

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108770

LAURINE R. FRAYER, EMPLOYEE	CLAIMANT
HAWORTH, INC., EMPLOYER	RESPONDENT
FEDERAL INSURANCE COMPANY, c/o CHUBB INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 8 , 2006

Hearing before Chief Administrative Law Judge David Greenbaum on March 24, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant appeared, *pro se*.

Respondents represented by Mr. David D. Hoffman, Attorney-at-Law, Monticello, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 24, 2006, to determine whether the claimant is entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on March 15, 2006, and a Prehearing Order was filed on said date. In addition, the claim has a lengthy procedural history and was the subject of a prior prehearing conference as reflected by a Prehearing Order filed January 3, 2006, at which time the claim was originally scheduled for a hearing on February 10, 2006, which was cancelled at the claimant's request in order to allow her additional time to obtain supplemental medical reports. At the March 15, 2006, prehearing conference, the parties agreed to waive the ten (10) day notice requirement in order to expedite the hearing

process. At the March 24, 2006, hearing, the parties stated that the stipulations, issues, as well as their respective contentions, were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record.

During the prehearing conference, as well as the hearing, the claimant was advised of her right to legal representation; that an attorney could not charge her a fee for representing her in a workers' compensation claim without approval of this Commission; that fees were normally awarded only out of benefits obtained in her behalf and that she would only be responsible for a portion of the fee if an attorney was successful in obtaining benefits for her. In addition, the claimant was advised that she had the burden of proving her claim; that she was only entitled to one hearing; and that, for any reason, if she was unsuccessful, she could not request a second hearing on the issues presented, maintaining that the reason for her failure to prove the claim was due to a lack of legal representation. The claimant elected to proceed in her own behalf.

It was stipulated that the employment relationship existed between the parties at all relevant times, including July 17, 2001; that the claimant sustained a compensable injury to her right upper extremity on said date; that her average weekly wage was \$392.00 which would yield compensation rates of \$261.00 per week for both temporary total disability and permanent total disability and \$196.00 per week for permanent partial disability; that respondents paid various medical and

indemnity benefits; and that respondents had controverted all benefits beyond those previously paid.

By agreement of the parties, the issues presented for determination included:

- 1) Respondents' responsibility for reimbursement of authorized medical bills, specifically, for treatment by Dr. Stacey Noel, as well as any valid referrals by Dr. Noel, together with continued, reasonably necessary medical treatment.
- 2) The claimant's entitlement to permanent disability benefits.

Claimant contended, in summary, that respondents improperly terminated all medical treatment; that respondents should be directed and ordered to pay and/or reimburse her for any out-of-pocket medical expenses, as well as remaining responsible for continued, reasonably necessary medical treatment. In addition, the claimant contended that, as a result of her July 17, 2001, admitted injury, she had been rendered permanently totally disabled (pointing out that she had been declared totally disabled by the Social Security Administration); and that respondents should be held responsible for either temporary total disability or permanent total disability benefits.

The respondents contended that the claimant was released without any permanent impairment ratings and that she could not prove entitlement to either temporary total disability or permanent total disability benefits.

The claimant was the only witness to testify. The record is composed solely of the transcript of the March 24, 2006, hearing including a thirty-three (33) page functional capacity introduced by the claimant as "Exhibit A," together with a

seventy-six (76) page volume of medical records introduced by respondents as “Respondent Exhibit A” and retained in the Commission file in bound form.

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 claimant and to observe her 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. On or about July 17, 2001, the claimant sustained an injury to her right shoulder and/or upper extremity which arose out of and during the course of her employment with Haworth, Inc., at which time her average weekly wage was \$392.00, entitling her to compensation rates of \$261.00 per week for total disability benefits and \$196.00 per week for permanent partial disability benefits.
3. Respondents have controverted all benefits beyond those previously paid.
4. The claimant has failed to prove, by a preponderance of the evidence, that she is entitled to temporary total disability benefits.
5. The claimant has failed to prove, by a preponderance of the evidence, that she is entitled to permanent partial disability benefits and/or permanent total

disability benefits within the meaning of the Arkansas workers' compensation laws.

6. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to continued, reasonably necessary medical treatment for her admitted injury.
7. Respondents are responsible for payment of medical bills related to treatment for claimant's compensable injury, including, but not limited to reimbursement of medical bills by claimant's authorized treating physician, Dr. Stacey Noel, as well as for any valid referrals made by Dr. Noel, together with continued, reasonably necessary medical treatment.
8. Issues not addressed herein are specifically reserved for future determination.

#### DISCUSSION

This is an extremely unusual claim. The claim has been compromised, in part, because the claimant did not have the benefit of legal representation despite several admonitions concerning her rights, as well as her burden of proof. Even though the claimant was apparently approved for, and receiving Social Security Disability Benefits at the time of the within hearing, she has failed to satisfy the requirements of the Workers' Compensation Act necessary to establish entitlement to temporary total disability or permanent disability benefits, as will be discussed further below. The claimant has proven her entitlement to continued, reasonably

necessary medical treatment. Initially, respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with necessary medical treatment, as well as providing the claimant work within the restrictions imposed upon her by her authorized treating physicians. However, the record reflects that the employer subsequently terminated the claimant's employment on or about May 1, 2002. Thereafter, the record reflects that the respondent insurance carrier unilaterally terminated the claimant's medical treatment without reasonable grounds. The record reflects that prior to terminating medical treatment, the claimant did have the assistance of an attorney who apparently petitioned and obtained a change of treating physicians to Dr. Stacey Noel. However, claimant's former attorney then petitioned, and was permitted, to withdraw as attorney-of-record. After the claimant's employment was terminated, she retained the services of another attorney who she subsequently fired. The claimant then proceeded *pro se*.

The claimant, Laurine R. Frayer, is thirty-nine (39) years old. She has a high school education and has completed approximately two and one-half (2-1/2) years of college, but did not obtain a college degree. The claimant completed vocational training as a certified nurse's assistant; however, her certificate has since expired. The claimant has also received training in preparing various tax forms without a degree. She has also worked in sales and as a cashier. The claimant began working for Haworth, Inc., on or about October, 2000, on an assembly line. She

sustained an admitted, compensable injury on or about July 17, 2001, when while flipping a large panel holding fabric, she injured her right shoulder. The injury was immediately reported, at which time the claimant was provided modified work and allowed to continue working. The claimant was first examined and treated by the company physician, Dr. Michael Lack, with Occupational Health Partners in Jonesboro, Arkansas. Dr. Lack diagnosed a shoulder sprain/strain and allowed the claimant to continue working using her left hand only. Again, the employer had already provided the claimant with modified work which the claimant continued performing. Because of continued complaints, Dr. Lack subsequently referred the claimant to Dr. Thomas E. Day, an orthopedic surgeon in Jonesboro, Arkansas. Although the claimant's complaints involved progressive discomfort in her right shoulder and right upper extremity, Dr. Day was concerned about a possible cervical herniation. He ordered a CT scan and referred the claimant to Dr. Samuel E. Murrell, an orthopedic surgeon with Spine Memphis in Memphis, Tennessee. The claimant maintained that she, at all times, advised her treating physicians that her injury involved her right upper extremity and not her neck. She stated that a work-up of her back and neck revealed that nothing was wrong with her spine. The claimant pointed out that Charlie Clay, the employer's safety coordinator, accompanied her to all medical visits. She expressed concern over what she described as private conferences with the doctor concerning the lack of objective findings involving the neck, which, again, the claimant related she did not injure. It

is apparent that the claimant did not appreciate the fact that medical providers were attempting to exclude the cervical spine as the cause for her physical complaints.

The claimant next contacted an attorney and requested a change of physicians. The Workers' Compensation Commission authorized a one-time change of physician to Dr. Stacey Noel, a family practice physician in Paragould, Arkansas. The claimant was first examined and treated by Dr. Noel on January 16, 2002. Dr. Noel ran various diagnostic studies, including an MRI which revealed inflammation and fluid collection in the subcoracoid region. Dr. Noel treated the claimant conservatively with medications, injections, and physical therapy. The claimant continued working for Haworth through on or about May 1, 2002, at which time light-duty was no longer made available. The claimant pointed out that, at times, the employer required her to perform work outside the restrictions imposed upon her by Dr. Noel. The claimant stated that she received some disability benefits from the employer (perhaps short-term disability) beginning in May, 2002, and continuing until June 20, 2002, at which point her employment was terminated. The claimant remained under the care of Dr. Noel. Dr. Noel subsequently referred the claimant to Dr. Brian G. Dickson with Dickson Orthopedics in Jonesboro, Arkansas. Dr. Dickson recommended additional diagnostic testing and treatment in December, 2002, at which point respondents unilaterally terminated all medical treatment. (Tr.19-23)

The claimant has not returned to gainful employment since her termination in June, 2002. She stated that she applied for various jobs, but once she advised

prospective employers of her restrictions, they would not hire her. She pointed out that she worked three (3) days at Jordan's Quick Stop, but was let go because she could not perform all of the job duties. The claimant subsequently applied for, and began receiving, Social Security Disability. She maintained that although she would become Medicare eligible that her work-related injury was not covered by Medicare.

On cross-examination, respondents' attorney elicited substantial testimony to refute the claimant's request for either temporary total disability or permanent partial disability. However, it is equally clear from the cross-examination that the respondents unilaterally terminated all medical treatment without good cause, and failed or refused to permit diagnostic testing and treatment to be completed which was directed by the claimant's authorized treating physician or through referrals by claimant's authorized treating physician. Further, the record reflects that respondents also failed to reimburse the claimant for medical mileage as the result of her travel to Memphis, Tennessee, to be evaluated by Dr. Day, a physician selected by the employer. (Tr.41, 48)

Again, the record reflects that the claimant, at all times after her admitted injury in July, 2001, continued working for the employer herein because she was provided work suitable to the restrictions imposed upon her by all of the treating physicians. On cross-examination, the claimant candidly conceded that even Dr. Stacey Noel did not take her off work. In addition, the claimant has undergone two (2) separate Functional Capacity Evaluations. The first Functional Capacity

Evaluation apparently focused on any restrictions involving the claimant's cervical spine. Again, although the claimant continually questioned the reasons for any focus on the cervical spine when her primary complaint involved the right shoulder and right upper extremity, respondents were justified in eliminating the cervical spine as a source of the claimant's complaints. The claimant subsequently underwent a second Functional Capacity Evaluation which was suggestive of a lack of full effort, but, nevertheless concluded that even if valid, the claimant was capable of performing various work activities which was totally inconsistent with her claim for permanent total disability. The second Functional Capacity Evaluation was obtained by the claimant in support of her claim. It must be noted that the claimant stated that she did not know any of the recommendations or conclusions contained in the Functional Capacity Evaluation despite the fact that it was her exhibit. (Tr.51-58)(Cl. Ex. A)

The first issue presented for determination concerns respondents' responsibility for additional medical treatment. The claimant contends that respondents improperly terminated all medical treatment; that it should be directed and ordered to pay and/or reimburse her for any out-of-pocket medical expenses, together with remaining responsible for continued, reasonably necessary medical treatment. A review of the medical evidence supports this portion of the claim.

Compensability is undisputed. The claimant was first examined and treated by the company doctor, Dr. Michael Lack. Dr. Lack first examined the claimant on

July 17, 2001. The claimant's primary complaint concerned pain in the right shoulder which she reported, "pops and burns." Upon physical examination, Dr. Lack was able to hear and feel the pop. Dr. Lack diagnosed a sprain/strain of the right shoulder. He permitted the claimant to return to work. She was limited to left hand jobs only, with the restrictions intended to allow for spontaneous recovery and time to build activity tolerance through exercise. Dr. Lack prescribed medications and referred the claimant to physical therapy for evaluation and treatment. (Resp. Ex. A, pp.1-4)

Because of increased complaints, including swelling and numbness in the right extremity, Dr. Lack subsequently referred the claimant for an orthopedic consult to Dr. Thomas E. Day with Arkansas Orthopedics in Jonesboro, Arkansas. Dr. Day was concerned about a possible cervical herniation. He ordered a CT scan to rule out cervical disc herniation. The claimant was next referred by Dr. Day to Dr. Sam Murrell, an orthopedic surgeon with Spine Memphis, again, to rule out a cervical herniation due to the claimant's progressive complaints of developing pain radiating down her arm into the thumb, index, and long fingers with paresthesias and numbness. Suffice it to say that Dr. Murrell ruled out any disc herniation, but opined that the claimant had underlying degenerative disc disease of the cervical spine. He released the claimant to return to work with restrictions and without assessing any permanent impairment as the result of the work-related injury. (Resp. Ex. A, p.27)

It must be noted that prior to his release, Dr. Murrell referred the claimant for a Functional Capacity Evaluation which was interrupted to suggest a minor level of symptom magnification. The evaluation concluded that the claimant was capable of performing medium physical demand work. She was allowed to continue working with restrictions. (Resp. Ex. A, pp.27, 33-35)

The claimant subsequently petitioned, and received, a change of treating physicians to Dr. Stacey Noel. The claimant first saw Dr. Noel on January 16, 2002. Dr. Noel diagnosed A.C. joint sprain. He ordered an MRI of the right shoulder to evaluate any tendon and joint pathology. The MRI showed a significant amount of fluid around the claimant's coracoid process in the area of claimant's biceps tendon. Dr. Noel elected to proceed with intra-articular dose of steroids while permitting the claimant to work light duty with no repetitive motion involving the right shoulder. (Resp. Ex. A, p.40)

Dr. Noel continued to treat the claimant conservatively. He opined that the claimant reached maximum medical improvement on March 22, 2006. Although Dr. Noel pointed out that he did not assess disability rating, he imposed permanent restrictions on the claimant's work activities, specifically, no lifting more than twenty (20) pounds and no repetitive motion involving the right arm. The claimant returned to Dr. Noel on both April 19, 2002, and June 21, 2002. On June 21, 2002, the claimant complained of increased symptoms, specifically, numbness in the first finger and thumb which she requested be evaluated while, at the same time,

pointing out that she had recently been terminated from her job. Dr. Noel continued to follow the claimant through November 4, 2002, at which time he referred the claimant to Dr. Chan for nerve conduction studies. The claimant stated that she was referred to Dr. Brian Dickson in December, 2002; however, no report relative to said visit is contained in the medical records. The record does reflect that the claimant was seen by Dr. Ron Schechter, an orthopedic surgeon at Paragould Orthopedics, on March 14, 2002, by referral from Dr. Noel. As previously pointed out, the claimant had been referred to Dr. Kenneth Chan for nerve conduction studies in November, 2002. The claimant was initially evaluated by Dr. Chan on December 2, 2002, at which time Dr. Chan recommended EMG/NCV studies of the right upper extremity. Dr. Chan opined that the claimant had some rotator cuff injury, most likely infraspinatus tendonopathy and needed further investigation by an orthopedic surgeon, but was waiting approval of the workers' compensation carrier before proceeding. (Resp. Ex. A, pp. 74-76)

The claimant was referred to Dr. Dickson for evaluation on August 4, 2003. Interestingly, his examination revealed crepitus and popping with abduction and internal rotation of the right shoulder, also observed by Dr. Lack. Dr. Dickson recommended an MRI arthrogram or possibly a diagnostic arthroscopy to determine whether there was a tear or impingement in the claimant's right shoulder which was never accomplished because respondents had previously terminated all medical treatment. (Resp. Ex. A, pp.72-73)

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Rather than conduct a further analysis of the medical evidence, suffice it to say that the claimant has shown, by a preponderance of the credible evidence, that she continues to experience problems involving her admitted, compensable right shoulder injury, and that she is entitled to follow-up diagnostic testing, as well as additional treatment. Respondents were not justified in terminating claimant's medical treatment. Respondents are responsible for all outstanding medical expenses, including, but not limited to reimbursing the claimant for any out-of-pocket medical, as well as for mileage reimbursement in obtaining medical treatment from all authorized treating physicians or by referral from authorized treating medical providers.

The claimant also contends that she has been rendered totally disabled as

the result of her admitted injury and that respondents should be held responsible for either temporary total disability or permanent total disability benefits.

The claimant's contention is simply not supported by the record as a whole.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department vs. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson vs. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"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).

Clearly, the claimant cannot prove entitlement to temporary total disability. The record reflects that the claimant continued working for almost one year following her admitted injury. Admittedly, the claimant was provided work by the employer herein within the physical restrictions imposed upon her by various treating physicians. Nevertheless, her work history is inconsistent with a claim for total disability. Further, two (2) Functional Capacity Evaluations reflect that the

claimant is capable of performing work in light-duty capacity and medium-work capacity.

The claimant has also failed to prove, by a preponderance of the evidence, that she is entitled to permanent total disability benefits. I recognize that the claimant testified that she has been declared disabled by the Social Security Administration. First, any determination by the Social Security Administration is not binding upon this Commission. Further, it cannot be determined by the record what physical conditions were taken into consideration in awarding the claimant benefits. Even the initial narrative report from Dr. Lack reflects that the claimant was taking medications for unrelated problems at the time of his evaluation of the claimant's shoulder problems. Finally, the claimant has the burden of proving her entitlement to permanent partial disability benefits, including wage-loss disability. Our Supreme Court has previously held that the Commission and Courts cannot award permanent partial disability benefits and wage-loss disability in the absence of a percentage rating for permanent physical impairment. *See, Wal-Mart Stores, Inc., vs. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000).

The claimant was, at all times, advised of her right to legal representation. She was further advised that she had the burden of proving her entitlement to medical treatment and disability benefits. The claimant offer no medical evidence assessing permanent impairment. Accordingly, in the absence of an impairment rating, she is not entitled to permanent disability benefits.

I feel compelled to point out that the record does reflect that the claimant was terminated by the employer while under the care of an authorized treating physician.

Ark. Code Ann. §11-9-505 provides, in part:

(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.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

The claimant elected to proceed *pro se*. As reflected above, the claimant has failed to prove entitlement to temporary total and/or permanent partial disability benefits. The issues addressed herein are those specifically raised by the parties. Additional issues are, by necessity, specifically reserved. The claimant has proven entitlement to additional medical treatment. The parties are encouraged to communicate and amicably resolve any and all disputes without the necessity of further hearings and protracted litigation. In view of the foregoing, I hereby make the following:

#### AWARD

Respondents, Federal Insurance Company and Chubb Insurance Corporation, are hereby directed and ordered to pay and/or reimburse to the claimant any out-of-pocket medical expenses provided by authorized medical

providers and by referral of authorized medical providers, including, but not limited to reimbursement of prescription medications, travel expenses in obtaining medical treatment, and other associated treatment, and respondents remain responsible for continued, reasonably necessary medical treatment.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge