

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F606103

**LORETTA S. DOUCETTE,
EMPLOYEE**

CLAIMANT

**ARKANSAS VALLEY
FARMERS ASSOCIATION,
SELF-INSURED EMPLOYER**

RESPONDENT

**AGRI GROUP-COMP
SELF-INSURED FUND,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED DECEMBER 29, 2006,

Pursuant to a hearing conducted October 5, 2006, before Administrative Law Judge Richard B. Calaway in Russellville, Pope County, Arkansas, with

Mr. J. Gary Davis, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the claimant's request for additional temporary total disability benefits, primarily because of surgery and physical therapy for her admittedly compensable left shoulder injury of April 17, 2006 .

The claimant contended that, as the result of her compensable shoulder injury, she should be awarded additional benefits for temporary total disability for several periods beginning April 18 and ending June 6, 2006. She also requested temporary partial disability benefits from June 26 through July 30, 2006, due to her attendance at physical therapy sessions during that time. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant is not entitled to additional temporary disability benefits. Specifically, they contended that light duty work was made available to the claimant

immediately following the accident and continuing into October, 2006, when the claimant received a fully duty release. They further contended that from April 18 through April 26, 2006, the employer did not have off-work notes from any physician showing that the claimant should be taken off work. They also contended that from June 26 until a date after July 30, 2006, the employer continued to make light duty work available for the claimant and had time available for her to make up the time she lost as a result of physical therapy, but the claimant elected not to make up the time she had missed in order to undergo physical therapy. They contended that the claimant was released by her physician to return to work immediately following arthroscopic surgery May 11, 2006, and that she performed light duty employment until May 18, 2006, when she advised the employer that she was not able to work because of high blood pressure, unrelated to her compensable injury. Finally, they contended that the employer continued to make available light duty work that was appropriate in light of her compensable injury.

The record, which included documentary evidence and the testimony of the claimant, Julie Thomas, and Tammy Fincher at the hearing, was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-705(c).

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 suffered a compensable left shoulder injury April 17, 2006; and her average weekly wage was \$320.66.

3. The preponderance of the evidence fails to show that the claimant lost sufficient time from work due to total incapacity to earn wages during her healing period to be entitled to benefits for temporary total disability.

4. The record shows that the claimant is entitled to benefits for temporary partial disability for time lost due to her attendance at physical therapy from June 26 through July 30, 2006.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

On April 17, 2006, the claimant, 68 years of age at the time of the hearing, suffered a torn left rotator cuff when she slipped on a moist floor at the employer's convenience store and fell, hitting her left side and shoulder on a steel shelf, as she attempted to enter a walk-in cooler.

With the employer's permission, the claimant, who was in pain, received medical attention at the emergency room of Chambers Memorial Hospital in Danville. The associated medical record indicates that she was complaining of problems with her left shoulder and left hip and that she was x-rayed and given pain medication, as well as an appointment to see Dr. Russell Allison of Arkansas Orthopaedic Institute in Russellville the next day. At that time, Dr. Allison diagnosed her shoulder condition as a left rotator cuff tear. He performed arthroscopic surgery on her shoulder May 11,

2006, and prescribed physical therapy in June. The claimant has requested benefits for temporary disability, as noted 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).

Following her visit with Dr. Allison on April 18, the claimant took vacation time and did not work until April 27. She stated that she was hurting so bad that she needed some time to see what her condition was like. However, she admitted that Dr. Allison had given her a note that she could perform one-handed work when he saw her April 18 but that she elected to take vacation time and receive her regular paycheck, rather than attempt any one-handed work which might be available for her. After taking vacation time, the claimant worked from April 27 through May 10, the date before her shoulder surgery.

On May 11, 2006, Dr. Allison performed arthroscopic surgery on the left shoulder, debriding the glenohumeral joint, repairing the rotator cuff, and decompressing the subacromial space. On

May 11, 2006, he wrote that the claimant was not able to return to full activities at work. The form also stated that modified activities were “no use left arm”. Discharge paperwork indicated that the claimant was to wear an arm sling for support, to perform exercises, and not to drive until released by the doctor, but that the claimant “may shower.”

After surgery on May 11, the claimant stayed in the hospital May 12, 2006, and also missed the weekend days of May 13 and May 14, her regular days off. Her first scheduled day back at work was Monday, May 15, but the claimant did not go because she was feeling bad and decided she could not make it. The record indicates that this could be related to her problems with high blood pressure or to the effects of surgery.

After working light duty at the cash register on May 16 and May 17, the claimant sought medical attention on May 18. On cross-examination, claimant admitted that she had been having problems with blood pressure for several years. In fact, a week before her injury at work, the claimant had consulted her physician and was found to have high blood pressure.

A note from the Plainview Clinic of Plainview, Arkansas, dated May 18, 2006, indicated that the claimant was suffering from high blood pressure and would be seen in one week and that she was not to work until further notice. The claimant and her daughter gave testimony that they thought that the claimant’s blood pressure problems had been made worse by medication recommended by Dr. Allison.

The claimant returned to work June 7 and, when she saw Dr. Allison on June 23, he recommended physical therapy. Physical therapy began June 6 and continued through August 4, 2006. The claimant took her physical therapy in the morning and then went to work during this time, usually for three days a week for an hour and a half. This diminished her work week until she

changed to the night shift July 31 and received her normal hours. Thus, her claim for temporary partial disability benefits runs from June 26 through July 30, when she worked the day shift. The respondent's representative testified that the claimant could have made up the lost time if she had asked to do so. However, there was no indication that the employer actually offered extra time for the claimant, while the claimant did lose a small amount of time because of her physical therapy, for which she is entitled to temporary partial disability benefits.

As to the request for temporary total disability benefits, it should first be noted that disability benefits shall not be allowed for the first seven days, unless disability extends until the ninth day. Ark. Code Ann. §11-9-501. Here, the claimant was off work due to incapacity to earn wages during the healing period on April 18 when she saw her physician, on May 11 and 12, due to surgery and when she was in the hospital. There is insufficient proof that she was temporarily totally disabled during the vacation period from April 19 through April 26, since her physician had allowed her to attempt one-handed work which she failed to do. The record does not show that she was incapacitated to earn wages on the weekend of May 13 and May 14. Her absence from work on May 15 and from May 18 through June 6 appears to be related to a condition that pre-existed her injury at work, high blood pressure.

However, the record fails to show a sufficient connection between the claimant's injury and medication received for the injury and her blood pressure problems, which caused her to lose time from work following her surgery. The claimant's testimony as to her lost time prior to the surgery shows that she elected to take vacation time, rather than follow the doctor's instructions of returning to work after her initial evaluation. Thus, the record fails to show that the claimant missed sufficient

work because she was both in her healing period and totally incapacitated to earn wages, as required by the Act.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge