

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F507644

MAHDI NAMMARI, Employee	CLAIMANT
TYSON POULTRY, INC., Employer	RESPONDENT
TYNET, INC., Carrier	RESPONDENT

OPINION FILED JANUARY 10, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by M. MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

On December 12, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 26, 2005, and a pre-hearing order was filed on that same date. 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 employee-employer relationship existed between the parties on March 2, 2005.
3. The claimant sustained a compensable injury to his right lower extremity on March 2, 2005.
4. The claimant was earning an average weekly wage of \$400.00 which would entitle him to compensation at the weekly rates of \$267.00 for temporary total disability benefits and \$200.00 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 from March 30, 2005

through a date yet to be determined.

2. Claimant's entitlement to additional medical treatment.
3. Penalty pursuant to A.C.A. §11-9-802(c).
4. Attorney fee.

At the time of the hearing the parties agreed that respondent is currently providing medical treatment with Dr. Pleimann; therefore, there is no longer an issue as to claimant's entitlement to additional medical treatment.

The claimant contends that he is entitled to temporary total disability from on or about March 30, 2005 until a date yet to be determined. The claimant contends his attorney is entitled to an appropriate attorney's fee.

The respondents contend that the claimant is not entitled to temporary total disability benefits because light duty work within his restrictions was available at all pertinent times; that the claimant refused to return to work at available light duty positions; that the claimant has been non-compliant with his restrictions; and that no attorney's fee is due or appropriate.

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 October 26, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from March 30, 2005 through the date of the

hearing on December 12, 2005.

### FACTUAL BACKGROUND

The claimant suffered a compensable injury to his right foot on February 2, 2005 when it was struck by a ladder. Claimant received his initial medical treatment from Dr. Dunaway on March 3, 2005. Dr. Dunaway prescribed claimant a splint for his right foot and placed him on modified duty. Claimant was next evaluated by Dr. Dunaway on March 7, 2005, at which time Dr. Dunaway continued claimant on light duty and referred him to Dr. Aquilar, podiatrist. Claimant was seen by Dr. Aquilar on March 9, 2005 and diagnosed with a fracture of the Lisfranc's joint of the right foot and a contusion of the right fibula. Dr. Aquilar gave claimant a removable boot cast and completed a form indicating that claimant could return to light duty work as of that date. After that date the claimant continued to receive treatment from Dr. Aquilar over the next several months. On June 1, 2005, after claimant's condition did not improve, Dr. Aquilar recommended a surgical correction. Before that surgery was performed claimant was evaluated by Dr. Kelly, an orthopaedist, on September 1, 2005 for a second opinion. Dr. Kelly recommended that claimant undergo an evaluation by an orthopaedic foot specialist which resulted in his evaluation by Dr. Pleimann on September 14, 2005. Dr. Pleimann stated that he did not believe that the claimant had suffered a Lisfranc-type injury and indicated that he wanted to review an MRI scan to determine further medical treatment. In a report dated October 12, 2005, Dr. Pleimann indicated that he believed the claimant had contused the deep peroneal nerve which because of its position overlying a bony exostosis had remained hypersensitive. Dr. Pleimann recommended a surgical procedure to alleviate this condition.

Claimant has filed this claim contending that he is entitled to temporary total disability benefits as a result of his compensable injury. He seeks payment of temporary total disability benefits beginning March 30, 2005, and continuing through a date yet to be

determined. The claimant also requests a penalty pursuant to A.C.A. §11-9-802(c).

### ADJUDICATION

The claimant is requesting temporary total disability benefits beginning March 30, 2005 and continuing through a date yet to be determined. The injury which claimant suffered to his right foot is a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

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 meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits subsequent to March 30, 2005. This finding is made with the realization that Dr. Pleimann has recommended surgery for claimant which may result in a period of temporary total disability; however, this period will not be addressed in this opinion since surgery had not been performed as of the date of the hearing.

As previously noted, claimant's initial medical treatment was provided by Dr. Dunaway on March 3, 2005. At that time, Dr. Dunaway provided a splint for the claimant's ankle and placed him on modified duty of limited climbing. Claimant was next evaluated by Dr. Dunaway on March 7, 2005, at which time Dr. Dunaway indicated that claimant could continue performing light duty work until he was seen by a podiatrist on March 9, 2005.

Claimant's visit with a podiatrist, Dr. Aquilar, first occurred on March 9, 2005. At that time Dr. Aquilar diagnosed claimant's condition as a fracture of the Lisfranc's joint of his right foot and a contusion of the right fibula. Dr. Aquilar provided claimant with a removable boot cast and indicated that claimant should return for a follow-up visit in two

weeks. More importantly, Dr. Aquilar completed a form indicating that claimant was capable of returning to light duty work as of March 9, 2005. Claimant testified that he did return to light duty work for the respondent sweeping the cafeteria and wiping down tables. At some point claimant complained to the respondent that this job required him to stand and as a result claimant was given a sit-down job applying labels.

Claimant's next visit with Dr. Aquilar occurred on March 24, 2005. Dr. Aquilar's report of that date indicates that claimant should continue using the boot cast to stabilize his ankle and that claimant should continue performing his sit-down job.

Claimant testified that at some point the sit-down job applying labels began causing pain in his back due to sitting for extended periods of time. It is also at this point that Dr. Aquilar's medical reports regarding the claimant's ability to continue working for respondent become somewhat confusing and contradictory. As previously noted, Dr. Aquilar in his March 24 report indicated that claimant should continue performing his sit-down job. However, on March 30, 2005, Dr. Aquilar completed a form indicating that claimant needed to remain off work until April 25, 2005. No explanation was given by Dr. Aquilar for this change in claimant's work status and it does not appear that claimant saw Dr. Aquilar for an office visit on that date.

Claimant's next visit with Dr. Aquilar occurred on April 4, 2005, at which time Dr. Aquilar notes that claimant's fracture is healing and recommends a follow-up visit in three weeks. Dr. Aquilar made no mention of claimant's work status at the time of that visit.

Dr. Aquilar's form indicating that claimant should remain off work until April 25 becomes even more confusing when one considers his report of April 21, 2005. In his office notes of that date, Dr. Aquilar clearly indicates that not only is claimant continuing to work, but he also refuses to remove claimant from his sit-down job with the respondent.

He relates he is concerned about walking to the restrooms due to slipping on the slick floors and requested to be off work. I advised him that as

long as the nurses would accommodate him with the sit-down job he needed to ask them if maybe there is a different restroom for him to walk to that is not quiet [sic] as slick, but there is also gripping on the bottom of the boot to try to prevent slipping and that he may just have to be extra careful.

Claimant continued to see Dr. Aquilar for follow-up visits on May 5, May 17, June 1, and June 16, 2005. None of Dr. Aquilar's medical reports from those visits mentions any change in claimant's work status from the prior report of April 21, 2005.

Even more puzzling than Dr. Aquilar's completed form of March 30, 2005 is an undated form contained in the documentary evidence at Page 9 of Claimant's Exhibit Number 1. On that undated form, Dr. Aquilar indicates that claimant was unable to work beginning March 30, 2005 and continuing through August 26, 2005. The basis for Dr. Aquilar's completion of the form is unknown. Clearly, Dr. Aquilar's statement that claimant was totally disabled from working beginning March 30, 2005 is contrary to his specific discussion in his office report of April 21, 2005 in which he refused to take claimant off work as long as a sit-down job was provided to him by the respondent. Furthermore, according to claimant's own testimony Dr. Aquilar released him to return to light duty work as of May 5, 2005. Again, this would contradict the form completed by Dr. Aquilar.

At some point in time the claimant no longer worked for the respondent due to his termination for failure to return from a leave of absence associated with a non-work related condition in either March or April of 2005. It was claimant's testimony that he was unable to perform the sit-down job because of pain in his back caused by a non-work related condition.

Subsequent to the medical treatment of Dr. Aquilar claimant was evaluated by Dr. Kelly, an orthopaedist, for a second opinion. Dr. Kelly completed a form on September 1, 2005 indicating that claimant should continue his current work status. Dr. Kelly also referred claimant to Dr. Pleimann, an orthopaedic foot specialist. As previously noted, Dr.

Pleimann has recommended that claimant undergo a surgical procedure. On November 4, 2005, Tammy Ball, a claims adjuster for the respondent, wrote a letter to Dr. Pleimann inquiring as to claimant's work status. In a letter dated November 14, 2005 Dr. Pleimann responded to that inquiry indicating that claimant was capable of performing a light-duty job which involved "mainly sitting." Dr. Pleimann did go on to note that after claimant underwent surgery he would need to be off work for a period of time prior to returning to a sit-down job for a period before maximum medical improvement was reached.

I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 30, 2005. At the time of claimant's initial medical treatment from Dr. Dunaway, claimant was released to return to light duty work. When claimant initially came under the care of Dr. Aquilar, Dr. Aquilar likewise returned claimant to light duty employment. Respondent provided claimant with a job sweeping the cafeteria and wiping down tables. When claimant made complaints regarding that job respondent provided him a sit-down job applying labels. According to claimant's testimony the sit-down job caused his back to hurt. As of March 24, 2005 Dr. Aquilar indicated that claimant could continue performing his sit-down job. For some reason, Dr. Aquilar on March 30, 2005 completed a slip indicating that claimant needed to remain off work until April 25, 2005. No explanation was offered as to why Dr. Aquilar changed the work status of the claimant as of that date. Despite that slip, Dr. Aquilar in a report dated April 21, 2005 denied claimant's request to be taken off work. Instead, Dr. Aquilar indicated that claimant could continue performing the sit-down job as long as it was provided by the respondent. Subsequent medical reports from Dr. Aquilar do not indicate any change in claimant's work status. As previously noted, Dr. Aquilar did complete a form indicating that claimant was unable to work from March 30, 2005 through August 26, 2005.

I find that the March 30, 2005 form and the undated form of Dr. Aquilar taking

claimant off work from March 30, 2005 through August 26, 2005 are entitled to little weight when compared to the remaining medical evidence. First, both of those are fill-in-the-blank forms which were checked and signed by Dr. Aquilar. However, those forms specifically contradict more detailed narrative discussions of claimant's ability to work contained in Dr. Aquilar's office notes of March 24 and April 21, 2005. The fact that Dr. Aquilar in his April 21, 2005 report specifically refused to take claimant off work but instead indicated that he could continue performing a sit-down job as provided by the respondent is significant and in my opinion is more credible than a fill-in-the-blank form. Furthermore, I note that the form indicating that claimant should be off work beginning March 30 through August 26, 2005 is also contradicted by claimant's testimony that Dr. Aquilar returned him to light duty work as of May 5, 2005. Finally, with respect to claimant's ability to perform light duty work, I believe that the opinion of Dr. Pleimann, an orthopaedic surgeon, is credible and entitled to great weight. In response to questioning regarding the claimant's work status, Dr. Pleimann in a letter dated November 14, 2005 indicated that claimant could perform a light duty job performing mainly sitting until the time of his surgery. In my opinion, this opinion of Dr. Pleimann is consistent with the written office note reports of Dr. Aquilar dated March 24 and April 21.

Thus, while claimant may be entitled to temporary total disability benefits subsequent to surgery as recommended by Dr. Pleimann, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 30, 2005 through the date of the hearing. The credible medical evidence indicates that claimant's treating physicians returned him to light duty work at a sit-down job. Respondent provided claimant with a sit-down job applying labels which he subsequently refused to perform for non-work related reasons. Accordingly, claimant is not entitled to temporary total disability benefits at this time.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning March 30, 2005 and continuing through the date of the hearing. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE