

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503175

JAMES A. ELLIOTT, Employee	CLAIMANT
WILLSTAFF CRYSTAL, INC., Employer	RESPONDENT
AMERICAN HOME ASSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED APRIL 11, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 8, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 16, 2005, and a pre-hearing order was filed on November 17, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to her left shoulder on February 4, 2005.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to temporary total disability benefits for the following periods: 2/10/05, 2/14/05 through 2/18/05, 2/21/05, 2/24/05, 3/02/05 through 3/30/05, and 4/01/05 to present, excluding six weeks of temporary total disability paid by the respondents.
2. Additional medical from Dr. Tomlinson, including an MRI scan.
3. Attorney fee.

At the time of the hearing the claimant modified his request for temporary total disability benefits in part to reflect those periods set out in Claimant's Exhibit Number 1. Claimant testified that Claimant's Exhibit #1 reflected dates he worked during the months of August and September 2005. Claimant seeks payment for the remaining dates as well as other dates as reflected in the original pre-hearing order. The parties also stipulated that claimant's entitlement to additional medical treatment is no longer an issue. Since the time of the pre-hearing conference the respondents have paid for an additional MRI scan and claimant has undergone a second surgical procedure. Furthermore, respondent has reinstated claimant's entitlement to temporary total disability benefits as of January 10, 2006.

The claimant contends he is entitled to temporary total disability benefits as set forth above.

The respondents contend they have accepted this claim as compensable and all appropriate benefits have been paid, including temporary total disability benefits for the appropriate periods.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 16, 2005, and contained in a pre-hearing order filed November 17, 2005, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary total disability benefits other than from the date of his first surgery in May 2005 and continuing through June 1, 2005. Respondent is entitled to a credit for any temporary total disability benefits previously paid.

FACTUAL BACKGROUND

The claimant is a 45-year-old man with an eleventh grade education who has primarily worked in construction and as an operator of heavy equipment. The claimant was employed by the respondent, a temporary employment agency, and sent to work as an assistant superintendent for May Construction in either late December 2004 or early January 2005.

On February 4, 2005 while working for respondent at May Construction the claimant suffered an injury to his left shoulder when he slipped and fell. Claimant reported the injury to his supervisor at May and also to the respondent. As a result, the claimant was sent by the respondent to Dr. Berestnev for medical treatment.

Dr. Berestnev's initial medical treatment occurred on February 11, 2005 at which time he assessed claimant's condition as a left shoulder sprain. Dr. Berestnev recommended exercises, medication, and light-duty work of no lifting more than 10 pounds with the left hand and the avoidance of work above the shoulder level. The medical records indicate that claimant continued to be evaluated by Dr. Berestnev and that he eventually ordered an MRI scan on February 25, 2005. Dr. Berestnev indicated that the MRI scan showed only mild degenerative changes and as a result released claimant to

regular duties on March 2, 2005.

Following his release by Dr. Berestnev claimant requested a change of physician which was granted to Dr. Tomlinson. Dr. Tomlinson had previously treated claimant for an injury to his right shoulder. Dr. Tomlinson's initial medical treatment for claimant's left shoulder injury occurred on May 23, 2005, at which time he diagnosed claimant as suffering from a rotator cuff strain. Dr. Tomlinson prescribed conservative care with physical therapy and released claimant to return to work with restrictions. When claimant's condition did not improve, Dr. Tomlinson reviewed the MRI scan and indicated that claimant might have a partial cuff tear which would require an arthroscopic evaluation. Claimant underwent an arthroscopic evaluation in May 2005 and he continued to receive follow up treatment from Dr. Tomlinson. Dr. Tomlinson eventually returned claimant to work without restrictions on August 10, 2005. Claimant subsequently returned to Dr. Tomlinson complaining of additional pain and Dr. Tomlinson reinstated work restrictions. On September 20, 2005, Dr. Tomlinson assigned the claimant a permanent physical impairment rating in an amount equal to 6% to the body as a whole. Subsequent to that date, the claimant continued to have problems with his left shoulder and eventually underwent a second surgical procedure which resulted in the reinstatement of temporary total disability benefits as of January 10, 2006.

Following his compensable injury the claimant initially returned to work for the respondent performing some light duty work. Some of this light duty work consisted of simply sitting in an office and filing. It also included the counting of cars which passed the respondent's place of business. Claimant last worked for respondent on March 31, 2005.

Claimant has filed this claim requesting temporary total disability benefits for several periods of time. Claimant acknowledges that respondent has paid six weeks of temporary total disability benefits.

ADJUDICATION

At the hearing a significant portion of the testimony dealt with light duty work offered to the claimant by the respondent and the events surrounding March 31, 2005, the date claimant last worked for the respondent.

The injury to claimant's shoulder is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury, the claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits for any period of time other than from the date of his first surgery through June 1, 2005.

Even finding that claimant remained within his healing period throughout the disputed periods of time, claimant still has the burden of proving by a preponderance of the evidence that he suffered a total incapacity to earn wages. I find based upon the medical opinions of Dr. Berestnev and Dr. Tomlinson that claimant has failed to meet that burden of proof.

As previously noted, claimant was originally evaluated by Dr. Berestnev on February 11, 2005. At that time Dr. Berestnev indicated that claimant could return to work with restrictions of lifting no more than 10 pounds with his left hand and the avoidance of work above shoulder level. Dr. Berestnev reiterated that claimant could continue working with those same restrictions in his reports of February 18, 2005 and February 25, 2005. According to claimant's testimony he did in fact return to work for the respondent performing some light duty work during this period of time.

On March 2, 2005, Dr. Berestnev authored a report indicating that claimant's

condition was improving. He also released claimant to his regular duties at that time. Because of his continued complaints of pain claimant requested a change of physician to Dr. Tomlinson. Claimant's initial medical treatment with Dr. Tomlinson occurred on March 23, 2005, at which time Dr. Tomlinson indicated that claimant could return to work within certain restrictions. Dr. Tomlinson indicated that claimant should not lift or carry more than 10 pounds with his left arm and should not work at or above shoulder level. Dr. Tomlinson's subsequent medical reports of April 20, 2005 and May 11, 2005 also indicate that claimant can continue working with these same restrictions. In his report of May 16, 2005, Dr. Tomlinson indicated that claimant was four days post surgery and that he was temporarily totally disabled. This condition existed until June 1, 2005 when Dr. Tomlinson indicated that claimant could again return to work with restrictions of no lifting or carrying more than two pounds with his left arm and no work at or above the shoulder level.

On June 22, 2005 Dr. Tomlinson increased claimant's lifting limit from two pounds to 10 pounds. Subsequently, in a report dated August 10, 2005, Dr. Tomlinson indicated that claimant could return to work without restrictions.

Because of claimant's continued complaints of pain, Dr. Tomlinson in a report dated August 24, 2005 again indicated that claimant could return to work with restrictions of no lifting or carrying more than 10 pounds and no repetitive work at or near the shoulder level. In a report dated September 20, 2005 Dr. Tomlinson assigned a permanent physical impairment rating and indicated that claimant could continue working with the same restrictions of no lifting or carrying more than 10 pounds and no repetitive work at or above the shoulder level.

Based upon the opinions of Dr. Berestnev and Dr. Tomlinson, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages for any requested period of time other than from the date of his surgery in May 2005 through June 1, 2005. According to Dr. Tomlinson's report of May 16, 2005,

claimant was totally incapacitated from earning wages at that time. However, that incapacitation only lasted until June 1, 2005, at which time Dr. Tomlinson again released claimant to return to work with restrictions. During all other time periods claimant's physicians were of the opinion that claimant could work with restrictions. Therefore, he did not suffer a total incapacity to earn wages.

The parties acknowledged that the respondent paid temporary total disability benefits for a six week period of time. Respondent is entitled to a credit for temporary total disability benefits previously paid.

In reaching this decision, I note that it only covers the period prior to January 10, 2006, the date at which the parties agree that respondent reinstated temporary total disability benefits as a result of a second surgical procedure by Dr. Tomlinson.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits other than for the period beginning on the date of his first surgical procedure in May 2005 and continuing through June 1, 2005, the date he was released to return to light duty work by Dr. Tomlinson. Respondent is entitled to a credit for six weeks of temporary total disability benefits previously paid to claimant. Claimant's claim for any additional temporary total disability benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE