

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F606712

OTTO BENJAMIN, Employee	CLAIMANT
STEAK & SHAKE, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED OCTOBER 17, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by GARY DAVIS, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On September 27, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 30, 2007, 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-carrier relationship existed among the parties at all relevant times.
3. The claimant sustained compensable injuries to his arm, elbow, shoulder, and hand on June 9, 2006.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to temporary total disability benefits from May 14, 2007 through June 19, 2007.
2. Attorney fee.

At the time of the hearing the parties also agreed to litigate the claimant's compensation rate.

The claimant contends he is entitled to temporary total disability benefits from May 14, 2007 through June 19, 2007.

The respondents contend that claimant is not entitled to temporary total disability benefits from May 14, 2007 through June 19, 2007.

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 witness and to observe his 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 July 30, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning May 14, 2007 and continuing through June 19, 2007.
3. Claimant earned an average weekly wage of \$217.09 which would entitle him to compensation at the rate of \$163.00 per week for total disability benefits.
4. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

#### FACTUAL BACKGROUND

The claimant is a 46-year-old man with a high school education. The claimant went to work for the respondent waiting on tables. On June 9, 2006, the claimant injured his

right arm and shoulder when he tripped and fell over a dustpan handle. After some initial medical treatment the claimant came under the care of Dr. Christopher Arnold. Initially, claimant was treated conservatively by Dr. Arnold with medication, an injection, work restrictions, and therapy. Dr. Arnold eventually performed surgery on claimant's right shoulder on May 14, 2007.

After claimant's compensable injury, he did not return to work for the respondent. Instead, as of August 2006 he went to work at Golden Corral. Claimant continued to work at Golden Corral until the date of his surgery on May 14, 2007.

Claimant has filed this claim contending that he is entitled to temporary total disability benefits beginning May 14, 2007, the date of his surgery, and continuing through June 19, 2007.

### ADJUDICATION

The injury to claimant's right shoulder is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant is entitled to temporary total disability benefits beginning May 14, 2007 through June 19, 2007.

First, I find that claimant remained within his healing period throughout the requested period of time. It seems obvious that claimant was within his healing period as of May 14, 2007 because he underwent surgery on his shoulder that day. I find that this condition existed through at least June 19, 2007. As of June 19, 2007, Dr. Arnold still had not opined that claimant had reached maximum medical improvement. Accordingly,

based on the foregoing evidence, I find that claimant remained within his healing period from May 14, 2007 through June 19, 2007.

I also find that claimant suffered a total incapacity to earn wages during this period of time. Again, claimant was obviously totally incapacitated as of May 14, 2007 due to his surgical procedure. On May 16, 2007, Dr. Arnold completed an off-work slip indicating that claimant should remain off work until his post-op evaluation on May 21, 2007. On May 21 Dr. Arnold completed another slip indicating that claimant could return to work as of that date with the limitation of no use of his right arm. Claimant did not return to work for his employer at that time, Golden Corral, but instead did not return to work until after he was evaluated by Dr. Arnold on June 19, 2007 when he was released with some restrictions.

Clearly, the claimant was totally incapacitated from earning wages beginning on the date of his surgery of May 14, and continuing through the date of his evaluation by Dr. Arnold on May 21, 2007. The question is whether the claimant continued to suffer a total incapacity to earn wages between May 21 and June 19. Even though Dr. Arnold completed a slip indicating that claimant was released to work with the limitation of no right-handed duty, I nevertheless find based upon the evidence presented that claimant continued to suffer a total incapacity to earn wages through June 19, 2007. The Arkansas Court of Appeals has held that if during the period while a claimant's body is healing he is physically unable to perform any work "with reasonable consistency and without pain and discomfort," he is still entitled to temporary total disability benefits. *Pyles v. Triple F Feeds of Texas*, 270 Ark. 729, 606 S.W. 2d 146 (Ark. App. 1980). See, also, *Farmers Cooperative v. Biles*, 77 Ark. App 1, 69 S.W 3d 899 (2002).

Here, I find that the claimant was unable to perform work from May 21, 2007 through June 19 despite Dr. Arnold's release of claimant to work without the use of the right arm. First, I believe it is important to note that claimant's compensable injury was to his right shoulder and arm. The claimant is right-hand dominant; therefore, his work would have

been limited to his non-dominant arm. Second, claimant testified that prior to his surgery, it was his belief that he would be able to return to work to his job at Golden Corral within two or three days after the procedure. However, according to claimant's testimony the procedure was more complicated than he anticipated and his arm was in a sling for more than two or three days. Claimant testified that his employer, Golden Corral, would not allow him to return to work with his arm in a sling.

I also note that claimant testified that during this period of time he was taking pain medication which made him drowsy and sick. In fact, Dr. Arnold prescribed claimant additional medication to overcome the sickness caused by the pain medication.

Finally, I find that the claimant was motivated to return to work and would have returned to work had he been physically capable of doing so. First, I find that claimant's testimony was credible regarding his ability and motivation to return to work. This motivation is also reflected in Dr. Arnold's report of June 19, 2007, in which he indicates that claimant is anxious to go back to work. Finally, it is also reflected in claimant's current work situation. According to claimant's testimony he had to quit working at the Golden Corral because of an incapacitating problem with high blood pressure. Claimant is currently drawing social security disability benefits as a result of that condition. Despite that fact, the claimant continues to work two days a week at Western Sizzlin. Given all of this evidence, I find that the claimant was motivated to return to work and would have done so had he been physically able prior to June 19, 2007.

In summary, I find that claimant was within his healing period between May 14, 2007 and June 19, 2007. I also find that claimant suffered a total incapacity to earn wages during that period of time. Claimant was taken off work completely by Dr. Arnold until May 21, 2007. From May 21 through June 19, claimant was released to work with only his left arm. However, for reasons previously discussed, I nevertheless find that claimant suffered a total incapacity to earn wages during this period of time. Accordingly, claimant is entitled

to temporary total disability benefits beginning May 14, 2007, and continuing through June 19, 2007.

The final issue for consideration involves claimant's correct compensation rate. Wage records admitted into evidence by the respondent indicate that claimant worked for the respondent some ten weeks. During that period of time the claimant earned \$2,170.91 in wages and tips. This results in an average weekly wage of \$217.09 which translates to a compensation rate of \$163.00 per week for total disability benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning May 14, 2007 and continuing through June 19, 2007. Claimant is to be paid temporary total disability benefits at the rate of \$163.00 per week.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

All sums herein accrued are payable in a lump sum without discount and this award

shall bear interest at the maximum legal rate until paid.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$293.50.

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE