

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F402206

**JUDY REEVES,
EMPLOYEE**

CLAIMANT

**ARLINGTON HOTEL CO., INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

**ARKANSAS HOSPITALITY
WORKERS' COMPENSATION TRUST;
CROCKETT ADJUSTMENT,
BENEFITS ADMINISTRATORS**

RESPONDENT

OPINION FILED OCTOBER 13, 2004

Hearing conducted July 20, 2004, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. William K. Moritz, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant and

Mr. Gail O. Matthews, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's contention that she should be awarded additional temporary total disability benefits from the date of injury, January 11, 2004, through February 15, 2004, when surgery was performed for her admittedly compensable right shoulder injury. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant was not entitled to additional temporary total disability benefits because she was not totally incapacitated to earn wages during the period in question.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to her right shoulder January 11, 2004; and her wages entitled her to a compensation rate of \$188.00 per week for total disability.

3. The preponderance of the evidence fails to show that the claimant is entitled to the requested temporary total disability benefits.

DISCUSSION

The claimant, 61 years of age at the time of the hearing, had been employed about 7½ years as a waitress by the respondent employer when she slipped and fell in the kitchen, injuring her right shoulder, on January 11, 2004.

The claimant was given medical attention and diagnosed as having suffered a torn rotator cuff, which was surgically repaired February 16, 2004, by Dr. Bruce L. Smith, Jr., a Hot Springs orthopedic surgeon. The respondents initiated payment of temporary total disability benefits concurrent with the claimant's surgery but declined to pay benefits prior to surgery during the period now in question. Accordingly, the claimant has requested the benefits described above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual

determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Here, because temporary total disability benefits are requested, the claimant must prove that the compensable injury caused total incapacity to earn wages during the healing period, a two-part requirement. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244 (1981). The first part of the requirement, a showing that the claimant remained in the healing period, is confirmed by the respondent's medical evidence.

However, the witness of the respondent and the medical record indicates that the claimant was permitted to attempt light duty employment prior to her surgery on February 16, 2004, and, further, that the employer offered to accommodate the claimant in this regard. This includes testimony of Maria Viertbauer, her office notes, and records such as those of Dr. Michael Atta, which by January 16, 2004, indicated the claimant could return to work with restrictions such as no reaching above shoulder or over the head. By January 21, the notes of the nurse case manager indicated that the patient knew light duty work was available but did not feel like going to work. Indeed, the claimant did not attempt to perform light duty work during this period, even though the respondents had offered to provide her with a ride to work. The claimant's testimony varied about whether the offer of a ride to work was extended to her. However, the preponderance of the evidence tends to show that it was. Had she accepted the offer, but unsuccessfully attempt to return

to work, her claim may have been strengthened. However, as noted above, such conjecture and speculation on behalf of the claimant is not sufficient to prove her entitlement to benefits. Thus, the preponderance of the evidence of record fails to support a finding that the claimant was totally incapacitated to earn wages, the second requirement for entitlement to temporary total disability benefits.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge