

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613798

LISA HARTGRAVES	CLAIMANT
KLEIN TOOLS, INC.	RESPONDENT
ALTERNATIVE SERVICE CONCEPTS INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 19, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondent represented by MIKE WHITE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on June 14, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 22, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. On March 16, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her right shoulder on March 16, 2006.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$327.00 for temporary total disability and \$245.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Temporary partial disability from April 3, 2006, through March 25, 2006, and from August 10, 2006, until November 14, 2006.

2. Temporary total disability from November 15, 2006, to May 22, 2007.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is entitled to temporary partial disability benefits from April 3, 2006, through May 25, 2006, and from August 10, 2006, until November 14, 2006. The claimant contends that she is entitled to temporary total disability benefits from November 15, 2006, until May 22, 2007. The claimant contends that any disability benefits not previously paid have been controverted and that her attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant cannot sustain her burden of proving by a preponderance of the evidence that she is entitled to any temporary disability not previously accepted and paid. Discovery is ongoing in this claim, and the respondents reserve the right to raise any additional issues and to assert any defenses which are revealed during the discovery process.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The parties submitted a joint medical exhibit marked Joint Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified and the parties have stipulated that she sustained a compensable injury to her right shoulder on March 16, 2006. The claimant testified that she was working on a clicker machine going back and forth repetitively cutting anywhere from 100 to 1000 pieces in an hour which resulted in her shoulder injury. The claimant agreed that the respondents sent her to Dr. Holder on March 24, 2006, and that he sent her to physical therapy as well as placed her on restrictions. The claimant agreed that as a result of these restrictions she was limited to working only forty hours per week when she had been working overtime on a regular basis. The claimant agreed that Dr. Holder released her to full duty work on May 25, 2006. The claimant testified that in August 2006 she started having problems with her right shoulder again. The claimant testified that the work that she was doing in August 2006 was working on a sewing machine holding pieces of web, pressing it down in order to get it under the machine and then the machine would sew it. The claimant testified that once the pieces are sewn she would have to throw it off to the side. The claimant agreed that she was sent back to Dr. Holder in August 2006 and he again put her on restrictions which limited her to forty hours per week. The claimant testified that she was referred to an orthopedic

surgeon, Dr. Bebout. The claimant agreed that Dr. Bebout tried several times to schedule surgery for her but the respondents were uncooperative with the scheduling. The claimant testified that she would have undergone the surgery if she could had gotten it authorized because she was in pain and wanted to get her shoulder fixed. The claimant testified that after Dr. Bebout released her from his care due to the problems created by the respondents, she went back to work and talked to Leslie and Shonda who got her an appointment with another physician. The claimant agreed that at this time a case manager was assigned to her. The claimant testified that she then was seen by Dr. Evans who did perform surgery on her shoulder.

The claimant testified that on November 13, 2006, Dr. Bebout sent a letter to the respondent concerning her care. The claimant testified that the next day, November 14, 2006, she was suspended for three days and then she was terminated. The claimant testified that at that time she had been working for the respondent for over fourteen years and had never been suspended.

The claimant testified that she underwent a cervical MRI on November 20, 2006, and that Dr. Evans did surgery on her shoulder on December 6, 2006. The claimant agreed that she had not done any work for money since she was suspended on November 14, 2006. The claimant was asked about her suspension and termination and the claimant testified that on the date she was suspended she had seen Dr. Evans for the first time and when she came back to work she was called into the office by Carolyn Goodner who is in personnel. The

claimant testified that she was told that there was a report that she had incorrectly entered the amount of parts into her computer and they were going to investigate but she was suspended for three days until the investigation could be conducted. The claimant testified that she was told to call back the following Monday. The claimant testified that when she went back in to work she was terminated. The claimant testified that her termination occurred after Dr. Evans had indicated that he was going to do surgery on her shoulder.

The claimant testified that after her surgery in December 2006 she continued to have some problems and had a problem with strength in her arm. The claimant testified that she developed a frozen shoulder which Dr. Evans repaired surgically on February 7, 2007. The claimant testified that Dr. Evans released her on May 22, 2007, but stated that she has a follow up appointment with him in August 2007. The claimant testified that she does not feel like her shoulder is completely healed as of the date of this hearing but it is much better.

On cross examination, the claimant testified that after she reported her shoulder injury on March 17, 2006, she continued to work for the respondent and did not miss any substantial time from work up until her termination. The claimant testified that the respondent provided forty hours of work each week at her regular rate of pay and she continued to work on the clicker machine until she put in a bid for a new job. The claimant testified that it was at her treating physician's recommendation that she get off the

clicker job which required repetitive motion. The claimant agreed that she voluntarily bid on a job which was less repetitive but also paid less per hour. The claimant testified that after she was terminated by the respondent, she applied for unemployment benefits but was turned down. The claimant testified that she was able to do her household duties with her left hand and as her physical therapy progressed she began to use her right hand some. The claimant testified that she also has been able to drive her son to and from his various school activities. The claimant agreed that she has not looked for work and even though Dr. Evans released her to one handed duty she has not been able to find a job. The claimant agreed that even when her right shoulder was frozen she was able to use her left arm. The claimant testified that through gossip in the plant she had heard that other people had been terminated for falsifying their records.

On redirect examination, the claimant testified that she was unaware of any fourteen-year employee with a good work record who has ever been terminated for making a mistake on their records. The claimant testified that she has never had a job that required just the use of one hand.

On recross examination, the claimant agreed that Dr. Evans released her without restrictions on May 22, 2007. The claimant testified that since her release she has kind of looked through the paper for jobs comparable to what she was making while working for the respondent. The claimant agreed that she has not to date contacted any potential employers.

On redirect examination, the claimant testified that she has reapplied for unemployment benefits and on her application she has indicated that she is ready, willing, and able to go to work.

Craig Parsley testified that he is operations manager for the respondent and has been in that position for the past eight years. Mr. Parsley testified that he is familiar with the claimant as well as the circumstances surrounding her termination. This witness testified that on the morning of November 14 the claimant's supervisor reported that there was a discrepancy on what had been reported versus what was available for passing on down the assembly line. Mr. Parsley explained that these reports are necessary in order to keep the correct amount of raw material inventoried as well as it tells them the efficiency of the employees. Mr. Parsley testified that in the case of the claimant on the 14th it was discovered that there was supposed to be forth-five pieces but only twenty-one pieces were available to move to the assembly department. Mr. Parsley agreed that this information is used to evaluate the employees' efficiency as well as regulate decisions as to production needs. Mr. Parsley testified that the claimant is not the only employee who has ever been terminated for falsifying their records. Mr. Parsley testified that it was the respondent's standard procedure to terminate employees who falsify their production records. Mr. Parsley testified that the claimant would have been terminated regardless of whether she had a workers' compensation claim or not. This witness testified that except for the circumstances surrounding the cause for the claimant's

termination, the respondent would have and was prepared to continue to make light duty work available for her.

On cross examination, Mr. Parsley stated that the reason for the three-day extension was in order for the respondent to make a thorough examination of the reports before termination. Mr. Parsley testified that when considering termination an employee's work record and tenure are also considered. Mr. Parsley agreed that the claimant had been a good employee for the respondent for fourteen years. Mr. Parsley testified that the reason an employee might falsify their production records would be to increase their efficiency rate. Mr. Parsley was asked if it was possible that the claimant's error was just a mistake and this witness responded, "I suppose it could have been." Mr. Parsley testified that the respondent has a progressive disciplinary policy but that this policy does not have to be followed in every instance depending on the severity of the offence. Mr. Parsley testified that progressive discipline was not followed in the claimant's case because other employees have been terminated for the same reason and that in order to be firm, fair, and consistent in what they had done in these cases the claimant was terminated. Mr. Parsley testified that the reason why surgery was not scheduled through Dr. Bebout's office was because the respondent wanted to schedule the claimant's surgery late in the week so that she would only be off for a long weekend and could be returned to work on Monday following her surgery to one handed duty. Mr. Parsley testified that the reason for the scheduling problems was due to the

respondent trying to maintain their million man hour project but there were other considerations as well. Mr. Parsley testified that the reason the claimant was not paid temporary total disability following her right shoulder surgery was because she was no longer employed by the respondent.

On rebuttal, the claimant testified that it would have been no benefit to her to represent to the respondent that she had produced forty-five pieces instead of twenty-one pieces. The claimant testified that she did not intentionally falsify any records at the respondent's business.

On March 24, 2006, the claimant was seen by Dr. Keith Holder for her right shoulder problems. After examination, the claimant was returned to work with the restrictions of no lifting over twenty pounds, above the head work, and to limit repetitive motions of her right shoulder. Dr. Holder continued to treat the claimant conservatively with medication, physical therapy, and work limitations throughout April 2006. On May 1, 2006, Dr. Holder diagnosed the claimant with right shoulder impingement and right bicipital tendinitis and recommended injections if she did not improve with exercise and medication. Dr. Holder returned the claimant to work without restrictions except no working over eight hours per day. On May 10, 2006, Dr. Holder injected the claimant with a steroid medication and continued her medication and returned her to work with no lifting over ten to fifteen pounds, no repetitive motions of the right shoulder, and to limit the use of her right arm. On May 25, 2006, Dr. Holder recommended that the

claimant start her shoulder exercises and returned her to work without restrictions. On August 21, 2006, Dr. Holder recommended that the claimant undergo an MRI which revealed mild bursitis with a small amount of fluid in the subacromial/subdeltoid bursa and there were finding which suggested some chronic degeneration of the supraspinatus tendon with a probable small partial tear at the anterior attachment of the supraspinatus tendon. It is also noted that there is an equivocal small thickness component but no definite evidence for retraction of the musculotendinous junction or atrophy of the cuff musculature. Dr. Robert Bebout began treating the claimant on September 12, 2006, for her right shoulder problems. After reviewing the claimant's test results and examination, Dr. Bebout injected the claimant's shoulder with medication and prescribed Celebrex. Dr. Bebout notes that if she does not respond favorably to the conservative care she may need surgical intervention. Dr. Bebout writes on September 26, 2006, that the claimant did not get 100 percent pain relief from her injection. Dr. Bebout writes that the claimant's MRI shows degenerative disease of the acromioclavicular joint and a questionable supraspinatus tear. Dr. Bebout recommended surgery and noted that the claimant can work with the restrictions right now of no overhead use, no repetitive use, and no lifting with her right arm. On November 13, 2006, Dr. Bebout writes to whom it may concern that the claimant did not improve with conservative care so he had tried to schedule surgery for her. The doctor writes that the claimant's surgery date kept being canceled and changed by

Shonda Harrison, noting that Ms. Harrison was demanding that surgery only be done on a certain day and at a certain time of the day so the patient could return to work within just a couple of days time so that it would not reflect any loss for the company under workers' compensation. Dr. Bebout writes that he is unable to satisfy the respondents' demands so the claimant's surgery was canceled and the claimant was encouraged to find another physician who might be able to work with her company since he was not able to meet their demands and would not let him treat the claimant in a way that he felt was medically necessary. Dr. Jeffrey Evans began treating the patient on November 14, 2006, and after examination and review of the claimant's tests, Dr. Evans scheduled right shoulder surgery. Dr. Evans notes that the claimant cannot return to work due to her injury until after his next appointment on December 18, 2006, this note was dated December 6, 2006. The claimant underwent surgery on December 6, 2006, for repair of her right shoulder. Dr. Evans writes on December 18, 2006, that the claimant is being seen for follow up of her right shoulder surgery. Dr. Evans notes that the claimant can return to work with left-handed work only. The claimant was seen by Dr. Evans on February 1, 2007, where it is noted that she has developed an onset of right frozen shoulder. Dr. Evans recommended surgery to correct this problem. The claimant underwent surgery on February 7, 2006, to her right shoulder performed by Dr. Evans. Dr. Evans writes on February 22, 2007, that the claimant is doing much better following her second surgery but she is to remain off work for an additional

six weeks. Dr. Evans saw the claimant for follow up on April 5, 2007, where it is noted that she is improving but needs to continue with her range of motion exercises. The doctor recommended that she follow up in six weeks. On May 22, 2007, the doctor writes that as long as she has any discomfort in her right shoulder she needs to maintain her range of motion exercises at home. Dr. Evans released the claimant to full duty starting the following day, noting that she is at maximum medical improvement. Dr. Evans did schedule a follow up appointment with the claimant in three months.

After a complete review of this matter, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability from April 3, 2006, through May 25, 2006, and then from August 10, 2006, to November 14, 2006. It is not questioned that this claimant has sustained a compensable right shoulder injury which has been accepted and all medical has been paid for her right shoulder treatment. Dr. Holder did give the claimant restrictions of limited use of her right shoulder and to limit her repetitive motion. The claimant has testified that she continued to work on the same machine that she had originally been working on and agreed that the respondent provided her with forty hours of work per week. The claimant has indicated that she had worked a lot of overtime prior to her injury but based on the compensation rate agreed upon as well as the hourly weekly wage the claimant was earning at the time of her injury, she was only working a little over two hours per week overtime on average. The claimant has agreed and

testified that she chose to bid for a job that she considered to be easier for her to do which paid a lesser hourly rate. The claimant has not testified as to what this hourly rate was or when she began doing this job, therefore trying to compute any type of temporary partial disability, if in fact she would be entitled to it, is impossible. I do find, however, that the claimant is entitled to temporary total disability from November 15, 2006, to May 22, 2007. The parties have agreed that the claimant was suspended on November 14, 2006, after it was determined that she would need to have shoulder surgery. Although Dr. Evans did not take the claimant off work, it would seem extremely unlikely that another employer would hire a person who has restrictions of basically one handed duty and looking to have surgery in the near future with time off following that surgery. The respondents are contending that their termination of the claimant was justified and consistent with their prior practices. The respondents testified that the claimant was a good employee and the claimant has testified that she was an over fourteen year employee and had never had any type of suspension prior to her termination. Based on the testimony given as well as the notation from Dr. Bebout concerning the statements made by Shonda Harrison it appears more likely that the claimant's termination was enhanced due to her forthcoming surgery which would affect the respondent's one million man hours program. The claimant, therefore, shall be entitled to temporary total disability from November 15, 2006, until she was released by her treating physician, Jeffery Evans, on May 22, 2007. The claimant

certainly would be entitled to temporary total disability from the date of her surgery on December 6, 2006, until she was released by Dr. Evans on May 22, 2007, regardless.

FINDINGS & CONCLUSIONS

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

2. On March 16, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her right shoulder on March 16, 2006.

4. Medical expenses have been paid.

5. The claimant is entitled to a weekly compensation rate of \$327.00 for temporary total disability and \$245.00 for permanent partial disability.

6. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability from April 3, 2006, through May 25, 2006, and then from August 10, 2006, to November 14, 2006. See discussion above.

7. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from November 15, 2006, to May 22, 2007. See discussion above.

8. The respondents have controverted this claimant's entitlement to temporary total disability.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability from April 3, 2006, through May 25, 2006, and then from August 10, 2006, until November 14, 2006.

The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from November 15, 2006, until May 22, 2007, which the respondents should pay.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE