

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412281

PATRICIA GRIGSBY, EMPLOYEE	CLAIMANT
CHAMPION PARTS, EMPLOYER	RESPONDENT
EMPLOYERS INSURANCE COMPANY OF WAUSAU, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 20, 2006

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on June 28, 2006, at Texarkana, Miller County, Arkansas.

Claimant represented by HON. GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by HON. MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 28, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on April 5, 2006, and a Prehearing Order was entered on April 6, 2006. A copy of the April 6, 2006, Prehearing Order was marked as Commission Exhibit No. 1 and made a part of the record herein, without objection, subject to the modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including November 2, 2004.
- 3) The claimant's applicable temporary total disability rate is \$221.00 per week, and her applicable permanent partial disability rate is \$166.00 per week.
- 4) The claimant sustained compensable right shoulder and right arm injuries on November 2, 2004, for which some benefits have been paid.
- 5) The claimant reached maximum medical improvement regarding her compensable right shoulder and right arm injuries on November 29, 2005.
- 6) Parties agreed the claimant was underpaid temporary total disability benefits in the amount of \$31.00 per week in temporary total disability benefits paid prior to the date of the full hearing. Parties agreed the respondents would make up the difference, and that statutory attorney's fees would attach to the deficient amount.
- 7) Parties agreed the respondents accepted claimant's 7% impairment rating, but paid the rating at the rate of

\$154.00 per week instead of the now stipulated \$166.00 per week. Parties agreed the respondents would make up the difference and that statutory attorney's fees would attach to the deficiency.

- 8) Parties stipulate respondents are entitled to an A.C.A. 11-9-411 offset for any benefits claimant received through the employer sponsored short term or long term disability plan.
- 9) All issues not addressed herein are hereby reserved.

At the prehearing conference, the parties outlined several issues to be litigated at the full hearing; however, at the full hearing the parties resolved most of the outstanding issues and agreed the only issue that needed to be addressed at the full hearing was whether the claimant is entitled to additional temporary total disability benefits related to her admittedly compensable right shoulder and right arm injuries for the period of April 30, 2005 through July 27, 2005, plus attorney's fees.

With regard to the sole issue of additional TTD, the claimant contends she is entitled to additional temporary total disability benefits related to her stipulated compensable injuries for the period of April 30, 2005 through July 27, 2005, plus attorney's fees.

The respondents contend the claimant is not entitled to additional TTD benefits related to her stipulated compensable injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A. §11-9-704.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that she was within her healing period and totally incapacitated from earning wages for 7.8 weeks between the period of April 30, 2005 and July 27, 2005.
- 4) Therefore, the claimant has proven by a preponderance of the evidence that she is entitled to an additional 7.8 weeks of temporary total disability benefits related to her stipulated compensable injury, plus the maximum statutory attorney's fees.
- 5) Respondents are entitled to an offset pursuant to A.C.A. §11-9-411 for any long or short term disability payments

made to the claimant between April 30, 2005 through July 27, 2005.

- 6) Respondents have controverted all benefits sought herein.

DISCUSSION

I. HISTORY

The claimant worked for the respondent-employer as a production worker on November 2, 2004. The parties agree the claimant sustained compensable right shoulder and right arm injuries due to her employment on November 2, 2004.

The medical records contained in the record indicate the claimant first treated with Dr. Iqtidar Khan on November 4, 2004, regarding her compensable injuries. On November 4, 2004, Dr. Khan first recommended Tylenol #3, and requested a follow-up visit four days later. On November 8, 2004, the claimant had a follow-up visit with Dr. Khan wherein he recommended physical therapy. After trying physical therapy, the claimant returned to Dr. Khan with a lot of pain and, as a result Dr. Kahn recommended an MRI of the claimant's right shoulder. On November 23, 2004, the claimant underwent an MRI of her right shoulder which produced the following impression.

- "1) Lateral canal stenosis with comma shaped neer type III acromion and thickened supraspinatus tendon with myxoid degeneration consistent with neer stage I of tendinopathy.
- 2) Subcromion subdeltoid bursitis.
- 3) Probable mild adhesive capsulitis.
- 4) Other pertinent positive and negative findings are noted above. (JX-1, pg. 18)

After the MRI, Dr. Khan referred the claimant to Dr. Soeller for intra-articular injection on December 16, 2005. Dr. Soeller found "no evidence of a full thickness tear," but did find a positive impingement sign. (JX-1, pg 24) Thereafter, Dr. Soeller proceeded with right shoulder injection on December 16, 2004.

The claimant treated with Dr. Khan again on December 21, 2004, continuing to complain of pain. Dr. Khan referred the claimant to Dr. Dickson for further evaluation of her pain. (JX-1, pg. 26). On January 7, 2005, the claimant met with Dr. Dickson; however, since Dr. Dickson did not have the claimant's MRI reports, he did not treat her. (JX-1, pg. 32) The claimant continued to treat with Dr. Khan, who released her to return to work effective March 1, 2005, (JX-1, pg. 39), and then again released her back to work on March 18, 2005. (JX-1, pg. 47)

The claimant was referred to Dr. Charles Pearce, who evaluated the claimant on April 14, 2005. Dr. Pearce diagnosed the claimant with "Right shoulder pain-probable shoulder strain with overuse, " (JX-1, pg. 62), and released the claimant to work with no lifting over ten pounds and no overhead work with right arm. Dr. Pearce recommended against surgery in his April 14, 2004, report. The claimant continued to treat with Dr. Khan, and on April 20, 2005, the claimant reported to Dr. Khan her right shoulder pain was a "25" on a scale of 1-10 . (JX-1, pg. 70) The claimant attempted to return to work per her doctor's restrictions; however, on April 26, 2005, the claimant requested a leave of absence due to her inability to work under the restrictions imposed. (JX-1, pg. 71)

On April 29, 2005, the claimant went to the St. Michael Hospital Emergency

Room. The report from St. Michael's regarding that visit stated the claimant "must follow-up with orthopedic specialist for release to work." (JX-1, pg. 72) On June 9, 2005, the claimant went to see Dr. Charles Pearce again with continued right shoulder pain. At that visit, Dr. Pearce requested an updated MRI of her right shoulder. (JX-1, pg. 78) On June 10, 2005, another MRI of claimant's right shoulder was performed and the following impression was stated:

"Small fullthickness tear of the supraspinatus tendon at the attachment to the greater tuberosity."
(JX-1, pg. 81)

Dr. Poteet issued an off work order to the claimant for the period of 6/17/05 through 6/21/05. (JX-1, pg. 83) Dr. Pearce saw the claimant on June 23, 2005, and recommended more physical therapy and returned her to work on left arm duty only. (JX-1, pg. 84 & 85)

In late July of 2005, the claimant developed back problems unrelated to this claim. The claimant continued her physical therapy for her right shoulder and on August 18, 2005, Dr. Pearce ordered right shoulder arthroscopy with rotator cuff repair and subacromial decompression (JX-1, pg. 125) On August 26, 2005, the claimant underwent the right shoulder surgery and on November 29, 2005, Dr. Pearce found her at MMI with regard to her right shoulder and assigned a 7% whole body impairment. (JX1, pg. 132) At the time of the full hearing the claimant reported her right shoulder was doing "okay." (T. pg. 32, lines 9-15)

II. Additional Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he/she suffered a total incapacity to earn wages. Arkansas State Highway & Transportation Dept. v. Breashears, 272 Ark. 244, 613 S.W. 2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W. 2d 582 (1982)

The claimant contends she is entitled to temporary total disability benefits from April 30, 2005, through July 27, 2005. The parties have already agreed the claimant sustained compensable right shoulder and arm injuries on November 2, 2004. The first question becomes whether the claimant was still within her healing period during the period of TTD requested. Undoubtedly, the evidence shows the claimant was still within her healing period from her admitted compensable injury. Dr. Charles Pearce, in his July 21, 2005 report, stated.

"She is not at maximum medical improvement."

Further, the record allows one to have the benefit of perfect hindsight. The second MRI of the claimant's right shoulder showed a tear, and thereafter surgery was recommended and conducted. Clearly, the claimant was attempting to work under the restrictions imposed upon her; however, the claimant credibly testified her right shoulder kept her from doing her work tasks at times during the requested period of TTD. I find

the claimant has proven by a preponderance of the evidence that she was still within her healing period for her compensable injuries for the period of April 30, 2005 through July 27, 2005. It must also be noted that the parties stipulated the claimant did not reach MMI for her right shoulder until November 29, 2005, well after the period of TTD requested.

I also find the claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages at certain times during the requested period of TTD benefits. The claimant acknowledged on the record at the full hearing that she worked on and off between April 30, 2005 and July 27, 2005, but that there were days in that time frame in which she was unable to work even within the restrictions imposed upon her by Dr. Pearce. (JX-1, pgs. 61 & 62) It must be noted that when Dr. Pearce released the claimant to return to work with restrictions, he also stated there was no indication for further diagnostic testing and/or surgery. (JX-1, pg. 61 & 62) We now know Dr. Pearce was wrong about the need for further tests and surgery, as the claimant did, in fact, require both. Even though the claimant did attempt to work with her torn shoulder, she should not be penalized for her effort. I find, and the claimant agreed on the record; however, that the claimant cannot be compensated for TTD benefits on the days she actually worked between April 30, 2005, and July 27, 2005. The Joint Exhibit at pages 134 and 135 show that the claimant worked twenty-four (24) days during the requested TTD period; thereby reducing claimant's TTD period from 12.60 weeks to 7.80 weeks. I do find the claimant is entitled to TTD benefits for 7.80 weeks of the 12.60 weeks between April 30, 2005 and July 27, 2005.

The claimant's testimony was very credible about her inability to engage in meaningful work during the requested TTD period. The claimant testified her shoulder medication made her so drowsy that she even cut her right arm while attempting to do her job under Dr. Pearce's work restrictions. (T. pg. 20, lines 15-24) And, as stated above, the medical evidence shows the claimant needed more tests and surgery while she was attempting to work between April 30, 2005 and July 27, 2005. Further, Dr. Poteet even took the claimant off work for several days during her requested TTD period. Therefore, based on the reasons outlined above, I find the claimant has proven by a preponderance of the evidence that she is entitled to an additional 7.80 of TTD benefits, which occurred between the period of April 30, 2005 and July 27, 2005. As stipulated, the respondents are entitled to an A.C.A. §11-9-411 offset for any long or short term disability payments made to the claimant during the requested TTD period.

AWARD

The claimant has proven by a preponderance of the evidence that she is entitled to an additional 7.80 weeks of temporary total disability benefits which accumulated between April 30, 2005 and July 27, 2005. The 7.80 weeks takes into account the excluded days the claimant actually worked during said period. The respondents are hereby directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusion of Law set forth herein.

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The claimant's attorney, Mr. Gregory Giles, is hereby awarded the maximum attorney's fee on all indemnity benefits controverted, pursuant to A.C.A. §11-9-715. All accrued sums shall be paid in lump sum, without discount, and this award shall bear interest at that legal rate until paid pursuant to A.C.A. §11-9-809.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

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