

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103250

REBECCA K. McRANIE, EMPLOYEE	CLAIMANT
COLSON CASTER CORPORATION, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 10, 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 Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted February 13, 2004, to determine claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted 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 Prehearing Order.

It is undisputed that the employment relationship existed at all relevant times, including May 5, 2000; that the claimant sustained a compensable back injury on said date; that she earned sufficient wages to entitle her to compensation rates of \$334.00 per week for temporary total disability and

\$251.00 per week for permanent partial disability; that respondents paid various indemnity benefits (further identified at the hearing), as well as medical expenses through August 28, 2003; and that respondents had controverted any disability benefits beyond those previously paid. At the hearing, it was further agreed that respondents paid temporary total disability benefits for the period beginning June 12, 2003, through October 28, 2003, at which time disability benefits were terminated. Apparently, the claimant did not miss sufficient time from work prior to June 12, 2003, to qualify for temporary total disability. (Tr.4-5)

By agreement of the parties, the issues presented for determination included:

1. Whether the claimant's healing period has ended, as well as claimant's entitlement to additional temporary total disability; and,
2. Claimant's entitlement to benefits pursuant to A.C.A. §11-9-505.

The claimant contended, in summary, that her healing period had not ended; that she was entitled to temporary total disability benefits for the period beginning June 11, 2003, and continuing through the present, less credit for any dates worked or temporary total disability paid. Alternatively, claimant contended that she was entitled to benefits for one year after June 11, 2003, pursuant to 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, if any.

The respondents maintained that it had paid all appropriate benefits to which the claimant was entitled and that claimant could not prove entitlement to additional temporary total disability or benefits under A.C.A. §11-9-505.

The claimant testified in her own behalf. JoAnn Cook and Darrell Pickney were called as witnesses by the respondents. The record is composed solely of the transcript of the February 13, 2004, hearing containing numerous exhibits, together with the evidentiary deposition of Dr. Ron Williams, introduced as "Respondents' Exhibit 1" 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 and contained in the Prehearing Order, together with the stipulations announced at the hearing, are

hereby accepted as fact.

3. The claimant's healing period ended on or before August 28, 2003.
4. The claimant has failed to prove, by a preponderance of the credible evidence, that she is entitled to additional temporary total disability.
5. Even if the claimant's healing period has not yet ended, which is inconsistent with the findings herein, nevertheless, the claimant is not totally disabled within the meaning of the Arkansas Workers' Compensation Law.
6. The claimant has failed to prove that she is entitled to benefits pursuant to A.C.A. §11-9-505. The respondents have, at all relevant times, made suitable employment available to the claimant within her physical limitations.
7. Respondents have controverted claimant's entitlement to additional temporary total disability and/or benefits under A.C.A. §11-9-505.
8. The claimant specifically reserved the issue of permanent disability, if any.

DISCUSSION

_____The relevant facts in this case are basically undisputed. The claimant is forty-four (44) years old. She began working for the employer on June 6, 1999. The record reflects that the claimant last worked on June 11, 2003. The claimant sustained an admitted, compensable injury, primarily to her low

back, as the result of a slip and fall at work on or about May 5, 2000. The claim was immediately reported. The respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment. Although the claimant was a poor historian and unable to recall all of her treating physicians, which were numerous, clearly, as reflected further below, the claimant has been provided with a number of evaluations and has undergone significant diagnostic testing between May 6, 2000, through August 28, 2003, related to this claim, all of which have apparently been paid by the respondents. In fact, the only potential diagnostic study which has not been provided, to date, is a CT lumbar myelography. However, as reflected by the agreed issues presented for determination, claimant's entitlement to additional medical treatment is not at issue.

The claimant stated that she was initially examined and treated at the St. Bernard's Hospital in Jonesboro, Arkansas, following her slip and fall. No medical records from the hospital were introduced. The claimant was next examined and evaluated by the company physician, Dr. Michael Lack, with Occupational Health Partners in Jonesboro, Arkansas. The claimant was first seen by Dr. Lack on May 8, 2000. Contrary to respondents' assertion that the first complaint of any cervical problems contained in the medical evidence was during August, 2003, a review of Dr. Lack's clinical notes reflects that the

claimant's neck was improved, but that she continued to experience low back pain. It is undisputed that the claimant's primary injury involved her lumbar spine. Dr. Lack treated the claimant with medication and physical therapy while allowing the claimant to continue working. In fact, as reflected by the stipulations, the claimant did not miss sufficient time from work to qualify for disability benefits before 2003. The claimant was apparently next examined by her family physician. The claimant asserted that her family doctor wanted to perform a CT myelogram which was never performed. The claimant was next referred by the employer's nurse to Dr. Barry Baskin, a physical medicine and rehabilitation specialist in Little Rock, Arkansas. Dr. Baskin has been the claimant's primary treating physician. Dr. Baskin treated the claimant beginning July 17, 2000. Dr. Baskin last evaluated the claimant on June 9, 2003. The record reflects that Dr. Baskin has conducted various diagnostic studies. In addition, he has referred the claimant to various providers, including referral to a pain specialist, Dr. Hart, in Little Rock, Arkansas, for epidural injections, as well as to Dr. Reza Shahim, for a neurosurgical consultation. In addition, respondents requested that the claimant undergo a second neurosurgical evaluation by Dr. Ron Williams which was apparently performed during October, 2003. The reason for the second neurosurgical consultation is unclear.

The record reflects that the claimant continued working for the employer

herein between May 6, 2000, and March, 2003, at which time the claimant was required to take off work for unrelated medical problems. The claimant returned to work in early June, 2003, and only worked a few days before voluntarily leaving her employment. The claimant maintained that Dr. Baskin placed additional restrictions on her work activities which the employer refused to provide. This assertion by the claimant is simply inconsistent with the record. The record reflects that the employer, at all times, exercised good faith by providing the claimant restricted work within the limitations imposed by Dr. Baskin. After the claimant returned to work in June, 2003, after missing three (3) months of work for non-work-related medical problems, the claimant called Dr. Baskin and asked him to change her physical restrictions. Thereafter, Dr. Baskin made a referral for a neurosurgical consultation to Dr. Shahim, aforementioned, which respondents accepted and paid. In fact, as reflected by the stipulations, respondents paid temporary total disability for the period beginning June 11, 2003, through October 28, 2003, despite the availability of work within the claimant's restrictions. The claimant has not returned to any gainful employment since June 11, 2003. At the time of the within hearing, the claimant had apparently been seen by her family physician, Dr. James Bradley. Dr. Bradley had in turn referred the claimant to Dr. K. Dewayne Eubanks, a neursurgeon in Jonesboro, Arkansas, for further consultation. (Jt. Ex. A, pp.71-73) Respondents have paid all related medical expenses, save

the medical of Dr. Bradley and Dr. Eubanks which was unauthorized medical treatment. As previously pointed out, claimant's entitlement to further medical treatment was not at issue.

TEMPORARY TOTAL DISABILITY

Temporary total disability is determined by the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. It is that period in which an employee is within the healing period and totally incapacitated to earn wages. *Arkansas State Highway Dept. vs. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *J.A. Riggs Tractor Co. vs. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Stafford vs. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The healing period is that period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of the injury will permit, and if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods vs. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996); *Carroll General Hospital vs. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher vs. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

"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).

It is unclear from a review of the record as a whole, including the medical evidence, the exact date that the claimant's healing period may have ended. The claimant's initial healing period ended on or about February 5, 2002, as reflected by a July 5, 2002, report from Dr. Baskin addressed to claimant's attorney, indicating that he had released the claimant to return only as needed, at which time he assessed a five percent (5%) whole body impairment using the A.M.A Guidelines 4th Edition. Although the claimant may be entitled to permanent disability benefits, that issue has been specifically reserved. (Jt. Ex. A, p.57)

The claimant returned to Dr. Baskin after February 5, 2002, with additional complaints, at which time Dr. Baskin performed additional diagnostic studies, as well as provide the claimant with related medical treatment. Again, the claimant continued working for the employer herein until taking off work for unrelated medical problems in March, 2003. Contemporaneous with the claimant's non-

work-related problems, Dr. Baskin released the claimant back to work on March 10, 2003, with significant, physical restrictions which the employer apparently accommodated. At the same time, Dr. Baskin referred the claimant to Dr. Hart for an epidural steroid injection for the chronic back pain. (Jt. Ex. A, p.64)

In June, 2003, Dr. Baskin recommended a neurosurgical consultation. The claimant was subsequently evaluated by Dr. Reza Shahim at the Neurosurgical Surgery Associates in Little Rock, Arkansas, on August 14, 2003. As reflected by the addendum to Dr. Shahim's report, initially he did not think that the claimant needed a myelography to define her nerve root compression while, at the same time, indicating that the claimant might benefit from a discectomy at L4-5. To date, the claimant has declined any suggestion of low back surgery which, in my opinion, is reasonable in view of the overall medical opinion of record indicating that surgery is not warranted. In a follow-up report dated August 28, 2003, Dr. Shahim, for some unexplained reason, recommended that the claimant undergo a CT lumbar myelography. As previously noted, claimant's entitlement to additional medical treatment is not at issue. (Jt. Ex. A, pp.75-77)

Rather than conduct a further analysis of the medical evidence, suffice it say that I find that the claimant's healing period has previously ended and that the respondents have paid all appropriate, temporary total disability to which claimant is entitled. Even if the claimant's healing period has not ended, which is inconsistent with the findings of fact, aforementioned, there is no competent

evidence that the claimant suffers a total incapacity to earn pre-injury wages in the same or other employment. The claimant's contentions that she is totally disabled is a mere conclusion, unsupported by the record as a whole.

The only remaining issue concerns claimant's entitlement to additional benefits pursuant to Ark. Code Ann. §11-9-505 provides, in part:

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

Darrell Pickney, the Human Resource Manager for the employer, testified

at the hearing. Mr. Pickney's credible testimony was that he, at all times, provided the claimant with suitable employment within the restrictions imposed upon the claimant by Dr. Baskin, which the claimant declined to perform. It must be noted that the claimant performed work for almost three (3) years before taking off work for unrelated medical problems. It was only after the claimant's return to work that she decided the work being provided exceeded her physical limitations. To the contrary, the record reflects that the claimant could have performed the work by simply modifying her body mechanics and squatting rather than bending when picking up extremely light parts.

In determining whether the claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. A.C.A. §11-9-704(c)(4); *Wade vs. Mr. C. Kavanaugh's*, 298 Ark. 364, 768 S.W.2d 521 (1989).

The claimant was able to work at all times following her injury through at least March, 2003, when she took off for unrelated medical problems. Thereafter, the employer provided the claimant with work within her physical restrictions. Permanent disability has been specifically reserved. The claimant has failed to prove entitlement to additional benefits requested.

_____After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove

that she is entitled to the benefits requested. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge