

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E712283**

**DIANA VAUGHAN, EMPLOYEE**

**CLAIMANT**

**APS SERVICES, LLC, EMPLOYER**

**RESPONDENT**

**HARTFORD UNDERWRITERS INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED OCTOBER 29, 2003**

Hearing before Administrative Law Judge Dail Stiles on October 3, 2003, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. A. Gene Williams, Attorney at Law, Little Rock, Arkansas.

A hearing was held on October 3, 2003, to determine the claimant's entitlement to additional benefits.

It was stipulated that the claimant sustained a compensable injury on September 17, 1997. Her weekly indemnity rates are \$173.00 for temporary total disability benefits and \$154.00 for permanent partial disability benefits.

The claimant contends she is entitled to a reinstatement of temporary total disability benefits commencing January 6, 2003 and continuing through a date yet to be determined. It was agreed that respondents had paid temporary total disability benefits through January 14, 2003. Accordingly, the claimant amended her contention to reinstate temporary total disability benefits commencing January 15, 2003 and continuing through a date yet to be determined. The claimant further contends she is entitled to penalties because the respondent ceased paying benefits after having been ordered to do so in the year 2000.

The respondents controvert the additional temporary total disability benefits contending that the claimant's healing period ended no later than January 14, 2003.

### **STATEMENT OF THE CASE**

On September 17, 1997, the claimant worked for the respondent employer. The respondent's business was a thrift bakery. The claimant's job duties consisted of, but were not limited to, loading and unloading shelves. After her work shift on September 17, 1997, the claimant experienced pain primarily in her right shoulder. The claimant returned to work on September 18, 1997, but had to leave early because of increased pain in her shoulder. The claimant has not worked since. The claimant has been seen by several different physicians and has undergone myriad diagnostic testing.

The claimant has been treated by Dr. William Ackerman beginning some time in the year 2000. Dr. Ackerman is a pain specialist in Little Rock.

On October 24, 2002, Dr. Richard Jordan, a neurosurgeon in Little Rock, installed an epidural stimulator, which was referred to at the hearing and in Dr. Ackerman's deposition taken September 9, 2003, as a dorsal column stimulator.

The claimant has continued to see Dr. Ackerman and has received trigger point injections from him as well as a program of physical therapy, which she undergoes with a physical therapist in Pine Bluff.

On January 10, 2003, the claimant was seen at the instance of the respondent by Dr. J. K. Smelz, Director of the Occupational Injury Assessment Program, Physical Medicine and Rehabilitation Service at the Central Arkansas Veterans Healthcare System in Little Rock. The claimant was seen by Dr. Smelz for purposes of an independent medical evaluation only. In her report dated

January 10, 2003, Dr. Smelz stated, inter alia, that she didn't feel the claimant's examination was consistent and stated:

There does not appear to be any clear organic reason for any other treatment except maintenance of the dorsal column stimulator. It is unclear why this stimulator was placed, except that it was an untried modality. In this regard, I can find no documentation concerning successful trial of a TENS unit.

She has reached maximum medical improvement. Further medical intervention would simply further "medicalize" what appear presently to be significant social issues for Ms. Vaughan. Prognosis is poor for her, given her many years of such significant involvement with her health care, and her unemployment.

Impairment rating is 0%.

Based on that report from Dr. Smelz, the respondent ceased making temporary total disability payments.

At the hearing, the claimant stated that she had seen Dr. Ackerman for a scheduled appointment the day before her appointment with Dr. Smelz. She stated that she received trigger point injections from Dr. Ackerman on that date, and also she had not been instructed by anyone to disengage or turn off the dorsal column stimulator. The gist of the claimant's testimony regarding the examination by Dr. Smelz is that she was relatively pain free and having a good day without much in the way of symptomatology. The claimant indicated that she would have presented in a contrary condition if she had not had the trigger point injections the day before and if she had turned off her dorsal column stimulator several days before the appointment with Dr. Smelz.

The deposition of Dr. William Ackerman was taken on September 9, 2003, and introduced into evidence. Dr. Ackerman stated in his deposition that he had diagnosed the claimant with reflex sympathetic dystrophy some time back. He stated that her progress in resolving her symptoms of reflex sympathetic dystrophy

had made great strides since the implantation of the dorsal column stimulator by Dr. Jordan in the fall of 2002. Dr. Ackerman stated further that the claimant was showing progress in her physical therapy regimen and actually was showing some increase in the circumference of her muscular extremities. Dr. Ackerman stated at the time his deposition was taken that he felt the claimant was nearing the end of her healing period and had just about reached maximum medical improvement. He felt she would reach maximum medical improvement soon, and he felt that the claimant could return back to gainful employment.

At the hearing, the claimant stated that she had had significant improvement since the placement of the dorsal column stimulator and felt she had made great strides with her physical therapy in the year 2003, and it was her intention to return to the workforce as soon as she could.

### **FINDINGS OF FACT**

1. The claimant is entitled to a reinstatement of temporary total disability benefits commencing January 15, 2003 and continuing through a date yet to be determined.

2. The claimant is not entitled to penalties associated with the reinstatement of temporary total disability benefits.

3. Respondents have controverted temporary total disability benefits from January 15, 2003 through a date yet to be determined.

### **DISCUSSION**

#### **Medical Treatment**

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a) (Repl. 1997). 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, February 17, 1989 (D612291).

This Administrative Law Judge chooses to give the greater weight to the evidence produced by Dr. Ackerman in his deposition of September 9, 2003, as opposed to the opinions expressed by Dr. Smelz as a result of her one-time examination of the claimant on January 10, 2003.

It is well-settled that it is the duty of the Arkansas Workers' Compensation Commission to weigh the medical evidence as it does any other evidence, and the resolution of conflicting evidence is a fact question for the Commission. See Teague v. C & J Chemical Co., 55 Ark. App. 335, 935 S.W.2d 605 (1996).

#### Temporary Total Disability

Temporary total 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 when she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Ark. Code Ann. §11-9-102(13) defines the "healing period" 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 condition causing disability becomes stable, and when nothing further will improve that condition, the healing period has ended. See Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the instant case, placing the greater reliance on the opinions expressed by Dr. Ackerman, the claimant's primary treating physician, the claimant

had not reached maximum medical improvement in January of 2003 and medical efforts were continuing in an attempt to improve her condition.

**AWARD**

Respondents are directed to pay the claimant additional temporary total disability benefits in accordance with the findings of fact above.

Respondents are directed to continue to pay reasonable, necessary and related medical benefits to the claimant as a result of her compensable injury of September 17, 1997.

Respondents are directed to pay the claimant's attorney, Mr. Kenneth Buckner, the maximum attorney's fee on this award pursuant to Ark. Code Ann. §11-9-715.

IT IS SO ORDERED.

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DAIL STILES  
Administrative Law Judge