

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510634

DONNA FERGUSON

CLAIMANT

HEALTHSOUTH

RESPONDENT

ACE AMERICAN INSURANCE,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED APRIL 20, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville,
Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith,
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on January 30, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on November 21, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the appropriate weekly compensation rates for total disability and permanent partial disability were agreed upon. There was also an agreement concerning the appropriate weekly benefits for the period of disputed temporary partial disability. Finally, the issues were amended to reflect that the claimant was only seeking temporary total disability benefits for the period of September 16, 2005 through September 30, 2005 and temporary partial disability benefits from October 1, 2005 through December 2, 2005. A copy of the pre-hearing order with these various amendments noted thereon, was made Commission's Exhibit

No. 1 to the hearing.

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

1. On January 27, 2005, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$466.00 for total disability and \$350.00 for permanent partial disability.
3. On January 27, 2005, the claimant sustained a compensable injury to her right shoulder.
4. There is no dispute over the payment of medical expenses, at present.
5. There is no dispute over the payment of temporary total disability benefits, accruing through September 8, 2005.
6. If the claimant is entitled to temporary partial disability benefits from October 1, 2005 through October 15, 2005, the appropriate weekly rate would be \$372.00; from October 16, 2005 through October 30, 2005, the appropriate weekly rate would be \$319.00, from October 31, 2005 through November 13, 2005, the appropriate weekly rate would be \$288.00; from November 14, 2005 through November 28, 2005, the appropriate weekly rate would be \$332.00; and from November 29, 2005 through December 2, 2006, the appropriate weekly rate would be \$270.00.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical treatment by Dr. Park.
2. The claimant's entitlement to temporary total disability benefits from September 16, 2005 through September 30, 2005 and temporary partial disability benefits from October 1, 2005 through December 2, 2005.
3. Appropriate attorney's fees.
4. Whether the claimant has unreasonably refused suitable employment.

In regard to these issues, the claimant contends:

"The claimant contends that she injured her right shoulder while catching a patient that was falling on January 27, 2005. When she grabbed the patient she injured her right shoulder leading to a surgical procedure. The respondent originally accepted and paid TTD benefits but has cut off all TTD benefits since September 8, 2005."

In regard to these issues, the respondents contend:

"Respondents have paid all benefits to which the claimant was entitled as a result of the compensable injury. Light duty in the form of chart review has been provided to the claimant at all times by the respondent/employer."

DISCUSSION

I. THE CLAIMANT'S ENTITLEMENT TO ADDITIONAL MEDICAL TREATMENT, AS RECOMMENDED BY DR. PARK

____As indicated by the pre-hearing order, the respondents have accepted liability for and have paid the expense of all medical services actually provided to the claimant, as of the date of the

pre-hearing order (November 21, 2005). This includes the medical services provided the claimant for her compensable right shoulder injury by and at the direction of Dr. Park. The only disputed medical service concerns additional physical therapy, which may have been recommended by Dr. Park after September of 2005. However, this service was never actually received by the claimant, due to the respondents' refusal to pay for this service. The burden rests upon the claimant to prove that this service remains "reasonably necessary" for her compensable right shoulder injury at the present time.

The records of Dr. Park reveal that, on September 8, 2005, he recommended two weeks of physical therapy. His report of September 29, 2005, indicates that the claimant had received the previously prescribed physical therapy. Thus, it would appear that these services were included in those which have already paid by the respondent. In his clinic note of September 29, 2005, Dr. Park indicated that the claimant was to "continue working with stretch therapy." However, I am unable to tell from this statement whether Dr. Park was referring to formal physical therapy or to home exercises, which he had also been simultaneously prescribing for some period of time.

In his clinic note of November 15, 2005, Dr. Park stated that the claimant's range of motion in her right shoulder was "gradually" improving without formal physical therapy. He also stated that it was his opinion it had taken the claimant "much longer than other patients" to regain this range of motion because

she had not been able to go to “true physical therapy in a guided program.” However, this statement is somewhat inconsistent with the fact that Dr. Park also noted a substantial return of the range of motion of the claimant’s shoulder in his previous progress notes and the fact that the claimant had actually received a relatively lengthy program of “formal” physical therapy. On this visit, Dr. Park recorded the claimant’s complaints only as “significant aching” in the shoulder area. He recommended that the claimant continue at light duty and continue to work on her home stretching exercises. The claimant was directed to return for follow up in three months.

The last medical report or record from Dr. Park consists of a certificate to return to work which was dated November 30, 2005. In this document, Dr. Park released the claimant to return to a 40 hour work week but continued his restrictions on the use of her right arm.

The respondents have offered the narrative reports of two orthopaedic surgeons, a Dr. David H. Trotter and a Dr. Thomas S. Muzzonigro. Although both of these physicians appear to be board certified orthopaedic surgeons (similar to Dr. Park), neither of these physicians have actually seen or evaluated the claimant. Instead, these physicians have based their opinions on a review of the claimant’s medical reports and records. At the respondents’ request, these physicians have given their opinions in response to particular questions posed by the respondents. One of these questions was the reasonableness and necessity of previously

provided and continuing medical treatment for the claimant's compensable right shoulder injury by Dr. Park.

In his narrative report of September 15, 2005, Dr. Trotter concluded that the medical services provided to the claimant for her right shoulder difficulties, through July 29, 2005, likely represented reasonably necessary medical services for the compensable shoulder injury. Dr. Trotter also concluded that July 29, 2005 was the apparent end treatment date for the compensable injury of January 27, 2005. He further stated that it was his opinion the claimant no longer appeared to have any "ongoing condition directly or indirectly related" to the compensable injury, after July 29, 2005. Finally, he found no further indication for "ongoing diagnostics, office visits, medication, injections, DME's, club memberships, pain management, therapy modalities, work hardening/work conditioning, and/or any future surgical intervention" would be reasonably necessary after that date in regard to the "apparent completely resolved condition."

The medical evidence presented in this claim does not support Dr. Trotter's conclusions. The July 29, 2005 record, to which Dr. Trotter appears to refer and upon which he obviously relied has not been introduced. There is no medical evidence presented to indicate that the claimant's compensable right shoulder injury had "completely resolved" by July 29, 2005. Apparently, the respondents also lacked confidence in Dr. Trotter's opinion, as they continued to provide the claimant with medical services, after July 29, 2005.

In his report of October 26, 2005, Dr. Mozzonigro opined that continuing "formal" physical therapy was not reasonably necessary for the claimant's compensable injury, at the time of this report (October 26, 2005). He further stated that, as the claimant was now four months out from her surgery, it was his opinion that she was capable of advancing to a home exercise program.

At the hearing, the claimant testified that she still wanted more formal physical therapy services, particularly exercises and electrostimulation. She stated that she believed these services had been beneficial, in the past, and would thus be beneficial, at the present time. However, there is simply no direct evidence that Dr. Park or any other medical expert continues to believe that additional physical therapy would, at the present time, have a reasonable expectation of improving the claimant's difficulties.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence, that continued medical services, in the form of formal physical therapy, are currently medically appropriate or would have a reasonable expectation of accomplishing their intended purpose or goal of either resolving the actual physical damage caused by the claimant's compensable injury or even reducing the magnitude of the symptoms and complaints this injury may be continuing to produce. The fact that such services may have been medically appropriate in the distant past and the claimant's belief no matter how sincere that they may still be beneficial, is not sufficient to prove that such medical services would currently

be reasonably necessary or now have a reasonable expectation of accomplishing any beneficial purpose. While Dr. Park obviously felt that such formal physical therapy was reasonably necessary or medically appropriate in September of 2005, and possibly even November 15, 2005, there is simply no evidence that this continues to be his expert medical opinion at the present time. On the other hand, two other orthopaedic surgeons have clearly expressed the opinion that such medical services would not be medically appropriate or reasonably necessary, at the present time.

II. TEMPORARY TOTAL DISABILITY BENEFITS FROM SEPTEMBER 16, 2005 THROUGH SEPTEMBER 30, 2005

The next issue concerns the claimant's entitlement to temporary total disability benefits for the period of September 16, 2005 through September 30, 2005. In order to be entitled to these benefits, the claimant must prove by the greater weight of the credible evidence two factual requirements. First, she must show that she continued within her healing period from the effects of her compensable right shoulder injury. Secondly, she must show that she was rendered temporarily totally disabled from all regular gainful employment, as a result of the effects of this compensable injury.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the claimant has received the maximum benefit of time and medical treatment in regard to the resolution or stabilization of

the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved, or at least stabilized, the mere continuation of chronic symptoms and complaints is not sufficient, in and of itself, to extend the healing period.

The medical reports and records of Dr. Park show that the claimant continued under his active medical treatment during the period of September 16, 2005 through September 30, 2005. During this period, he provided the claimant with treatment in the form of physical therapy, oral medication, rest, and a localized injection. All of these services were clearly directed toward resolving or stabilizing the claimant's actual physical injury, rather than merely treating chronic symptoms.

The narrative report of Dr. Muzzonigro does not give any expert opinion on when the claimant's healing period from the effects of her compensable shoulder injury had or should end. However, his opinion that the active medical treatment provided to the claimant by and at the direction of Dr. Park (prior to the date of his October report) was reasonably necessary for the claimant's compensable injury, would strongly imply that it was his opinion that the claimant's healing period continued through this time. His statement that the claimant should, at that time, be capable of advancing to a home exercise program (rather than formal physical therapy) would only indicate that he believed that formal physical therapy was no longer medically appropriate or reasonably necessary for the claimant's compensable injury. It cannot be implied from

this statement that it was his expert opinion that no further medical services, whatsoever, or even time would offer a reasonable expectation of improving the damage caused by the compensable injury. Clearly, his recommendation of continuing treatment in the form of a home exercise program would imply that he believed that such exercises and time could reasonably be expected to provide some further improvement.

I recognize that Dr. Trotter has, on some basis, concluded that the claimant had experienced a full and complete resolution of all of the effects of her compensable right shoulder injury by July 29, 2005. However, (as previously noted) the medical reports and records upon which he appears to have relied have not been introduced into evidence. On the other hand, the medical reports and records of Dr. Park and Dr. Muzzonigro which have been introduced are clearly contrary to this conclusion by Dr. Trotter. I simply do not find that Dr. Trotter's conclusion that the claimant's healing period had ended and her difficulties from the compensable injury of January 27, 2005 had totally resolved to be supported by the evidence presented and entitled to any weight and credit.

After consideration of all the medical evidence presented, it is my opinion that the greater weight of this evidence shows that the claimant continued within her healing period from the effects of her compensable right shoulder injury from September 16, 2005 through September 30, 2005. Thus, she has proven the first element necessary for her entitlement to temporary total disability

benefits during this period.

In regard to the second element of actual total disability, the claimant testified that, for two weeks prior to September 8, 2005, she had been working part-time limited duty for the respondent and drawing temporary partial disability benefits. It was her testimony that, although she was given an essentially one-handed position, she could not keep her injured right arm “propped up” and that her pain in her right arm and shoulder would increase with any movement. She testified that when she returned to Dr. Park, on September 8, 2005, he again restricted her from engaging in any type of employment. The claimant stated that for the period between September 8 and September 16, 2005, she continued to be paid her regular wages, under the respondent’s sick leave program. Finally, she testified that she returned to part-time employment with the respondent, when she was released to do so by Dr. Park, on September 29, 2005.

In his clinic note of September 8, 2005, Dr. Park noted a reported increase in the claimant’s right shoulder pain and difficulties. However, he recorded that the claimant’s light duty position “requires a lot of usage of the arm just at the site area.” This description is inconsistent with the claimant’s testimony that her light duty position required only the use of her left arm. However, based upon this information, Dr. Park again took the claimant entirely off work. He stated that this would allow her to concentrate on physical therapy and to allow her arm “to rest completely.”

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that her compensable right shoulder injury totally disabled her from continuing in the part-time light duty position provided her by the respondent before September 8, 2005 and after September 29, 2005. Clearly, the evidence indicates that this part-time position would have allowed her ample opportunity to obtain the increased physical therapy recommended by Dr. Park. The claimant's description of this light duty position does not indicate that it required "a lot of the usage" of her right arm or shoulder, but in fact indicates that it required no "usage" of her right arm and shoulder. Thus, it would not appear necessary for her to cease performing this position in order to "completely" rest her right shoulder and arm. I am also at a loss to understand why the claimant could not "elevate" her right arm, at work, during her brief periods of part-time employment, as well as she could at home. The evidence further fails to show that performing this part-time limited employment position would result in any more "movement" of her right shoulder and arm, than would be involved in the day-to-day activities of her normal home life.

Thus, the claimant has failed to satisfy the second element necessary for her entitlement to temporary total disability benefits, during the period of September 16, 2005 through September 30, 2005. Her failure to prove this necessary element prevents an award of temporary total disability benefits for this period.

III. TEMPORARY PARTIAL DISABILITY BENEFITS

The final issue concerns the claimant's entitlement to temporary partial disability benefits during the period of October 1, 2005 through December 2, 2005. The burden again rests upon the claimant to prove her entitlement to these benefits. The claimant must also prove two essential factual elements in order to be entitled to these benefits. Again, she must prove that she continued within her healing period from the effects of her compensable right shoulder injury. Secondly, she must prove that she experienced an actual loss or reduction in her wages that was caused by the effects of her compensable right shoulder injury.

In regard to the first of these factual elements, the medical evidence shows that the claimant continued under active medical treatment for her compensable right shoulder injury by Dr. Park through at least November 15, 2005. In his clinic note of that date, Dr. Park noted continued improvement in the claimant's symptoms and limitations, but in no way indicated that the claimant's compensable injury has, at that time, resolved or even stabilized. In fact, his report implied that he expected the claimant to continue to improve and that her symptoms were expected to completely resolve at some future date. These statements would clearly support the conclusion that the claimant's healing period continued, at that time. In this report, he directed the claimant to maintain her home stretching exercises and to return for follow up in approximately three months.

In a notation, dated November 30, 2005, Dr. Park released the claimant to return to a 40 hour work week at limited duty. However, he again gave no indication that the claimant's compensable injury has resolved or even stabilized.

Once again, I have given no weight or credit to the opinion of Dr. Trotter that the claimant's healing period from the effects of the compensable injury ended on July 29, 2005. The reasons for this are heretofore stated in this Opinion. As previously stated, I find the records and reports of Dr. Park and Dr. Muzzonigro to support the conclusion that the claimant continued to require time and some degree of medical treatment in order to resolve or stabilize the physical damage from her compensable shoulder injury through some time after November 15, 2005.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the medical evidence that she continued within her healing period from the effects of her compensable right shoulder injury from October 1, 2005 through December 2, 2005. Thus, she has established the first factual element necessary for her entitlement to temporary partial disability benefits during this period.

As previously indicated, the claimant testified that any use of her right arm and shoulder prior to November 30, 2005, would cause her increased pain. In light of the nature and extent of the claimant's compensable injury and the surgical reconstruction it required, significant restrictions on the claimant's use of her right shoulder and arm would be reasonably expected. As recognized

by the Appellate Courts, an injured employee cannot be required to perform an employment position that would result in significantly increased pain.

The reports and records of Dr. Park reveal that, during the period of October 1, 2005 through December 2, 2005, it was his expert opinion that it was medically appropriate and reasonably necessary to restrict the claimant's use and movement of her injured right shoulder and arm, in order to facilitate healing and avoid additional injury. Again, in light of the nature and extent of the claimant's compensable injury, such restrictions would appear reasonable and appropriate.

However, I am somewhat puzzled as to Dr. Park's reason to limit the claimant to a "part-time" position during this period. No explanation for this action can be ascertained from the records introduced. I would note that it appears that this restriction is similar to that imposed by Dr. Park, when he released the claimant to return to light duty in August of 2005. Although none of his reports and records from this period have been tendered, it would appear that they contained some rationale basis for the limitation to part-time work, as the respondents accepted liability for and actually paid temporary partial disability benefits during this prior period. Again, it must be noted that Dr. Park is a highly competent orthopaedic surgeon with particular expertise in the area of treatment of shoulder injuries and conditions. I am not inclined to readily assume that he would impose restrictions and limitations that did not have some sound medical basis.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant's actual reduction in wages, during the period of October 1, 2005 through December 2, 2005, were the result of the temporary restrictions and limitations on her potential employment activities by her compensable right shoulder injury of January 27, 2005. Thus, the claimant has proven the second essential element for her entitlement to temporary partial disability benefits during this period.

The parties have stipulated to the appropriate weekly compensation benefits for temporary partial disability during the period of October 1, 2005 through December 2, 2005. The claimant would be entitled to benefits for temporary partial disability during this period in the appropriate weekly amount.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 27, 2005, the relationship of employee-employer-carrier existed between the parties.
3. On January 27, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$466.00 for total disability and \$350.00 for permanent partial disability.
4. On January 27, 2005, the claimant sustained a compensable injury to her right shoulder.
5. There is no dispute over the payment of medical expenses

for medical services provided through at least the date of the pre-hearing conference.

6. The claimant has failed to prove that the physical therapy recommended by Dr. Park, apparently on September 29, 2005, represent reasonably necessary medical services for her compensable shoulder injury. While such services may have been “reasonably necessary” at that time, they were not provided, and the greater weight of the credible evidence fails to show that they continued to be “reasonably necessary” for the claimant’s compensable injury, at the present time.
7. There is no dispute over temporary total disability benefits accruing through September 8, 2005.
8. The claimant has failed to prove by the greater weight of the credible evidence that she was entitled to temporary total disability benefits for the period of September 16, 2005 through September 30, 2005. Although the claimant has proven that she continued within her healing period from the effects of her compensable right shoulder injury, during this period, she has failed to prove that she was temporarily rendered totally disabled from performing all forms of regular gainful employment as a result of the disabling effects of this compensable injury for this period.
9. The claimant has proven by the greater weight of the credible evidence that she was rendered temporarily

partially disabled by her compensable shoulder injury for the period of October 1, 2005 through December 2, 2005. Specifically, she has proven by the greater weight of the evidence that, during this period, she continued within her healing period from the effects of her compensable injury and experienced an actual reduction in her weekly wages, as a result of the effects of this compensable injury.

10. For the period of October 1, 2005 through October 15, 2005, the appropriate weekly temporary partial disability benefit rate is \$372.00. For the period of October 16, 2005 through October 30, 2005, the appropriate weekly temporary partial disability benefit rate is \$319.00. For the period of October 31, 2005 through November 13, 2005, the appropriate weekly temporary partial disability benefit rate is \$288.00. For the period of November 14, 2005 through November 28, 2005, the appropriate weekly temporary partial disability benefit rate is \$332.00. For the period of November 29, 2005 through December 2, 2005, the appropriate weekly temporary partial disability benefit rate is \$270.00.
11. The respondents have controverted the claimant's entitlement to the physical therapy recommended by Dr. Park on or about September 29, 2005. The respondents have controverted the claimant's entitlement to temporary total disability benefits for the period of September 16,

2005 through September 30, 2005, and temporary partial disability benefits from October 1, 2005 through December 2, 2005.

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary partial disability benefits herein awarded.

ORDER

The respondents remain liable for all reasonably necessary medical services required by the claimant for her compensable right shoulder injury of January 27, 2005. However, for the reasons heretofore set forth in this Opinion, the claimant's request for medical services, in the form of the physical therapy recommended by Dr. Park on or about September 29, 2005, must be denied.

For the reasons heretofore set forth in this Opinion, the claim for temporary total disability benefits for the period of September 16, 2005 through September 30, 2005 must be and hereby is denied and dismissed.

The respondents shall pay to the claimant temporary partial disability benefits at the appropriate weekly rates for the period of October 1, 2005 through December 2, 2005.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary partial disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this is to be withheld by the respondents from such benefits.

All benefits 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.

MICHAEL L. ELLIG
Administrative Law Judge