fact that, after the third surgery, the claimant moved away from the Stuttgart area where she had performed light duty subsequent to her second surgery. It is my opinion that Mr. Bailey was a very credible witness. After viewing the video-tape, (Rx-3), I am concerned about the credibility of the claimant. I could not see any restrictions on the claimant's use of her left hand. She was lifting and pulling heavy items during a period of time from March 19 through March 27, 2003. Claimant's Exhibit 1, page 31 is a note dated March 27 from Dr. Marcia Hixson. She apparently saw the claimant on March 27, (the same date as the video tape,)and the report states, **"She states that she is unable to use the left arm for any but the very lightest of activities. Specifically, she stated that she was not able to carry a bag of groceries or anything heavier than a loaf of bread or a tiny saucepan with the left hand."** Observing the claimant's movements in the video-tape (Rx. #3) indicates that the statement to Dr. Hixson

was not accurate.

Therefore, the preponderance of the evidence reflects that the claimant is not entitled to temporary total disability from June 18, 2002 to September 25, 2002, or from September 26, 2002 to January, 2003. Also, the claimant is not entitled to any penalty on any temporary total disability.

The claimant also alleged as an issue that she is entitled to temporary total disability during the time she was actually paid permanent partial disability. It has been stated that the claimant is not entitled to temporary total disability for the above mentioned dates. Therefore, the payment of permanent partial disability was correctly made on those dates referred to by claimant. The claimant is entitled to an attorney's fee for the above mentioned awarded benefits.

AWARD

The claimant is awarded the benefits specifically described herein, along with the attorney's fee for claimant's attorney, Kenneth A. Harper, pursuant to the Arkansas Workers' Compensation law. This Award shall bear interest at the legal rate until paid.

_____ **IT IS SO ORDERED.**

DON N. CURDIE,
Administrative Law Judge

DC