

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603523

EVELYN AGUILAR	CLAIMANT
HERITAGE PARK NURSING CENTER	RESPONDENT
FIRST COMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 16, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 23, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on June 20, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to litigated and resolved at the present time. Prior to the commencement of the hearing, the parties agreed on the appropriate weekly compensation rates and the claimant identified the date on which she contended temporary total disability benefits should have commenced. A copy of the pre-hearing order with these 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. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On February 28, 2006, the relationship of employee-employer-carrier existed between the parties.
3. The appropriate weekly compensation rates are \$192.00 and \$154.00 for permanent partial disability.
4. On February 28, 2006, the claimant sustained compensable injuries to her left shoulder, arm, and hand.
5. There is no dispute over the payment of medical expenses, at this time.

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 temporary total disability from March 24, 2006 through a date yet to be determined.
2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"Claimant was injured on February 27, 2006. Her neck, left shoulder, left wrist, and middle finger on left hand were injured when she was putting a patient to bed and the patient was combative. The patient grabbed her left arm and twisted it and grabbed her middle finger and pulled it. She reported the incident to her supervisor, but he didn't make a report."

In regard to these issues, the respondents contend:

"The claimant suffered an injury to her left hand and shoulder on February 28, 2006 when a patient grabbed her hand and twisted it. The claimant was seen on March 2 and 7, 2006, with complaints of left arm pain at the Cooper Clinic by Dr. Karl Haws, who ordered an x-ray of the claimant's left hand, which was normal. Dr. Haws prescribed a brace, sling, and pain medication. He released the claimant to light duty with restrictions of no use of the left arm. Subsequent to this, the claimant was seen on March 12, 2006, at the Siloam Springs Memorial Hospital emergency room. At that point, she complained of pain in her hand and she was out of pain medication. The claimant was released with instructions to continue wearing her splint and to take Tylenol for

the pain due to her pregnancy. On March 14, 2006, the claimant was seen by Dr. Haws for a follow up. At that point, the claimant had a normal examination with complaints of pain. Dr. Haws again released the claimant to one handed light duty. It is the respondents contention that the claimant is not entitled to temporary total disability since she was released to light duty on March 2, 2006 and the respondent/employer had work available for the claimant. However, the claimant failed to appear for work nor did she call in to state that she was unable to work. Subsequent to this, the claimant was terminated on March 31, 2006.”

DISCUSSION

_____The single issue presented for resolution is the claimant’s entitlement to temporary total disability benefits for the period beginning March 24, 2006, and continuing through a date yet to be determined. The burden rests upon the claimant to prove her entitlement to temporary total disability benefits.

The claimant’s compensable injuries, on February 28, 2006, involved portions of her body that are both “scheduled”, under Ark. Code Ann. §11-9-521, and “unscheduled”, under Ark. Code Ann. §11-9-522. The criteria for determining temporary total disability differs between “scheduled” and “unscheduled” injuries. For “scheduled” injuries, the claimant need only prove that she continued within her healing period from the effects of the compensable injury and had not “returned to work”. For unscheduled injuries, the claimant must prove that she continued within her healing period from the compensable injury and was also rendered totally disabled from performing regular gainful employment, as a result of the compensable injury.

One fact necessary for the claimant’s entitlement to temporary total disability benefits is common to both scheduled and

unscheduled injuries. That fact being that the claimant must prove that she continued within the healing period from the effects of the compensable injury from March 24, 2006 through a date yet to be determined. The duration of the healing period is primarily a medical question, and considerable consideration must be given to the expert medical evidence presented. The healing period ends when the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this actual physical damage has resolved or has at least stabilized, at a level where nothing further offers a reasonable expectation of improvement, then the healing period has ended.

All of the evidence presented to indicate that she continued within her healing period from the effects of her compensable injury on and after March 24, 2006 is based upon the claimant's continued subjective complaints. The claimant testified that her difficulties with her hand and arm have remained essentially unchanged since the compensable injury. She stated that she has continued to experience swelling, pain, and numbness, primarily from her elbow to her hand. She stated that any movement of her left hand or fingers causes increased pain. From her testimony, it appears that none of the actual medical treatment provided her has been of any benefit in resolving her subjective complaints. This testimony essentially coincides with the complaints made by the claimant to her various physicians.

The medical record shows that the claimant's compensable injuries were diagnosed as being in the form of a strain or sprain. Appropriate medical treatment was rendered to the claimant for such a diagnosis. Again, this diagnosis appears to be based solely on the claimant's subjective complaints. The medical evidence shows that the claimant's continued subjective complaints have been unresponsive to all appropriate treatment modalities. However, multiple physical examinations by various medical experts have failed to disclose any objective evidence of any continuing injury or physical damage to any portion of the claimant's left upper extremity. There have been no recorded observations of any swelling, bruising, redness, or inflammation involving any part of the claimant's left upper extremity. Multiple electrodiagnostic studies performed on the claimant's left upper extremity have also failed to reveal any abnormality. The same is true for plain x-rays. It is apparent from the medical evidence that the various physicians have found no reasonable physical cause for the claimant's continued significant and varied subjective complaints.

It must also be noted that physical examinations of the claimant have revealed the presence of "give way" weakness and "glove" sensory loss in the left upper extremity. These particular symptoms are noted for having no physical or organic basis and are indicative of either intentional symptom magnification or manufacture or psychosomatic complaints.

After consideration of all the evidence presented, particularly the medical evidence, I find that the claimant has failed to prove by the greater weight of the credible evidence that she continued within her healing period from any of her admittedly compensable injuries on and after March 24, 2006. With rest and the other conservative treatment provided a simple strain or sprain should have reasonably resolved by March 24, 2006. Therefore, the claimant has failed to prove the first required fact for her entitlement to the temporary total disability benefits she now seeks.

In regard to the issues of whether the claimant had "returned to work" or was no longer rendered totally disabled by the compensable injuries, on and after March 24, 2006, the evidence shows that, since the claimant's compensable injuries, she has been continuously released to return to light duty or one handed work by all of her various physicians. The evidence further shows that the respondent actually made such work available, and the claimant initially returned to this limited or light duty position immediately following her compensable injuries. She continued in this limited or light duty position until approximately March 24, 2006. At that time, it was the claimant's opinion that the pain and swelling in her left hand, wrist, and arm was sufficiently severe, that she could not work at all, even at one handed duty. The respondent apparently advised the claimant that she would only be excused from work, entirely, if she obtained an appropriate doctor's statement. It appears from the claimant's testimony that

she attempted to obtain such a statement, but that none of her physicians would take her off work, entirely, for her compensable injuries. When she could not get the required doctor's statement, she continued to stay home, but simply stopped calling into the respondent to advise them of this fact.

In regard to actual disability the claimant offers only her self-serving testimony. The medical evidence presented clearly shows that it was the expert medical opinion of all of the claimant's various physicians that the claimant was at all times physically capable of at least performing the one handed position offered her by the respondent. This conclusion by the claimant's various physicians is clearly supported by the fact that their examinations and testing have failed to show any physical damage to the claimant's left upper extremity that would reasonably prevent her from such regular gainful employment at any time, on and after March 24, 2006. After consideration of all the evidence presented, it is simply my opinion that the claimant has failed to prove that her compensable injuries of February 28, 2006, have rendered her totally disabled from performing regular gainful employment from March 24, 2006 through a date yet to be determined.

In regard to the "return to work" requirement of Ark. Code Ann. §11-9-521, the facts in this case are strikingly similar to those in the case of Roark v. Pocahontas Nursing and Rehabilitation, CA05-1226(Ark. App. 5-10-2006). For the same reasons announced by the Court in Roark, I find that the evidence presented in this case also establishes that the claimant had, in

fact, "returned to work" prior to March 24, 2006, within the meaning of Ark. Code Ann. §11-9-521(a). The claimant's failure to continue in this employment position is the result of her intentional or voluntary refusal to do so and has not been proven to have been required or necessitated by the effects of the claimant's compensable injuries.

Therefore, I find that the claimant has failed to prove the second of the required facts for her entitlement to the temporary total disability benefits she now seeks under either Ark. Code Ann. §11-9-521(a) or §11-9-520(and/or §11-9-519). This failure alone would prevent her from being entitled to the temporary total disability benefits she now seeks.

There is also the matter of Ark. Code Ann. §11-9-526. This subsection provides that injured employees are not entitled to compensation, including temporary total disability benefits, during any period wherein the employee unjustifiably refuses suitable employment that has been offered to or procured for them by the respondent. In the present case, the evidence presented unquestionably shows that the respondent provided the claimant with suitable limited or light duty employment. The greater weight of the credible evidence further shows that the claimant's refusal of such employment, on or about March 24, 2006, was unjustified.

In summary, and for all of the foregoing reasons, I find that the claimant is not entitled to temporary total disability benefits from March 24, 2006 through a date yet to be determined. Therefore, her request for such benefits must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On February 28, 2006, the relationship of employee-employer carrier existed between the parties.

3. On February 28, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$192.00 for total disability and \$154.00 for permanent partial disability.

4. On February 28, 2006, the claimant sustained compensable injuries to her left shoulder, arm, and hand.

5. There is no dispute over the payment of medical expenses, at this time, and all such appropriate benefits have been provided.

6. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to temporary total disability benefits for the period of March 24, 2006 through a date yet to be determined. Specifically, she has failed to prove that she continued within her healing period from the effects of any of her compensable injuries on and after March 24, 2006. She has also failed to prove that she had not "returned to work" during that period, within the meaning of Ark. Code Ann. §11-9-521(a). She has also failed to prove by the greater weight of the credible evidence that she was rendered totally disabled from performing all forms of regular gainful employment for which she would otherwise be qualified by the effects of any unscheduled compensable injury

during the period of March 24, 2006 through a date yet to be determined.

7. The greater weight of the evidence presented does establish that on or about March 24, 2006, the claimant unjustifiably refused suitable employment that had been and was being provided to her by the respondent. Pursuant to the provisions of Ark. Code Ann. §11-9-526 the claimant is prevented from receiving compensation in the form of temporary total disability benefits during the continuation of this refusal.

8. The respondents have controverted the claimant's entitlement to any temporary total disability benefits.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the present claim for additional benefits, in the form of temporary total disability benefits from March 24, 2006 through a date yet to be determined.

The respondents remain liable for all appropriate benefits to which the claimant may be entitled under the Act for her compensable injuries of February 28, 2006.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE