

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F111349**

**LELA I. DOLLINS, EMPLOYEE**

**CLAIMANT**

**L A DARLING COMPANY, EMPLOYER**

**RESPONDENT**

**MANAGEMENT CLAIM SOLUTIONS,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED MAY 12, 2004**

Hearing before Chief Administrative Law Judge David Greenbaum on February 13, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Ralph Theodor Stricker, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Mark A. Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted February 13, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 3, 2003, and a Prehearing Order was filed on December 4, 2003. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the December 4, 2003, Prehearing Order. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including December 1, 2000; that the claimant sustained a compensable

injury to her right shoulder on said date; that she earned sufficient wages to entitle her to compensation rates of \$282.00 per week for temporary total disability and \$212.00 per week for permanent partial disability; that respondents paid temporary total disability through May 31, 2002, as well as a six percent (6%) whole body impairment; and that respondents had controverted all benefits beyond those previously paid.

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the respondents were responsible for medical treatment provided by Dr. William P. Thorpe, as well as any referrals from Dr. Thorpe.
- 2) Whether the claimant's healing period had ended, together with claimant's entitlement to additional, temporary total disability.
- 3) Whether the claimant was entitled to benefits under A.C.A. §11-9-502.

Claimant contended, in summary, that all her medical treatment was reasonably necessary, as well as related to the compensable injury and should, therefore, be the responsibility of the respondents; that her healing period had not ended and that she should be awarded additional temporary total disability after May 31, 2002, and continuing until a date yet to be determined. Alternatively, the claimant maintained that she was entitled to benefits under A.C.A. §11-9-505. The claimant requested a controverted attorney's fee on

any additional benefits awarded. The claimant specifically reserved the issue of permanent disability.

The respondents contended that it had paid all appropriate temporary total disability to which the claimant was entitled through May 31, 2002, at which time it accepted, and paid, permanent partial disability benefits based upon a disability rating previously assessed. Respondents further contended that any additional medical treatment obtained by the claimant, on her own, was unauthorized, and, further, not reasonable, necessary or related to the claimant's compensable injury. Respondents contended that the claimant was not entitled to benefits under A.C.A. §11-9-505. Alternatively, in the event respondent was determined to owe all or part of claimant's medical treatment, it claimed a credit for any benefits paid by other providers pursuant to A.C.A. §11-9-411.

At the hearing, another issue was raised by the respondents concerning the respective liabilities of the parties for costs related to the taking and transcribing of the evidentiary deposition of Dr. Glenn Dickson, a non-treating physician whose expert medical opinion was obtained by the respondents, specifically, to address the issue of whether additional surgery performed by Dr. William P. Thorpe was reasonably necessary to treat the claimant's admitted shoulder injury. Following submission of Dr. Dickson's report, claimant's attorney requested the right of cross-examination, but was unwilling to pay any

fees in excess of those established by Commission Rule 30. This administrative law judge shared preliminary inclinations with the parties on the record while encouraging the parties to amicably resolve their differences. In the event the issue could not be resolved, the parties were directed to submit simultaneous briefs within twenty-one (21) days following the hearing. (Tr.7-9)

By letter dated February 18, 2004, respondents advised that it elected to withdraw that issue from the matters to be decided, and that the issue had been amicably resolved.

The claimant, Lela Irene Dollins, testified in her own behalf. Gary Gossett was called as a witness for the respondents. The record is composed solely of the transcript of the February 13, 2004, hearing containing a volume of medical exhibits, together with the evidentiary deposition of Dr. Glenn Dickson taken prior to the hearing and submitted subsequent to the hearing and retained in the Commission file in bound form.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over

this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The medical treatment provided by Dr. William P. Thorpe, as well as any referrals by Dr. Thorpe, were unauthorized, obtained at the claimant's own instance following receipt of a Commission Form AR-N and, therefore, not respondents' responsibility pursuant to A.C.A. §11-9-514 (Repl. 2002).
4. The claimant's healing period ended on or before March 24, 2003.
5. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to additional temporary total disability for the period beginning June 1, 2002, and continuing through December 25, 2002. The claimant has failed to offer any credible medical evidence that she was totally disabled within the meaning of the Arkansas Workers' Compensation Laws after December 25, 2002.
6. The claimant is not entitled to benefits under A.C.A. §11-9-505.
7. The claimant's entitlement to permanent disability benefits has been specifically reserved for future determination.
8. Respondents have controverted all benefits beyond those previously paid.

#### DISCUSSION

\_\_\_\_\_The facts in this case are basically undisputed. The claimant's

employment history, her work-related injury, as well as the claimant's course of medical treatment for her admitted injury is undisputed. Admittedly, there exists a difference in the medical opinion concerning respondents' responsibility for medical treatment provided by Dr. Thorpe, and whether it was reasonably necessary, which will be addressed further below. Part of the difficulty in this claim is, despite a volume of medical records consisting of 179 pages, together with an evidentiary deposition, the medical evidence is incomplete. The Prehearing Order encouraged the parties to submit a comprehensive, indexed by medical provider, and chronologically arranged set of relevant medical reports. If the joint packed exceeded 50 pages, the parties were to submit an abstract of the medical evidence. Suffice it to say that the parties failed to comply with this directive.

First, much of the medical documentation was irrelevant. It contained substantial duplication. Many of the notes were handwritten and illegible. Some of the diagnostic testing was never interpreted and is of no probative value in the form offered. Neither party submitted an abstract. More importantly, unless my review was incomplete or overlooked, there is no medical records or reports from Dr. Thorpe after November 11, 2002, despite the fact that the claimant testified that Dr. Thorpe performed two (2) surgeries, one on or about July 3, 2002, which she maintained corrected, for the first time, the instability in her shoulder which had existed at all times after

December 1, 2000, the date of the injury, and a second surgery which she alleged was to remove scar tissue which, again, is undocumented. Dr. Dickson acknowledged in his evidentiary deposition that he reviewed a volume of medical records, including Dr. Thorpe's office records and operative reports which covered two (2) separate surgeries. Although Dr. Dickson opined that neither of Dr. Thorpe's surgeries were reasonably necessary, for reasons set out further below, I must respectfully disagree concerning the initial surgery on July 3, 2002, but defer to his expert opinion concerning the reasonableness of the later in the absence of any supporting medical documentation.

#### HISTORY

The claimant began working for the respondent, L A Darling Company, on July 11, 1994. She sustained an admitted injury as the result of a specific incident identifiable in time and place of occurrence on December 1, 2000, which she described as follows:

Q And how did that occur?

A We have – my co-worker opened the pit door on me as I was stepping across because we was getting things set up to hang parts vertical, and when he opened the door – it was split second timing. He opened the door up as I was stepping. When I realized I was falling, I grabbed the railing behind, and I also heard the door hit the post behind, and I hung there by three fingers.

Q Okay. With your right arm?

A Yes, sir.

Q And the injury that you sustained was to what part of your body?

A Right shoulder and right arm, upper.

Q Did you report that injury to your employer?

A Yes.

Q Who did you report it to?

A Harry Boggs, my supervisor, and Danny Reed was there with him. I understand he's the night manager.

Q Okay. (Tr.10-11)

The employer exercised good faith in providing the claimant with prompt medical treatment. The claimant was initially sent to the company doctor, Dr. Mack Shotts at the Paragould Doctor's Clinic. Dr. Shotts treated the claimant conservatively and subsequently referred her to Dr. Ron Schechter, an orthopedic surgeon in Paragould, Arkansas, who performed surgery. The claimant maintained that her symptoms were actually worse following surgery and that Dr. Schechter referred her to Dr. Savu, a pain specialist. The claimant stated that Dr. Savu conducted additional diagnostic studies and wanted to refer her to a psychiatrist, but that respondents refused and sent the claimant to Dr. Ken Rosenzweig, an orthopedic surgeon in Little Rock, Arkansas, for further evaluation and recommendations. Dr. Rosenzweig ultimately evaluated the claimant on February 19, 2002. Rather than conduct an exhaustive analysis of Dr. Rosenzweig's eight (8) page report, suffice it to say he concluded that the claimant had not reached maximum medical improvement

and required further treatment, specifically, a work-up to exclude neck injury or nerve injury, including the brachial plexus. Dr. Rosenzweig's initial impression was that the claimant had the residuals of a frozen shoulder. He recommended an aggressive course of therapy with effective pain management, as well as further diagnostics such as an MRI. Although Dr. Rosenzweig did not feel the claimant had reach maximum medical improvement, since he was asked to assess impairment based upon the claimant's past treatment, he speculated that the claimant sustained a six percent (6%) impairment to the upper extremity. (Cl. Ex. A, pp.57-64)

As reflected by the stipulations, respondents paid temporary total disability through May 31, 2002, as well as the six percent (6%) whole body impairment assigned by Dr. Rosenzweig.

The claimant was next sent, by the respondents, to Dr. E.C. Hansbrough, an orthopedic surgeon in Poplar Bluff, Missouri. The claimant stated that Dr. Hansbrough performed an arthrogram which was negative for torn rotator cuff and returned the claimant to work. The claimant then, on her own, went to her primary care physician who referred her to Dr. William P. Thorpe, an orthopedic surgeon in Cape Girardeau, Missouri. Dr. Thorpe performed surgery on the claimant's right shoulder on July 3, 2002, followed by a course of physical therapy. The record reflects that Dr. Thorpe performed an arthroscopic LACS/SAD, SLAP repair, specifically, to correct multidirectional instability of her

shoulder. Dr. Thorpe's follow-up note on July 8, 2002, reflects that the claimant reported for the first time that her shoulder felt stable. The claimant likewise confirmed that the surgery corrected the pre-existing instability in the right shoulder. Dr. Thorpe, based upon the medical evidence of record, last evaluated the claimant on November 15, 2002, at which time he recommended continued physical therapy for six (6) weeks followed by a return to work. (Cl. Ex. A, pp.80, 86)

The record reflects that the claimant attempted to return to work following her course of physical therapy but, the employer did not permit the claimant to return to work until after all restrictions had been removed, which, to date, has never been achieved. The claimant did not seek any alternative, gainful employment. Further, the issue of claimant's entitlement to permanent disability benefits, if any, has been specifically reserved.

The only other medical opinion of record is the report and evidentiary deposition of Dr. Glenn Dickson, an orthopedic surgeon in Jonesboro, Arkansas. Dr. Dickson has never personally examined the claimant. His medical opinion was solicited by the respondents, specifically, to address the reasonable necessity, as well as the causal relationship of Dr. Thorpe's treatment. I did not find Dr. Dickson's opinion to be particularly persuasive. Further, for reasons set out below, respondents are not responsible for any of the treatment provided by Dr. Thorpe, specifically because the treatment was unauthorized.

I find that based upon the claimant's credible testimony, together with the results achieved by Dr. Thorpe in alleviating the instability of the claimant's right shoulder, which is clearly documented, that the surgical procedure and follow-up treatment does entitle the claimant to an extended period of temporary total disability.

#### MEDICAL TREATMENT

The first issue presented for determination is whether respondents are responsible for medical treatment provided by Dr. William P. Thorpe, as well as any referrals from Dr. Thorpe. The claimant contended that all of her medical treatment, including any treatment by Dr. Thorpe, was reasonably necessary, as well as related to the compensable injury, and should therefore be the responsibility of the respondents. Conversely, respondents maintained that the treatment was obtained by the claimant, on her own, and was unauthorized, and, further, was not reasonably necessary or related to the compensable injury.

While there is disagreement among the various medical providers concerning whether the treatment was reasonably necessary, clearly it was related to the admitted injury. There is no evidence whatsoever of any independent intervening cause for the claimant's complaints following her release by Dr. Schechter. In fact, respondents sought second opinions from additional medical providers to determine whether the claimant required further

treatment which was recommended by various medical providers. Although the nature and extent of treatment necessary differed, it was required. However, the claim for additional medical treatment fails because the claimant failed and/or refused to comply with the provisions of A.C.A. §11-9-514.

It is undisputed that the claimant received a Commission Form AR-N advising her of the procedure to follow in the event she was dissatisfied with the medical treatment being provided by the respondents. (Tr.22)(Resp. Ex. 1)

The Workers' Compensation Act states that treatment or services furnished by any physician other than the ones selected pursuant to A.C.A. §11-9-514, except emergency treatment, shall be at the claimant's expense. See, A.C.A. §11-9-514(b). Likewise, the Act provides that any unauthorized medical expense incurred after the claimant has received a copy of the notice shall not be the responsibility of the employer. A.C.A. §11-9-514(c)(3).

The treatment provided by Dr. Thorpe was obtained by the claimant on her own. It was not emergency treatment. The treatment was not authorized by the respondents or this Commission. Accordingly, all treatment furnished by Dr. Thorpe or through his referral is at the claimant's own expense. In fact, as noted by respondents' alternative contentions, claimant's medical treatment was paid, in substantial part, by the employer's health insurance provider. The claimant remains responsible for any co-payment or co-insurance.

#### TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department vs. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson vs. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

Despite the denial of claimant's medical treatment for the foregoing reasons, based upon the record as a whole, including the claimant's credible testimony, together with the medical evidence, I find that the claimant has proven, by a preponderance of the evidence, that she remained temporarily totally disabled beyond May 31, 2002, the date respondents terminated temporary total disability and accepted, and began paying, a six percent (6%) impairment assessed by Dr. Rosenzweig. Although respondents may claim a credit for the permanent impairment previously paid against its liability for

temporary total disability, in my opinion respondents were not justified in terminating temporary total disability benefits.

First, as previously pointed out, Dr. Rosenzweig, a physician selected by the respondents to determine whether additional treatment was warranted, opined that the claimant's healing period had not ended on the date of his examination on February 19, 2002. Dr. Rosenzweig recommended additional diagnostic studies, as well as further, conservative treatment. It is clear from his report that he merely opined that the claimant had reached maximum medical improvement related to the treatment, to date, and offered only an estimation of permanent impairment because it was requested by the respondents. In a report dated April 16, 2002, addressed to respondents' claim representative, Dr. Rosenzweig attempted to clarify his prior report:

I apologize for the delinquency of responding to your request on Lila Dollins independent medical examination. Apparently, your letter, and/or the chart were misplaced, and fortunately, due to the persistence of my employees, I am able to address this. Again, please accept my sincerely apologies.

The concern is the confusion on the maximum medical improvement status as reported in the chart, and you have asked that I elaborate on the contradictory statements in regard to whether she is at maximum medical improvement, and if her outcome can be improved.

The intent of the independent medical examination report was to state that Ms. Dollins was at maximum medical improvement with current treatment, and therefore, based on her current status of her complaints, no significant improvement was anticipated, based on her current care.

I went on to discuss what other options might be considered in a more aggressive or more complete evaluation and treatment, assessing the shoulder

with an MRI and nerve testing to check for nerve injury, and then a more aggressive approach to see if Ms. Dollins' outcome can be improved. If further diagnostics and/or more aggressive management were entertained, and were successful, then Ms. Dollins could reach a higher level of improvement, and therefore, reduce her overall impairment and/or pain. As you know, in the state of Arkansas, pain does not factor in as far as impairment ratings.

I apologize for the confusion, but in order to be complete, and to offer some options, in cases where having performed an independent medical examination and someone is as good as they are going to get with the current care, then I will offer that as an endpoint. If there are further options in regard to diagnostics and/or treatment, then I will chose to elaborate on that as well. That may or may not change her overall outcome.

Specifically, Ms. Dollins was felt to have a frozen shoulder and had symptomatology that would suggest that she had neurologic injury to her upper extremity in the form of brachial plexus or brachial plexopathy that has left her with a causalgia type picture. Evaluation of this may or may not reveal any findings that can improve her outcome. In cases where there is no further treatment or diagnostics, then obviously, this discussion would not be offered. (Jt. Ex. A, pp.55-56)

The claimant, on her own, sought medical treatment from Dr. Thorpe.

Because of the claimant's persistent complaints, Dr. Thorpe ran additional diagnostic studies and eventually performed a second arthroscopic evaluation of the right shoulder on July 3, 2002, which revealed the following findings:

Multidirectional instability, synovial hypertrophy, capsular laxity and glenoid labral instability. SLAP lesion repairable. Anterior, inferior and posterior labral lesions unrepairable. Partial rotator cuff tear with impingement. (Jt. Ex. A, p.83)

During the arthroscopic procedure, Dr. Thorpe surgically repaired the right shoulder. As reflected by his follow-up office notes on July 8, 2002, the surgery was successful because, for the first time since the injury, the claimant achieved stability which was lacking prior to that date. This was confirmed by

both the claimant, as well as Dr. Dickson. In fact, in his evidentiary deposition, Dr. Dickson acknowledged that while he would not have recommended the procedure based upon the prior medical opinion of record, the claimant did achieve a positive result. He further stated in his deposition that his interpretation of the MRI was different than the interpretation of Dr. Thorpe, but not that Dr. Thorpe was incorrect in his interpretation. Again, he conceded that the July 3, 2002, arthroscopic surgery improved the claimant's multidirectional instability, while, at the same time, opining that the second procedure (which was never documented) was, in his opinion, unreasonable. (Dickson D., pp.26, 40, 47)

As previously pointed out, the last medical report submitted from Dr. Thorpe is dated November 11, 2002. At that time, Dr. Thorpe recommended continued physical therapy for six (6) weeks. (Cl. Ex. A, p.80)

Although not documented by the claimant, she stated that she remained under the care and treatment of Dr. Thorpe and received physical therapy through March 24, 2003. Accordingly, I find that the claimant's healing period ended on or before March 24, 2003; however, I do not find that the claimant was totally disabled within the meaning of the Arkansas Workers' Compensation Laws through said date. I find that the claimant has failed to prove entitlement to total disability benefits beyond December 25, 2002, which was six (6) weeks after Dr. Thorpe's last report. Claimant's statements that

she remains totally disabled through a date yet to be determined is a mere conclusion not supported by credible evidence. Admittedly, the claimant continues to experience symptoms which, in my opinion, are permanent in nature. Clearly, following three (3) arthroscopic surgeries, the claimant has sustained permanent disability which requires further development of the medical evidence. Claimant's entitlement to permanent disability has been specifically reserved.

#### BENEFITS UNDER A.C.A. §11-9-505

Alternatively, the claimant maintained that she was entitled to benefits under A.C.A. §11-9-505. This section is set out, in part, below:

(a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

Before A.C.A. §11-9-505(a) applies, several requirements must be met. The employee must prove, by a preponderance of the evidence, that she sustained a compensable injury; that suitable employment which is within her physical and mental limitations is available with the employer; that the employer refused to

return her to work; and that the employer's refusal to return her to work was without reasonable cause. See, Edward Tori vs. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

It is undisputed that the claimant sustained a compensable injury. Likewise, the record reflects that the employer refused to return the claimant to work based upon her physical restrictions. However, the claimant has failed to prove that suitable employment within her physical limitations was available with the employer at the time of her release, and, further, that the employer's refusal to return her to work was without reasonable cause. Accordingly, the claim for additional benefits pursuant to this section is respectfully denied and dismissed.

#### AWARD

Respondent, L A Darling Company and Management Claim Solutions, TPA, is hereby directed and ordered to pay, to the claimant, additional temporary total disability benefits at the rate of \$282.00 per week beginning June 1, 2002, and continuing through December 25, 2002.

All accrued benefits shall be paid in lump sum and without discount; however, respondents may claim credit for any temporary total disability and permanent partial disability previously paid.

Additionally, claimant's attorney, Mr. Ralph Theodor Stricker, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to

Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge