

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403869

SHERRY ROARK, EMPLOYEE	CLAIMANT
POCAHONTAS NURSING & REHABILITATION, EMPLOYER	RESPONDENT
AIG CLAIM SERVICE, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 6, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on December 9, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted December 9, 2004, to determine the claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on October 20, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to some clarification as set out below. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including April 9, 2004; that the claimant sustained a compensable, low back

injury on said date; that she earned sufficient wages to entitle her to compensation rates of \$200.00 per week for temporary total disability and \$154.00 per week for permanent partial disability; that respondents paid temporary total disability through May 14, 2004, at which time the claimant was released to return to light-duty employment; that respondents have continued to pay all appropriate medical and related benefits, to date; and that the respondents had controverted all indemnity benefits after May 14, 2004. At the hearing, it was pointed out that respondents paid temporary total disability until April 28, 2004, at which time the claimant was released to return to light-duty employment and that she in fact returned, and was provided light-duty employment, until her termination on May 14, 2004.

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the claimant's healing period has ended, as well as claimant's entitlement to additional, temporary total disability.
- 2) Whether the claimant is entitled to benefits pursuant to Ark. Code Ann. §11-9-505.

Claimant contended, in summary, that following her release to light-duty employment, she was terminated for missing work on days that were previously approved and that her termination was unreasonable, entitling her to full salary pursuant to Ark. Code Ann. §11-9-505 or, in the alternative, that she was entitled to temporary total disability benefits because her employer refused to provide her with suitable, light-duty work. The claimant requested a controverted attorney's fee

on any disability benefits awarded.

The respondents contended that all appropriate benefits had been paid and were continuing to be paid; that the claimant was released to light-duty by her treating physician and that light-duty was made available for the claimant by her employer, but that the claimant failed and/or refused to attend light-duty work and was, therefore, deemed to have self-terminated on May 14, 2004. Respondents contended that the claimant was not entitled to additional temporary total disability and that A.C.A. §11-9-505 benefits were not appropriate in this claim.

The claimant testified in her own behalf. Pamela Murphy, the administrator for the employer, was called as a witness by the respondents. The record is composed solely of the transcript of the December 9, 2004, hearing containing numerous exhibits.

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 are hereby accepted as fact.

3. The claimant had not reached maximum medical improvement at the time of the within hearing.
4. The claimant has failed to prove that she was totally disabled within the meaning of the Arkansas Workers' Compensation Laws after May 14, 2004.
5. The provisions of Ark. Code Ann. §11-9-505(a)(1) do not apply in the instant claim.
6. Respondents have paid all appropriate benefits to which the claimant is entitled, to date, including, but not limited to appropriate, reasonably necessary medical treatment which was continuing at the time of the within hearing. Respondents have not controverted medical treatment, to date.
7. Issues not addressed herein, including, but not limited to claimant's entitlement to permanent disability benefits, if any, are specifically reserved.

#### DISCUSSION

The relevant facts in this case are basically undisputed. The claimant sustained an admitted, compensable low back injury on April 9, 2004. Respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment and have continued to pay related treatment through the date of the hearing. In addition, the record reflects that respondents paid appropriate temporary total disability through April 28, 2004, at which time the claimant was released to return to restricted work which the employer provided. The claimant

was provided with suitable light-duty employment by respondents through May 14, 2004, at which time she was terminated for cause by the employer. The only factual dispute is whether the claimant's termination was justified. This issue was apparently already addressed in a different forum after the claimant filed a claim for unemployment benefits which were denied. I feel compelled to point out that there is no allegation of retaliatory discharge in this claim as provided under A.C.A. §11-9-107. As will be set out further below, the provisions of A.C.A. §11-9-505 simply do not apply. Further, although it appears that the claimant remains within her healing period, she cannot prove entitlement to temporary total disability.

#### 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).

The claimant, Sherry Roark, began working for the respondent on March 29, 2004. She was hired as a Certified Nurses Assistant (CNA), her primary duties consisting of patient care. Again, it is undisputed that the claimant slipped and fell on April 9, 2004, resulting in a low back injury. The claimant returned to work for the employer at light-duty on April 28, 2004, and continued working through the date of her termination on May 14, 2004. As previously pointed out, the only factual dispute was whether the claimant's termination was justified. Rather than conduct an exhaustive analysis of the testimony of either the claimant or respondents' administrator, suffice it to say that the claimant was terminated for un-excused

absences from work. The claimant applied for unemployment compensation which was denied both at the hearing level, as well as on appeal. This reflects that an appropriate agency has determined that the claimant's termination was for cause. The claimant candidly acknowledged that she has been ready, willing, and able to perform light-duty work since her termination. The record further reflects that the claimant has previously performed clerical work which is clearly within the restrictions imposed upon the claimant by her treating physicians. In view of the claimant's relatively low compensation rates, her prior work experience, as well as her course of conduct indicating that she was capable of working up until the date of her termination, and continues to be ready, willing, and able to work, she has failed to prove entitlement to temporary total disability under the workers' compensation laws. (Tr.19-20, 32)

Alternatively, claimant maintains that she is entitled to full salary pursuant to Ark. Code Ann. §11-9-505. This section which provides for additional compensation under certain circumstances is set out below:

(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.

In order to prove entitlement to benefits pursuant to Ark. Code Ann. §11-9-502(a)(1), the employee must establish (1) that she sustained a compensable injury; (2) that suitable employment within her physical and mental limitations was available

with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work was without reasonable cause. *Torrey vs. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In the instant case, there is no credible evidence that the employer ever refused to return the claimant to work. In fact, suitable employment was made available within the claimant's physical limitations until the date of claimant's termination for cause. The claimant has failed to establish that her termination was unjustified and that she is entitled to a salary continuation pursuant to the aforementioned section. The claimant has failed to prove that her termination is relevant to the issues presented for determination. After full consideration of the facts, issues, and the law, it is hereby concluded that the claimant has simply failed to show that she is entitled to additional benefits beyond those previously paid and currently being paid by the respondents. Accordingly, this claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

---

DAVID GREENBAUM  
Chief Administrative Law Judge