

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F604343

STELLA FARRAR, Employee

CLAIMANT

TYSON FOODS, INC., Self-Insured Employer

RESPONDENT

OPINION FILED APRIL 18, 2007

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

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

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On March 28, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 24, 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 relationship of employee-employer existed among the parties on November 29 and November 30, 2005.
3. The claimant suffered a compensable injury to her back while working for respondent.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$356.00 for temporary total disability benefits and \$267.00 for permanent partial disability benefits.
5. Respondent has accepted and is paying permanent partial disability benefits based upon a 10% rating assigned by Dr. Knox.

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

1. Claimant's entitlement to four weeks of temporary total disability benefits from July 12, 2006 through August 15, 2006.
2. Attorney fee.

At the time of the hearing the respondent also raised as an issue its entitlement to a credit for short-term disability benefits the claimant received during the requested period of temporary total disability benefits.

The claimant contends she is entitled to temporary total disability benefits from July 12, 2006 through August 15, 2006.

The respondent contends that claimant is not entitled to temporary total disability benefits.

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 her 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 January 24, 2007, 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 she is entitled to temporary total disability benefits from July 12, 2006 through August 15, 2006.

FACTUAL BACKGROUND

The claimant is a 61-year-old woman who began working for the respondent in 1998 as a line worker. After a few months the claimant was promoted to work in quality

assurance. Claimant's job duties in quality assurance required her to check the quality of product as well as actually pulling product off the line and weighing it with scales to make sure it was the correct weight. Claimant was also responsible for checking product as it went through a metal detector which insured that no foreign objects were in the product.

Claimant suffered a compensable injury to her low back while working on November 30, 2005. On that date she was walking through a line area when she stepped on a spot drain, slipped, and twisted her back. The claimant initially received medical treatment from Dr. Berestnev who diagnosed claimant's condition as a right-sided lumbar strain and ordered physical therapy and medication. Claimant continued to be evaluated and also continued to undergo physical therapy as prescribed by her treating physician.

Claimant eventually filed a change of physician request which was granted to Dr. Luke Knox, orthopaedic surgeon. Dr. Knox likewise ordered physical therapy and eventually ordered a myelogram. After the myelogram was performed Knox discussed surgery with claimant but indicated that claimant did not wish to pursue surgery at that time. Accordingly, Dr. Knox in a report dated November 27, 2006 found that claimant had reached maximum medical improvement and assigned a 10 percent impairment rating which is currently being paid by the respondent.

Following her compensable injury the claimant continued to work for the respondent performing her same job in quality assurance. Claimant performed those jobs with some restrictions, including those assigned by Dr. Knox to avoid lifting over 10 pounds and the avoidance of significant bending, stooping, and lifting. Claimant has continued to work for the respondent as of the time of the hearing.

The only time claimant has been off work since the date of her compensable injury is the period beginning July 12, 2006 and continuing through August 15, 2006. Claimant contends that she is entitled to payment of temporary total disability benefits for this period of time.

ADJUDICATION

In order to be entitled to temporary total disability benefits for a non-scheduled injury, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she 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 has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits.

Based upon the medical evidence presented, I do find that claimant was within her healing period from the date of her injury until her release by Dr. Knox on November 27, 2006. However, I do not find that claimant suffered a total incapacity to earn wages from July 12, 2006 through August 15, 2006.

Claimant's last medical visit prior to July 12, 2006 occurred when she was evaluated by Dr. Knox on June 26, 2006. A review of Dr. Knox's medical report from that date does indicate that he stated that claimant might elect to take a leave of absence while allowing her lumbar spine to heal. However, he went on to state that he was going to continue claimant on the same work restrictions which had previously been assigned of a 10 pound lifting restriction and the avoidance of significant bending, stooping, and lifting. The fact that Dr. Knox was of the opinion that claimant was capable of working during this period of time is also reflected by his completion of a form dated June 26, 2006, and contained on Page 16 of Respondent's Exhibit Number 1 indicating that claimant can return to work with the same restrictions previously assigned.

Furthermore, it should also be noted that after claimant's visit with Dr. Knox on June 26, 2006 she continued to work for the respondent at her same job with restrictions from June 26, 2006 until July 11, 2006. There is no indication in the record that claimant's

condition was any different for the period of July 12 through August 15, 2006 which would support a finding that claimant was totally incapacitated from working during that period of time as opposed to the periods before and after those dates.

In summary, in order to be entitled to temporary total disability benefits, claimant has the burden of not only proving by a preponderance of the evidence that she remained within her healing period but also that she suffered a total incapacity to earn wages. Here, based upon my review of the medical records as well as the other evidence presented at the hearing, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a total incapacity to earn wages from July 12, 2006 through August 15, 2006.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her compensable injury. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE