

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401980

ANTOINETTE COOPER, EMPLOYEE	CLAIMANT
AmFUEL, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 26, 2007

Hearing conducted before Administrative Law Judge S. Dale Douthit on May 3, 2007, in Union County, Arkansas.

The claimant was represented by Mr. Thomas W. Mickle, Attorney at Law, Conway, Arkansas.

The respondents were represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on May 3, 2007, in El Dorado, Arkansas, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on March 7, 2007, and a Prehearing Order was filed on March 12, 2007. The parties agreed to the introduction of the Prehearing Order as "Commission's Exhibit #1" to the record, subject to any modifications made to it on the record at the full hearing.

The parties stipulated to the following at the full hearing:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times, including February 17, 2004.

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- 3) The claimant's applicable compensation rates are \$400.00/\$300.00 per week for temporary total disability and permanent partial disability, respectively.
- 4) The claimant sustained a compensable left ankle injury on February 17, 2004, and as a result, sustained a five percent (5%) impairment to her left lower extremity which was accepted and paid by the respondents.
- 5) Claimant did not work at all for respondents between April 19, 2006, and November 8, 2006.
- 6) The parties agreed to reserve all issues not specifically addressed herein.

The parties agreed the following issue would be presented for determination:

- 1) Whether the claimant is entitled to additional temporary total disability or temporary partial disability benefits between February 22, 2005, and November 15, 2006, plus attorney's fees.

The claimant contended, in summary, that she sustained a scheduled injury to her left ankle in February of 2004, and then re-injured her left ankle in August of 2004. Claimant was treated by Dr. Gati, who allegedly found the claimant at maximum medical improvement on February 22, 2005, and assessed a five percent (5%) impairment to the lower extremity. Claimant contended she was then diagnosed with a peroneal nerve injury, which Dr. Gati noted did not resolve as of the time he said the claimant had reached MMI. The claimant continued treating with Dr. Gati after February 22, 2005, and saw Dr. Gati on November 8, 2005. On December 9, 2005, Dr. Gati advised respondents, by letter, that an EMG study would be necessary and would possible show improvement in her condition. Thereafter, claimant attempted to work at restricted duty for a time and was unable to do any kind of work after April 1, 2006.

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Claimant further contended that she requested, and was granted a change of physician to Dr. Ruth Thomas due to continuing left ankle pain. That Dr. Thomas diagnosed claimant with evidence of peroneal nerve neuritis and recommended a neurology consult. Claimant was then seen by Dr. Rutherford in September of 2006. Dr. Rutherford found claimant at MMI and rated her with a five percent (5%) impairment on November 15, 2006. Claimant contends that because she had a scheduled injury, she is entitled to temporary total disability and/or temporary partial disability from February 22, 2005, through November 16, 2006, plus attorney's fees. Claimant consented to claimant's portion of attorney's fees, payable to claimant's attorney, be deducted from compensation payable to the claimant by respondents, and paid directly to claimant's attorney.

Respondents contended, in summary, that the claimant was paid for the correct period of temporary total disability. That the claimant was released to her regular duties as of February 28, 2005, and the employer had a job available for her at all times that she is claiming temporary total disability. Respondents contended there is a distinction between temporary light duty and permanent restrictions that are not temporary in nature. Respondents contend that any restrictions claimant had were permanent in nature and make the case law different as to those that are temporary in nature.

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS AND CONCLUSIONS

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
- 3) Claimant reached maximum medical improvement for her 2004 left lower extremity, compensable injury on February 22, 2005.
- 4) Claimant has failed to prove, by a preponderance of the evidence, entitlement to additional temporary total disability or temporary partial disability benefits after February 22, 2005.

DISCUSSION

The claimant, age thirty-six (36), sustained, admittedly, compensable injuries to her left ankle in February and July of 2004. After the July, 2004, left ankle incident, the claimant underwent an MRI of her left ankle. The claimant treated with Dr. Kenneth Gati throughout 2004 and, ultimately, Dr. Gati recommended surgery. (Cl. Ex. 1, p.10) In his September 24, 2004, report, Dr. Gati stated, "we are going to go ahead and proceed with ankle arthroscopy and lateral ankle reconstruction." In the same report, Dr. Gati noted that the claimant had two (2) problems going on with her ankle. Dr. Gati noted that the claimant had injury to her peroneal nerve and instability within her ankle due to recurrent ankle sprains. (Cl. Ex. 1, p.10)

In October of 2004, the claimant underwent an ankle arthroscopy for synovitis and a lateral ankle reconstruction. Following the October, 2004, surgery, the claimant continued to treat with Dr. Gati and, in his February 22, 2005, report, Dr. Gati recommended the claimant return to work on regular duties beginning February 28,

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2005. Dr. Gati also assessed the claimant at MMI as of February 22, 2005, pursuant to his report. (Cl. Ex. 1, p.15) Dr. Gati rated the claimant's lower extremity with a five percent (5%) permanent impairment based on her peroneal nerve injury. (Cl. Ex. 1, p.16)

After the claimant was found at MMI on February 22, 2005, by Dr. Gati, the medical records show the claimant saw Dr. Gati again on April 25, 2005, complaining of instability within her ankle. In his April 25, 2005, report, Dr. Gati noted, "There is no swelling on today's exam and it is near the end of the day." (Cl. Ex. 1, p.17) Dr. Gati also stated, "There is no instability within her ankle," and "I have no further recommendations."

The claimant continued to complain of ankle pain and swelling, and saw Dr. Gati again on November 8, 2005, and November 29, 2005. Dr. Gati gave the claimant some restrictions based on a FCE, but did not change his previous findings of permanent impairment. Dr. Gati thought another EMG/nerve conduction study might be necessary, but, in a letter dated December 9, 2005, stated, "I have reconsidered and have decided that the test would not be needed and at this point will not make any difference in her permanent restrictions or in her impairment rating." (Cl. Ex, 1, p.20)

The claimant then treated with Dr. Ruth Thomas and Dr. Reginald Rutherford. Dr. Thomas stated in her August 15, 2006, report that, "Superficial peroneal nerve resection can be fraught with many complications and is not recommended. She does not need any surgery for correction of instability. She may benefit from chronic pain management. " (Cl. Ex. 1, p.22) Ultimately, Dr. Rutherford agreed that he knew of no

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further treatment to offer Ms. Cooper, agreed that she was at MMI, and agreed with a five percent (5%) impairment to the lower extremity. (Cl. Ex. , pp.28-29)

The basic issue here is whether claimant's healing period ended on February 22, 2005, pursuant to Dr. Gati's report, or whether it ended on November 15, 2006, when Dr. Rutherford issued his findings. I find that the claimant's healing period ended on February 22, 2005, and agree with Dr. Gati.

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability compensation during her healing period or until she returns to work, regardless of whether she has demonstrated that she is actually incapacitated from earning wages. A.C.A. §11-9-521(a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). "Healing period means that period for healing of an injury resulting from an accident." A.C.A. §11-9-102(12). Whether or not a claimant's healing period has ended is a question of fact for the Commission. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

The record clearly shows that the claimant was not still within her healing period after February 22, 2005. The medical evidence contained in the record shows that no doctor ever took the claimant off work after Dr. Gati's release in February of 2005. The doctors that did see the claimant after Dr. Gati's release, Drs. Thomas and Rutherford, never offer the claimant any type of treatment to improve the claimant's condition other than pain management. Pain management does not necessarily extend one's healing period. In fact, Dr. Gati was still prescribing medications for pain at the time he found

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the claimant at MMI. The claimant was given a permanent impairment rating for her left lower extremity and Dr. Gati specifically stated in his November 8, 2005, report that her ankle pain will probably be “a lifelong deal.”

The medical reports clearly show that the claimant’s condition did not change after February 22, 2005, and that none of the three (3) doctors could really offer the claimant anything to improve her ankle condition. Even the claimant herself testified that her left ankle condition really didn’t change.

Q The same?

A Yes, sir.

Q The same as when? Back in ‘04 when it happened?

A I’m pretty much the same.

Q So it’s been pretty much the same all throughout?

A Yes, sir.

Q But you are working today?

A Yes, sir.

Q And you have been working for what, six months?

A I think so, yes, sir, something like that. (Tr.44)

The healing period is that period for the healing of an injury that continues until the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. The medical records in evidence here shows that the claimant’s left ankle was as good as it was going to get on February 22, 2005, and even though two (2) other doctors subsequently looked at the claimant’s

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ankle, neither could offer the claimant any suggestions for treatment to improve her condition. The evidence shows that Dr. Gati's MMI assessment on February 22, 2005, was correct. Claimant admittedly did not work between April 19, 2006, and November 8, 2006; however, claimant's failure to return to work was not causally related to the compensable injury.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find the claimant has failed to prove that she remained within her healing period after February 22, 2005. I find the claimant's healing period ended on February 22, 2005. As such, I find the claimant has failed to prove, by a preponderance of the evidence, that she is entitled to additional temporary partial disability or temporary total disability benefits after February 22, 2005. Accordingly, the within claim for additional benefits is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge