

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312557

MELIA FENDLEY	CLAIMANT
PEA RIDGE SCHOOL DISTRICT	RESPONDENT
RISK MANAGEMENT RESOURCES INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 17, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 31, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 2, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. The June 12, 2004, opinion is final.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional temporary total disability from August 24, 2004, to a date to be determined.

2. The claimant's entitlement for reimbursement for the income tax which she was required to pay on her long and short term disability benefits.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is entitled to temporary total disability and that her attorney is entitled to an award on the full amount of the temporary total disability awarded.

In regard to the foregoing issues the respondents contend that they have paid all benefits which they were ordered to pay.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1. The parties submitted medical information which is marked Joint Exhibit No. 1. The respondents submitted a letter dated August 26, 2004, marked Respondents' Exhibit No. 1 and amended medical records marked Respondents' Exhibit No. 2. All these records were admitted without objection.

#### DISCUSSION

The parties have previously stipulated that the claimant sustained a compensable injury to her right ankle on September 26, 2003, and after a hearing held on April 13, 2004, an opinion was entered on June 21, 2004, ordering that the respondents pay additional medical treatment for this claimant subsequent to January 9, 2004, and further found that she was entitled to temporary total disability from November 13, 2003, to a date to be

determined subject to the provisions set forth in Ark. Code Ann. §11-9-411.

The claimant testified that she underwent surgery on her right ankle in April 2004 but continued to have problems with her ankle due to the hardware in her ankle hindering the movement of the tendons. The claimant testified that she underwent physical therapy following this first surgery, further noting that it was at least six weeks before she could bear weight on her right foot. The claimant testified that her physical therapy continued on into her second ankle surgery which was done on November 15, 2004. The claimant testified that the reason for this second surgery was because the hardware was in an awkward position in her heel and it hindered the Achilles tendon from stretching normally. The claimant testified that this second surgery involved removing the hardware from her ankle and again she was to be off her feet with no weight bearing for two weeks then to start trying to put pressure on her foot as she could tolerate. The claimant testified that when she could begin to bear some weight on her foot the doctor had her begin physical therapy again and that she is still doing physical therapy both professionally as well as at her home as recommended by her doctor. The claimant testified that she is still under her doctor's care and has not been released noting that she has an appointment with her doctor on June 15, 2005.

The claimant testified that to her knowledge her group carrier is paying the medical bills for her compensable injury. The

claimant testified that she has received bills for the deductible amounts for her medical care from her group carrier.

The claimant testified that she has never received by-weekly checks from her workers' compensation carrier for temporary total disability benefits. The claimant did agree that she received a lump sum payment sometime around August 2004 but she has not received anything since. The claimant testified that she has been drawing short term and then long term disability benefits and to her knowledge these have not been reimbursed by the workers' compensation carrier. The claimant testified that she has had to pay taxes on her long term and short term disability benefits in the amount of \$1,654.00. The claimant was asked if she anticipated her doctor releasing her and the claimant responded that she expected to be released on June 15, 2005.

On cross examination, the claimant testified that she has drawn approximately \$10,000.00 in long term disability benefits. The claimant testified that she has not turned over any of her medical bills to the workers' compensation carrier or to the respondent. The claimant testified that she no longer has to wear a support boot but does wear orthotic devices in her shoes. The claimant testified that these orthotic devices are an insole which the doctor has prescribed. The claimant testified that she spends her day rehabing her foot which she does twice a day and then she does just normal home functions such as cleaning the house and doing laundry. The claimant testified that her only child is in daycare from 8:00 to 4:30 each day. The claimant testified that

she does go to physical therapy twice a week and that each session is about an hour long. The claimant explained that her home rehab consists of running in her neighborhood, walking, working with weights, doing balance exercises, toe raises, pilates, working with an exercise ball as well as incline running and jogging for stability of her ankle. The claimant testified that she can drive and has no problem driving.

On redirect examination, the claimant testified that she feels as though she has given full effort to her rehabilitation efforts and that she has done everything her physical therapist has asked her to do. The claimant testified that she is still experiencing muscle atrophy and that this affects her balance.

The medical records set forth that the claimant underwent reconstruction surgery to her right foot on April 16, 2004, by Dr. Ruth Thomas. Dr. Thomas writes on August 18, 2004, that the claimant is now weight bearing and wearing a regular shoe for the past month and she is in physical therapy. Dr. Thomas notes that the claimant is concerned that she does not have dorsiflexion when she tries to roll over her foot and she does not feel like her calf muscle is firing appropriately. An EMG was scheduled and she was encouraged to continue her strengthening program. Dr. Thomas notes that there is obvious asymmetry with the left measuring 12.5 cm and the right 10.75 cm. Dr. Thomas writes again on October 27, 2004, that the claimant reports that she is having terrible pain in the posterior aspect of the calcaneus. The claimant further reports that if she touches this area, it hurts and anything she tries to

do causes a tightness in the area. X-rays taken revealed a complete healing of the calcaneal osteotomy. Dr. Thomas recommended that the screws be removed so that they could get rid of the residual pain. Surgery was scheduled. Dr. Thomas performed surgery on the claimant's right ankle on November 15, 2004, to remove two screws from her right ankle. The claimant was released from the hospital following her surgery with instructions to bear weight as tolerated and to return for removal of bandages and stitches in two weeks. The claimant was instructed to return for a follow up visit on April 19, 2005. Dr. Ruth Thomas writes on April 27, 2005, that she has reviewed the claimant's chart noting that she underwent reconstruction surgery of her right foot on April 16, 2004. Dr. Thomas notes that at the claimant's last visit with her on March 27, 2005, the claimant demonstrated two centimeters of atrophy of her right calf when compared with the non operative side. Dr. Thomas writes that she feels the claimant could have performed some type of employment if it did not require the full strength of her operated calf. Dr. Thomas notes that sitting and teaching would have been appropriate but that physical activities such as gymnastics and running would not be appropriate.

After a review of this matter, I find that the claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability from August 24, 2004, until March 27, 2005. The medical records set forth and the claimant has testified that she was under active physical therapy rehabilitation in August 2004 and experiencing problems with the hardware which

had been used in her reconstructive surgery. The medical records also set forth that the claimant underwent additional surgery to relieve her discomfort on November 15, 2004. Dr. Thomas does however note that the claimant, on March 27, 2005, should be able to perform some employment services such as sitting and teaching, however, not being able to do gymnastics or running. The claimant, by her testimony, has indicated that she is able to run as a part of her home exercise program at least by the time of the scheduled hearing on May 31, 2005. Therefore, I find that the claimant was capable of doing some sedentary to moderately sedentary type work subsequent to March 27, 2005, as indicated by Dr. Thomas. The respondents, however, should pay temporary total disability to this claimant from August 24, 2004, to March 27, 2005.

I find, however, the claimant is not entitled to a reimbursement for the income tax which she has paid on her long term disability benefits. There is no provision in Arkansas law for reimbursement for this type expense.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. The June 12, 2004, opinion is final.
3. The claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability from August 24, 2004, until March 27, 2005. See discussion above.

4. The claimant has failed to prove her entitlement to the reimbursement of her income tax which she paid on her long term disability benefits. See discussion above.

5. The respondents have controverted this claimant's entitlement to additional benefits.

6. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

#### ORDER

The claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability from August 24, 2004, until March 27, 2005.

The claimant has failed to prove that she is entitled to be reimbursed for the income tax which she paid on her long term disability benefits.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such 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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE