

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305756

ANGEL POST

CLAIMANT

WHIRLPOOL CORPORATION,
SELF INSURED

RESPONDENT

OPINION FILED APRIL 12, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by TOM HARPER, JR., Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 17, 2004, in Fort Smith, Arkansas. The deposition of the claimant was taken on January 21, 2004, and has been admitted as Respondent's Exhibit No. 5. The deposition of Dr. Claude Marimbeau was taken on January 21, 2004, and has been admitted as Respondent's Exhibit No. 6.

A pre-hearing order was entered in this case on December 10, 2003. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the respondent conceded that the claimant's admittedly compensable injury to her right wrist, on May 6, 2003, included her de Quervain's tenosynovitis. The respondent has accepted liability for the medical services provided the claimant for this condition and all such expenses have or are in the process of being paid. Thus, the first issue set out in the prehearing order has been rendered moot. The second issue, as it concerns the claimant's entitlement to the payment of the expenses incurred for medical services, has also been rendered moot. Finally, the respondent has also accepted liability for and have paid temporary total disability benefits for the period of August 20, 2003 through September 30, 2003. This alters the period initially indicated to be in dispute. A copy of the pre-hearing order, with the appropriate amendments noted thereon, was made

Commission's Exhibit No. I to the hearing.

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

1. On May 6, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. On May 6, 2003, the appropriate weekly compensation rates were \$373.00 for total disability and \$280.00 for permanent partial disability.
3. On May 6, 2003, the claimant sustained a compensable injury to her right wrist in the form of a strain or sprain and de Quervain's tenosynovitis.
4. There is no dispute over the claimant's entitlement to medical services for the foregoing injuries and all such expenses have or will be paid.

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 benefits attributable to benefits attributable to the de Quervain's tenosynovitis in the form of temporary total disability benefits from May 7, 2003 through August 19, 2003 and from October 1, 2003 through November 12, 2003 (the respondents have paid such benefits from August 20, 2003 through September 30, 2003)-less the days the claimant worked which were May 12, May 13, and May 14, 2003.
2. Whether the claimant is barred from receiving temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526.

In regard to these issues, the claimant contends that she is entitled to the temporary total disability benefits, as a result of her admittedly compensable wrist injury, for the entire period of May 7, 2003 through November 12, 2003, with the exception of the three days she actually worked (May 12-14, 2003).

The respondent denies that the claimant is entitled to any temporary total disability benefits, except for the period of August 20, 2003 through September 30, 2003. It is further their position that, even if such benefits would otherwise be appropriate, the claimant is barred from receiving temporary total disability benefits for any other periods by her unjustified refusal of suitable employment, Ark. Code Ann. §11-9-526.

DISCUSSION

_____The sole issue concerns the claimant's entitlement to temporary total disability benefits for the periods of May 7, 2003 through May 11, 2003, from May 15, 2003 through August 20, 2003, and from September 30, 2003 through November 12, 2003. The burden rests upon the claimant to prove her entitlement to such benefits.

The present compensable injury was to a portion of the claimant's anatomy that is "scheduled" in Ark. Code Ann. §11-9-521. Thus, in order to be entitled to temporary total disability benefits she now seeks the claimant need only prove that during the times in question she continued within her healing period from the effects of her compensable injury and had not returned to employment, International Paper Company v. McGoogan, 255 Ark. 1025, 504 S.W. 2nd 739(1974). She need not prove actual "disability" during these periods.

The duration of the healing period is a medical question that must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period continues until the claimant has received the maximum benefit of time and medical treatment in regard to the healing of the actual physical damage produced by the compensable injury. Once this underlying physical damage resolves or at least stabilizes at a level where nothing further in the way of medical treatment can be reasonably expected to provide improvement, then the healing period ends.

In the present case, the greater weight of the credible medical evidence proves that the claimant continued within her healing period from the effects of her admittedly compensable injury for the entire period of May 7, 2003 through November 12, 2003. The

reports and records of Dr. Claude Martimbeau and, to a limited extent, the reports and records of Dr. Christiaan Slabbert and Dr. Randall Carson show that the claimant was under continuous active medical treatment to improve the damage caused by admittedly compensable right wrist injury during this entire period. Initially, this treatment consisted of only conservative modalities, which included direct injections, oral medication, physical therapy, splinting, immobilization and avoidance of use of the entire right upper extremity. Subsequently, the claimant underwent surgical correction of her injury by Dr. Martimbeau. Following this corrective surgery, she continued to receive follow up care for both the compensable injury, itself, and the effects of the corrective surgery, through November 12, 2003. Thus, the claimant has satisfied the first requirement for her entitlement to the additional temporary total disability benefits she now seeks.

There is no dispute that the claimant did not actually work during any portion of the periods for which she now seeks additional temporary total disability benefits. This satisfies the second requirement for her entitlement to such benefits.

Thus, under the rule announced in McGoogan, the claimant has proven that she continued to be rendered temporarily totally disabled by her compensable scheduled injury and her entitlement to additional temporary total disability benefits for the periods of May 7, 2003 through May 11, 2003; May 15, 2003 through August 19, 2003; and from October 1, 2003 through November 12, 2003. It therefore becomes necessary to determine if she is barred from receiving benefits during these periods by the provisions of Ark. Code Ann. §11-9-526. As the provisions of this subsection enure to the benefit of the respondent, the burden shifts to the respondent to prove all of the elements necessary to invoke its application.

The record unquestionably reveals that the respondent provided the claimant with a limited or light duty position on May 12, 2003. This limited or light duty position was based upon the limitations or restrictions imposed by Dr. Carson (a general practitioner and

the respondent's company physician). The restrictions, as set out in a notation dated May 12, 2003 (Respondent's Exhibit No. 4, page 1) are:

“No heavy lifting-no strenuous gripping right wrist-“

However, the evidence reveals that this limited or light duty position still required frequent or continuous use of her right wrist and hand during her eight hour shift.

When the claimant complained of increased difficulties with any use of her right wrist and hand, the respondent made no further attempt to modify her employment position, but elected to follow the restrictions previously established by Dr. Carson. The claimant continued to work under these restrictions for a total of three days. During this time, she continued to complain of increased difficulties with the required use of her right wrist and hand and repeatedly requested to be sent back to the company physician to see if more extensive restrictions would be appropriate. However, the respondent elected to continue the treatment by the plant nurse and to follow the physical limitations and restrictions previously imposed by Dr. Carson. More importantly, the claimant's repeated requests to return to Dr. Carson or some other physician were not honored, and the respondent apparently decided that the claimant would have to wait until her previously scheduled follow up visit with Dr. Carson on May 16, 2003.

On May 15, 2003, the claimant was seen for a previously scheduled follow up visit by Dr. Slabbert (a general practitioner and her family physician). At that time, she was referred by Dr. Slabbert to Dr. Claude Martimbeau (an orthopaedic surgeon). The reports and deposition of Dr. Martimbeau reflect that he initially saw the claimant on May 19, 2003. Following this physical examination, Dr. Martimbeau diagnosed the claimant as suffering from acute tendonitis of the right wrist. He elected to give the claimant an injection of cortisone into the affected area of the wrist and gave her a protective splint. He directed the claimant to take oral medication (in the form of anti-inflammatories and pain medication) and to remain off work in order to rest her wrist until he saw her in follow up

in two weeks. Dr. Martimbeau continued to treat the claimant and ultimately performed surgery on her injured wrist in August of 2003. During his entire course of treatment, he continued his medical restriction against the claimant performing gainful employment. However, in his deposition, he indicates that he would have released the claimant to return to limited or light duty employment, so long as the limited or light duty position required no use of her injured wrist and hand. Dr. Martimbeau is a highly competent orthopaedic surgeon with a great deal of expertise in the area of medicine associated with the claimant's compensable injury. His opinion, in regard to the appropriate medical restrictions necessary to treat the claimant's compensable injury is persuasive. Clearly, it is entitled to more weight and credit on this issue, than the opinion of Dr. Carson. Dr. Carson is a general or family practitioner, who may or may not have actually evaluated the claimant (the claimant denies that he performed any physical examination or evaluation of her injured wrist) on, at most, one occasion.

Thus, in order for the respondent to have offered the claimant employment "suitable to her capacity", the respondent would have had to offer the claimant a limited or light duty position that did not require any use of her injured wrist and hand. There is simply no evidence presented, that the respondent ever actually offered such a light duty position to the claimant.

In her testimony, Ann Duplantis (the respondent's chief plant nurse and the administrator over the workers' compensation department) initially testified that the claimant was originally offered a "one handed" job. However, she subsequently conceded that she was in error in this statement and that the job actually offered to the claimant was one which met the restrictions contained in Respondent's Exhibit 4, page 1. The medical restrictions imposed in this document are only no heavy lifting and no strenuous gripping with the right wrist. Clearly, any use of the claimant's right wrist and/or hand would have exceeded the appropriate medical restrictions imposed by Dr. Martimbeau, and such an

employment position would not have been “suitable”.

The evidence shows that another offer of employment was made to the claimant, either directly or through her union representative, on May 29, 2003. The terms of this offer are set out in a nurse’s note by Ms. Duplantis dated May 29, 2003 (Respondent’s Exhibit No. 4, page 3). It would appear from this notation that the claimant was offered limited or light duty employment that again would not be within the restrictions imposed by Dr. Martimbeau, (who was deemed her personal physician). Instead, she would only be offered employment that was within the restrictions that were deemed appropriate by Dr. Carson (the company physician) and possibly any restrictions imposed by Dr. James Kelly. However, the claimant would only get to see Dr. Kelly, if Dr. Carson felt that the services of a specialist were needed. I do not find that the claimant’s refusal of this offer represents an unjustified refusal of suitable employment. There is no indication that Dr. Carson would have changed his restrictions or that he would have even deemed an evaluation by Dr. Kelly to be appropriate.

There is also no indication as to how long this anticipated process would take. Yet, if the claimant accepted this offer, she would be expected to immediately return to employment that met only the restrictions previously imposed by Dr. Carson and continue in this position, while this process was being carried out. As previously noted, it is clear that the restrictions initially imposed by Dr. Carson were not medically sufficient. For the claimant to return to such a position would likely have been detrimental to her condition. The respondent’s previous reluctance to take any action to have Dr. Carson review his prior restrictions to see if additional restrictions would be medically appropriate, would cause concern to any reasonable person that to accept this offer could jeopardize their physical well being.

By the time this offer was made, Dr. Martimbeau had already become the claimant’s primary treating physician for her compensable injury. This occurred when the respondent

repeatedly failed to provide her with the reasonably appropriate medical services she requested on May 12, May 13, and May 14, 2003. It is apparent from the notation in the nurse's log that the offer of employment made to the claimant, on May 29, 2003, was a "package deal" that not only required the claimant to accept a lighter limited employment, which gave no consideration to any physical restrictions imposed by Dr. Martimbeau, but also required her to totally abandon her ongoing treatment by Dr. Martimbeau.

I simply find that any employment position actually offered to the claimant on May 29, 2003, has not been shown to be "suitable to her capacity". I further find that the claimant was justified in refusing to accept this "package deal", which also required her to abandon her current treatment by Dr. Martimbeau and return to the care of Dr. Carson.

Finally, I would note that Ms. Duplantis testified that when the claimant was able to go back to work at limited or light duty, after her surgery, the respondent would have made a job available for her that was within Dr. Martimbeau's restrictions (i.e. a one handed job). However, there is no evidence that any such position was ever actually offered to the claimant. In fact, there is no evidence that prior to the preparation of this hearing, the respondent ever contacted Dr. Martimbeau to determine if the claimant could return to limited or light duty employment and what her physical limitations or restrictions would be. The fact that the respondent would have or could have made available "employment suitable to the claimant's capacity" is not a substitute for an actual offer of employment as required by Ark. Code Ann. §11-9-526, Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W. 2nd 444 (1995).

In summary, it is my opinion that the respondent has failed to prove that, at anytime between May 7, 2003 and November 12, 2003, the claimant unjustifiably refused suitable employment. Therefore, the claimant is not barred from receiving any temporary total disability benefits during this period by the provisions of Ark. Code Ann. §11-9-526.

Finally, I would note that the evidence shows the claimant received short term group disability benefits of \$270.00 per week during part or all of the periods for which additional temporary total disability benefits have been found appropriate. Ark. Code Ann. §11-9-411 provides for a reduction, dollar for dollar, of any additional temporary total disability benefits to offset any amounts previously received under the group short term disability policy for this same period of disability. This offset applies to the entire gross amount of group disability benefits, rather than any net amount the claimant may have actually been paid. The respondent is entitled to this set off against any temporary total disability benefits herein awarded, but shall reserve this amount for a period of five (5) years to satisfy any subrogation interest of the group carrier. Should no Order directing distribution of these sums be made within five (5) years, the respondent shall pay the sum to the Death & Permanent Total Disability Trust Fund of the State of Arkansas.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 6, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On May 6, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$373.00 for total disability and \$280.00 for permanent partial disability.
4. On May 6, 2003, the claimant sustained a compensable injury to her right wrist, in the form of a strain or sprain and de Quervain's tenosynovitis.
5. There is no dispute, at the present time, over the claimant's entitlement to medical services at the respondent's expense for these compensable injuries. All such expenses have or are being paid.
6. The respondent has properly paid temporary total disability benefits for the

period beginning August 20, 2003, and continuing through September 30, 2003.

7. The claimant is entitled to additional temporary total disability benefits for the periods beginning May 7, 2003 and continuing through May 11, 2003, beginning again on May 15, 2003 and continuing through August 19, 2003, and beginning again on October 1, 2003 and continuing through November 12, 2003. Specifically, during these periods of time the claimant continued within her healing period from the effects of her compensable scheduled injury and had not returned to employment.
8. The respondent has failed to prove by the greater weight of the credible evidence that, during any of the foregoing periods, the claimant unjustifiably refused suitable employment. Thus, she is not barred from receiving these temporary total disability benefits by the provisions of Ark. Code Ann. §11-9-526.
9. During a portion or all of the periods for which she has been awarded additional temporary total disability benefits, the claimant has received group disability benefits in the weekly amount of \$270.00. Pursuant to Ark. Code Ann. §11-9-411, the additional temporary total disability benefits, herein awarded, must be reduced (dollar for dollar) by these weekly group disability benefits. However the respondent shall reserve an amount sufficient to satisfy the subrogation interest of the group disability carrier for a period not to exceed five years.
10. The respondent has controverted the claimant's entitlement to the additional temporary total disability benefits herein awarded.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein

awarded. This fee is to be calculated prior to the set off provided by Ark. Code Ann. §11-9-411.

ORDER

The respondent shall pay to the claimant additional temporary total disability benefits for the periods of May 7, 2003 through May 11, 2003 and from May 15, 2003 through August 19, 2003, and from October 1, 2003 through November 12, 2003. These amounts shall be reduced by the gross weekly amount of any group disability benefits paid to the claimant during these same periods.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded, without consideration to the reduction provided by Ark. Code Ann. §11-9-411. One-half of this fee is the obligation of the respondent in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondent from such benefits.

The respondent remains liable for the expense of all reasonable and necessary medical services required for the claimant's compensable injury.

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

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

The respondent shall reserve an amount equal to that necessary to satisfy the group carrier's subrogation interest, pursuant to Ark. Code Ann. §11-9-411. Should no Order be obtained from this Commission providing for the distribution of those funds for a period of five years, this amount shall be paid to the Death & Permanent Total Disability Trust Fund of the State of Arkansas.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

