

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001912

PAMELA KILPATRICK,  
EMPLOYEE

CLAIMANT

SUCCESS STAFFING CORPORATION,  
EMPLOYER

RESPONDENT

ONE BEACON INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED NOVEMBER 27, 2006**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Batesville, Independence County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on September 5, 2006 in Batesville, Arkansas. A prehearing order was entered in this case on June 29, 2006. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The claimant was an employee of the respondent.
3. The claimant's date of injury was January 19, 2000.
4. The claimant's compensation rates are \$370 for total disability and \$278 for permanent partial disability.
5. All prior findings of the Commission are res judicata.
6. The respondents paid the claimant temporary total disability compensation from January 10, 2005 until February 10, 2005.

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

1. Prescription medications.
2. Claimant's entitlement to additional temporary total and/or temporary partial disability benefits, from when the respondents' termination of compensation on February 10, 2005, until October 13, 2005.
3. Controverted attorney's fee.

The record consists of the September 5, 2006 hearing transcript and the exhibits contained therein.

**DISCUSSION**

The claimant sustained injuries to her neck, back, and right shoulder on January 19, 2000, when the tractor trailer she was in flipped. Her team driver was behind the wheel, and the claimant was asleep in the back when the accident occurred.

The claimant did not return to work as a team driver. Instead, the claimant and her team driver opened a restaurant. In a deposition taken on July 25, 2006, Dr. John D. Allen, the claimant's treating orthopedist, testified that he performed surgery on January 10, 2005 on the claimant's rotator cuff. Dr. Allen testified that the claimant reached maximum medical improvement following surgery on October 13, 2005. Dr. Allen testified that if the claimant has a prescription with Dr. Allen's name on it, the prescription was for the claimant's shoulder. Dr. Allen testified that the claimant generally takes Ultracet and Tramadol.

The claimant testified that she worked at the restaurant until Dr. Allen performed surgery, but that her partner, Mary, performed all of the lifting. The claimant testified at the September 5, 2006 hearing that she has not returned to work anywhere since Dr. Allen's January 10, 2005

surgery. The respondents paid the claimant temporary total disability compensation for the period from January 10, 2005 until February 10, 2005. The claimant currently seeks additional temporary disability compensation from February 10, 2005, until October 13, 2005, when Dr. Allen opined she reached maximum medical improvement. In addition, the claimant seeks reimbursement for the Ultracet and Tramadol prescriptions that the respondents denied and that Mary (her partner) paid for.

**1. Unpaid Ultracet And Tramadol Prescriptions**

In the present case, the claimant has established through Dr. Allen's testimony that the claimant's Ultracet and Tramadol prescriptions were in fact prescribed for her shoulder (and any therapeutic benefit the drugs may have also provided for her back problems was therefore incidental). Dr. Allen's testimony regarding the post-surgical inflammation indicated on the claimant's post-surgical MRI, and Dr. Allen's testimony regarding pain associated with surgical scarring also persuade me that any prescriptions through the date of Dr. Allen's July 25, 2006 deposition were reasonably necessary for treatment of the claimant's shoulder injury and post-surgical condition.

## **2. Additional Temporary Disability Compensation**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary partial disability is that period within the healing period within which an injured employee suffers a decrease in her capacity to earn the wages that she was receiving at the time of the injury. Id. 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).

In the present case, Dr. Allen testified in his July 25, 2006 deposition that Ms. Kilpatrick reached maximum medical recovery for her shoulder injury on October 13, 2005. (Cl. Exh. 1 A p. 15-16). I find that Dr. Allen's unrebutted medical opinion establishes by a preponderance of the evidence that the claimant's post-surgical healing period for her compensable shoulder injury ended on October 13, 2005. Accord Bingle v. Quality Inn, \_\_\_ Ark. App. \_\_\_,

\_\_\_ S.W.3d \_\_\_ (CA04-1142 delivered October 11, 2006)[The Commission may not arbitrarily disregard a physician's opinion dating maximum medical improvement].

With regard to her ability or inability to work between her surgery on January 10, 2005 and her maximum medical improvement on October 13, 2005, Ms. Kilpatrick acknowledged at the hearing that she worked with a torn rotator cuff at the restaurant that she co-owns for five years before her January 10, 2005 surgery. Nevertheless, Ms. Kilpatrick testified that Mary did all of the lifting during that period. Ms. Kilpatrick testified that the business had three or four employees before her surgery, but now has six or seven part-time employees.

Ms. Kilpatrick testified that she has had to have somebody cook and do her work after surgery because she could not do it herself anymore. Ms. Kilpatrick testified that her shoulder now hurts too much to stand at the grill and move her arm to cook. She testified that no job at the deli is within her ten pound lifting restriction. Ms. Kilpatrick testified that she did not go back to the deli until September or October of 2005. Since that time, Ms. Kilpatrick goes down to the deli, talks to the customers,

answers the telephone, and supervises employees if they need it.

Nevertheless, I find on the record before me that the claimant has failed to establish by a preponderance of the evidence that she was incapacitated from returning to work at the deli from the time of surgery until October 13, 2005, as she asserts. In this regard, I point out that the claimant has not offered into evidence any medical reports prepared during the period from January 10, 2005 until October 13, 2005, contemporaneously documenting her post-surgical progress. The claimant has also not offered into evidence any off-work slips, if any were issued, for that period from Dr. Allen, her treating physician.

The claimant did offer Dr. Allen's July 25, 2006 deposition testimony, and Dr. Allen did testify that (1) Ms. Kilpatrick was required to perform a lot of heavy work at the deli, including lifting, pushing, and pulling, and (2) Ms. Kilpatrick would not have been able to do that type of work following surgery. (Cl. Exh. 1 A p. 10). I do not find credible Dr. Allen's testimony that Ms. Kilpatrick was unable to work at the deli after surgery for two reasons. First, I find Dr. Allen's opinion is based on a material mistake of fact. As discussed above, Ms. Kilpatrick's own

testimony acknowledges that she did not have to lift to work at the deli, because Mary did all of the lifting, and Ms. Kilpatrick was therefore able to work for five years at the deli before surgery under this arrangement. Second, even Dr. Allen acknowledged in his deposition the existence of a report (not in the record) from a therapist indicating that the patient had an excellent result, increased ranged of motion, and decreased pain. Dr. Allen also acknowledged that he (Dr. Allen) had also indicated at one point that Ms. Kilpatrick was doing great, and that Dr. Allen was going to let her go. (Cl. Exh. 1 A p. 27-28).

In reaching my conclusion that the claimant has failed to persuade me that she was incapacitated from working through October 13, 2005, I recognize that Dr. Allen obtained a post-surgical MRI (not in the record) which Dr. Allen has interpreted as indicating the presence of painful scar tissue and possible adhesive capsulitis. (Cl. Exh. 1 A p. 27). However, the questions posed on page 4 of Dr. Allen's deposition in combination with comments in Dr. Allen's June 8, 2006 office note, indicate to me that the MRI discussed in Dr. Allen's deposition was not performed until after June 8, 2006, some eight months after the end of

the post-surgical healing period at issue in this temporary disability claim.

In short, on this record, I find that the preponderance of the credible evidence establishes that the claimant was physically capable of returning to work after surgery at the deli that she co-owned under the same conditions she worked under for five years with a torn rotator cuff prior to surgery on January 10, 2005. I therefore find that the claimant has failed to establish any impairment to her wage earning capacity through October 13, 2005 as a result of her shoulder injury and surgery, except for the six week period immediately after surgery that Dr. Allen testified that Ms. Kilpatrick was restricted to only passive range of motion of her shoulder (Cl. Exh. 1 A p. 10-11). For that six week period, I note that the claimant was incapacitated from driving safely, and I therefore find that she was also completely incapacitated from returning to work for that six week period.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The claimant was an employee of the respondent.

3. The claimant's date of injury was January 19, 2000.

4. The claimant's compensation rates are \$370 for total disability and \$278 for permanent partial disability.

5. All prior findings of the Commission are res judicata.

6. The respondents paid the claimant temporary total disability compensation from January 10, 2005 until February 10, 2005.

7. The claimant established by a preponderance of the evidence that the Ultracet and Tramadol prescriptions which she has received, and which the respondents have refused to pay for, are reasonably necessary for treatment of her compensable shoulder injury.

8. The claimant established by a preponderance of the evidence that she was in her post-surgical healing period for her compensable right shoulder injury for the period from January 10, 2005 until October 13, 2005.

9. The claimant failed to establish by a preponderance of the credible evidence that she sustained any incapacity from returning to work at the deli which she co-owns for the period from January 10, 2005 until October

13, 2005, except for the six week period immediately following her January 10, 2005 surgery.

10. The claimant therefore established by a preponderance of the credible evidence that she is entitled to temporary total disability compensation for the six week period immediately following January 10, 2005; the claimant failed to establish that she is entitled to any period of temporary total or temporary partial disability beyond that six week period.

11. The respondents are entitled to a credit against their liability for the additional compensation awarded herein based on the temporary total disability benefits the claimant has already received for the period from January 10, 2005 until February 10, 2005.

**AWARD**

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983

S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to the maximum allowable statutory attorney's fee on the additional benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996) and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge