

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402092

CYNTHIA MCGOWAN

CLAIMANT

ARKANSAS SUPPORT NETWORK

RESPONDENT

COMMERCE & INDUSTRY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 30, 2004

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

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

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 9, 2004, in Springdale, Arkansas. A pre-hearing conference was held in this case on June 28, 2004, and a pre-hearing order entered on June 30, 2004. 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. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On February 19, 2004, the relationship of employee-employer carrier-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$220.00 for total disability and \$165.00 for permanent partial disability.
3. On February 19, 2004, the claimant sustained a compensable injury to her lower back.
4. There is no dispute over the payment of medical expenses, at present.

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 March 30, 2004 through a date yet to be determined.

2. Whether the claimant is barred from receiving such benefits during this period under Ark. Code Ann. § 11-9-526.

In regard to these issues, the claimant contends:

“Claimant was injured on February 19, 2004, when she was performing a job as a CSP2 earning \$8.50 an hour. She was removing a wheelchair from (sic) for a consumer and injured her neck and lower back. This is a specific injury incident and she injured both areas.

The claimant was seen by Dr. Moffitt who obviously found nothing wrong with her, but she found her way to other physicians who have performed an MRI, and she is in need of additional treatment.

She does not want to see Dr. Moffitt anymore. She maintains that getting away from Dr. Moffitt does not constitute change of physician, but that she simply needs to receive additional medical treatment.”

In regard to these issues, the respondents contend:

“Respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim. Claimant was released to return to light duty work on March 23, 2004. Light duty work was made available for her and she was notified of this on or about March 30, 2004. The claimant has refused to return to work in a light duty capacity. As such, her TTD benefits have been discontinued. Medical expenses are continuing to be paid with regard to this claim to the claimant’s treating physician. The claimant has already had a one time change of physician to Dr. Cyril Raben.”

DISCUSSION

_____The central issue in this case is the question of whether the claimant is entitled to temporary total disability benefits from March 30, 2004 through a date yet to be determined. The burden rests upon the claimant to prove her entitlement to these benefits. In order to meet this burden, the claimant must prove that she has continued within her healing period from the effects of her compensable injury and has continued to be rendered totally disabled from performing all forms of regular gainful employment as a result of this compensable injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment for the healing or

stabilization of the actual physical damage caused by the compensable injury. Once this physical damage resolves or stabilizes at a level where any remaining physical damage has become permanent, then the healing period has ended.

In the present case, the medical evidence shows that the claimant was initially treated by a Dr. Waqar Mehal and a Dr. James Kufdakis. Both of these physicians are associated with the Internal Medicine Clinic which serves as the claimant's family physician. The claimant was treated for her compensable injury by these physicians from February 24, 2004 through at least March 8, 2004.

At the request of the respondents, the claimant's care and treatment was switched from Dr. Mehal and Dr. Kufdakis to Dr. Gary Moffitt, a general practitioner. The reports and records of Dr. Moffitt shows that he actively treated the claimant from March 23, 2004 through April 20, 2004.

While still under treatment by Dr. Moffitt, the claimant apparently obtained a change of physicians to Dr. Cyril Raben, an orthopedic surgeon. The medical reports and records of Dr. Raben show that he was providing the claimant active treatment for her compensable injury through July 27, 2004, and that this treatment would continue through at least some time in August of 2004.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible medical evidence establishes that the claimant has continued within her healing period from the effects of her compensable injury from the date of that injury until a date yet to be determined. Although the claimant has received medical treatment from essentially three different physicians, her overall course of treatment has been continuous. There is no indication that any of her prior physicians released the claimant from further medical care or were of the opinion that she had achieved the maximum benefit of medical treatment. Each time the claimant changed physicians she was still under active medical treatment by her previous physician. It is obvious from the reports and record of Dr. Raben that it was his expert medical opinion that the compensable injury has required medical treatment for her compensable injury through the date of his last report (July 27, 2004) and continued to require medical treatment for at least a month thereafter. Dr. Raben is a board certified orthopaedic surgeon with considerable expertise in the area of medicine associated

with the claimant's compensable injury. His professional opinion concerning the need for continuing active medical treatment of the claimant's compensable injury is entitled to substantial weight and credit.

It next becomes necessary to address the question of whether the claimant has proven that during this same period she has continued to be rendered totally disabled from performing all forms of regular gainful employment (for which she would otherwise be qualified) by the disabling effects of her compensable injury. This question is somewhat intertwined with the second issue set out in the pre-hearing order. This is the issue of whether the claimant is barred from receiving temporary total disability benefits by the provisions of Ark. Code Ann. § 11-9-526 (i.e. whether she has unjustifiably refused suitable employment).

The initial medical reports and records of Dr. Mehal show that he medically restricted the claimant from engaging in any type of employment from February 19, 2004 through March 4, 2004. This period of temporary disability does not appear to be in dispute.

When the claimant was seen by Dr. Kufdakis, on March 3, 2004, he initially restricted the claimant from only engaging in any type of work that required repetitive bending, lifting, pulling, or kneeling. However, at the claimant's request, he subsequently provided her with a release to be off work entirely from March 4, 2004, through April 4, 2004. Apparently, a portion of this period also does not appear to be in dispute.

When the claimant was seen by Dr. Moffitt, on March 23, 2004, he released the claimant to return to limited work or light duty, with the prohibition from engaging in any employment activities requiring lifting, pushing, or pulling with more than 10 pounds of force, or that required any significant bending or twisting at the waist. He also noted that she would need to have an employment portion that would allow her to alternate between sitting, standing, and walking, as needed. Finally, he indicates that she would have to be available to undergo physical therapy on a regular basis. These restrictions by Dr. Moffitt remain relatively unchanged throughout his period of treatment.

When the claimant came under the treatment of Dr. Raben, he also released the claimant to light or limited duty. The limitations he imposed were essentially similar to those previously imposed

by Dr. Moffitt. These limitations consisted of no prolonged standing, no prolonged sitting, no working in a bent over posture and no repetitive bending/lifting/twisting. He further indicated that the claimant was to avoid highly vibrational situations, that she would not be able to run or walk at a fast pace, and that she would not be able to restrain or restrict the movements of any other individual. Finally, he indicated that she would not be able to engage in any substantial lifting, pushing, or pulling. He reaffirmed these continuing restrictions in his office notation of July 27, 2004, and specifically stated that the claimant could not perform any employment duties for the respondent that would require her to run after, restrain, or restrict another person. He suggested that the claimant be placed in a clerical type position.

The physical restrictions and limitations imposed by Dr. Kufdakis, Dr. Moffitt, and Dr. Raben all appear reasonable and logical in light of the nature of the claimant's compensable injury. I find these restrictions and limitations to be an accurate depiction of the claimant's actual physical abilities.

The record shows that all of the employment positions offered the claimant by the respondent involved her monitoring and taking care of all the needs of a physically and/or mentally disabled individual for varying periods of time. In performing these positions, the claimant would be working alone in the disabled individual's home, without the assurance of any immediate outside assistance. During these periods, she would be solely responsible for taking care of all the needs of the handicapped individual and dealing with any situations that might arise.

I do not find that the claimant's refusal to accept these positions offered represents an "unjustified" refusal, within the meaning of Ark. Code Ann. § 11-9-526. Clearly, situations could easily arise that would require physical activity or exertion on the part of the claimant that would exceed her current abilities. In such a situation, both the well being of the claimant and her handicapped charge could be in serious jeopardy. The claimant's refusal to take this risk is justified. At this point, I would note that there is no indication that the respondent ever offered the claimant a clerical type position, as recommended by Dr. Raben.

At the present time, the claimant's physical limitations and restrictions prevent her from performing the employment position she held at the time of her compensable injury. Although she

could possibly be physically capable of performing a clerical or light sales position, she has no particular expertise in this area. The fact that she would also have to be available to participate in her ongoing medical treatment would make it unlikely that she could, at this time, obtain this type of employment in the open job market. Thus, it is my opinion that the claimant has proven by the greater weight of the credible evidence that she has continued to be rendered temporarily totally disabled as a result of the effects of her compensable injury from March 30, 2004 through a date yet to be determined.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 19, 2004, the relationship of employee- employer carrier-TPA existed between the parties.
3. On February 19, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$220.00 for total disability and \$165.00 for permanent partial disability.
4. On February 19, 2004, the claimant sustained a compensable injury to her lower back.
5. The claimant has proven by the greater weight of the credible evidence that she has continued to be rendered temporarily totally disabled, as a result of the effects of this compensable injury, for the period of March 30, 2004 through a date yet to be determined. Specifically, she has proven by the greater weight of the credible evidence that she has continued within her healing period from the effects of her compensable injury and has continued to be rendered totally disabled by her compensable injury during this period.
6. The greater weight of the credible evidence shows that the claimant was justified in refusing the employment offered to or procured for her by the respondent and further shows that the employment positions offered to or procured for her by the respondent were not "suitable to her capacity." Thus, the claimant is not barred

from receiving benefits for temporary total disability by the provisions of Ark. Code Ann. § 11-9-526.

7. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing on and after March 30, 2004.
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 additional temporary total disability benefits for the period of March 30, 2004 through a date yet to be determined.

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 in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these benefits.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge