

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606255

TARSHER LOFTON, EMPLOYEE	CLAIMANT
A I D TEMPORARY SERVICES, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 23, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on January 19, 2007, at Luxora, Mississippi County, Arkansas.

Claimant represented by Mr. Joe M. Rogers, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Mr. Glenn Lovett, Jr., Attorney-at-Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted January 19, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 13, 2006, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including May 3, 2006; that the claimant sustained a

compensable injury to her right thumb on said date; that her average weekly wage was \$363.40, entitling her to a temporary total disability rate of \$243.00 per week; and that respondents had controverted claimant's entitlement to any temporary total disability benefits.

By agreement of the parties, the primary issue presented for determination concerned claimant's entitlement to temporary total disability, if any. A corollary issue was whether the claimant refused suitable employment and was disqualified from receiving benefits pursuant to Ark. Code Ann. §11-9-526.

Claimant contended, in summary, that as the result of her May 3, 2006, compensable crush injury, she was entitled to temporary total disability benefits for the period beginning May 17, 2006, and continuing through September 27, 2006, the date claimant maintained that her healing period ended, less credit to respondents for the dates that she worked, specifically from July 17, 2006, through July 26, 2006, and August 1, 2006, through August 31, 2006. The claimant requested a controverted attorney's fee on any benefits awarded.

The respondents contended that the claimant had been paid all benefits to which she was entitled. Respondents maintained that the claimant was provided suitable, light-duty work within the restrictions placed upon her by her physician, but chose not to work. Respondents further contended that the claimant advised her physical therapist that she would not continue with physical therapy because she had found another job; that the claimant did not complete the physical therapy

prescribed by Dr. Brandt, and failed to keep her last appointment with Dr. Brandt on August 10, 2006, and, therefore, could not prove entitlement to temporary total disability.

The claimant testified in her own behalf. Dorothy Cook, Dwayne Lucius, and Kim Grimes were called as witnesses for the respondents. The record is composed solely of the transcript of the January 19, 2007, hearing containing a joint medical exhibit consisting of forty-six (46) pages.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant's healing period ended on or before August 10, 2006.
4. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to temporary total disability benefits for the period beginning May 17, 2006, and continuing through July 17, 2006, at which time she returned to gainful employment. The claimant has failed to prove that she

is entitled to temporary total disability benefits after July 17, 2006.

5. Respondents have failed to show that it offered the claimant employment suitable to her physical restrictions after May 17, 2006. The claimant did not refuse any employment suitable to her physical capacity. Further, a preponderance of the credible evidence reflects that the claimant's refusal to perform the work made available to her by respondent on May 17, 2006, was justifiable.

DISCUSSION

_____The facts in this case are undisputed. The claimant was employed by A I D Temporary Services, Inc., at all relevant times. On April 7, 2006, the claimant began working for Viskase, a factory located in Osceola, Arkansas, by referral of A I D Temporary Services. The claimant began working as a machine operator. She continued working at the Viskase plant through May 16, 2006. It is undisputed that the claimant sustained an admitted injury to her right thumb as a result of a specific incident identifiable in time and place of occurrence on May 3, 2006, when her right hand was accidentally crushed in a machine that the claimant was operating. The employer exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment. The claimant was initially taken to the emergency room at the Osceola hospital where her thumbnail was removed. Apparently, the tip of the claimant's thumb was amputated during the accident. Respondents also

provided the claimant with follow-up care. As reflected by the stipulations, respondents have paid all appropriate medical, to date. In addition, the record reflects that, initially, the employer provided the claimant with suitable work which could be performed with one hand only. The record reflects that the claimant worked for Viskase at least through May 13, 2006. However, on or about May 16, 2006, respondents advised the claimant that the only work available required the claimant to sweep, which the claimant maintained required the use of two (2) hands and caused her great difficulty. The claimant advised the employer that she could not perform a full-time sweeping job. No temporary total disability benefits were ever paid. The claimant continued to receive follow-up medical care, including physical therapy through July 17, 2006, at which time she returned to work for a different employer. The claimant worked for Auto Zone from July 17, 2006, through July 26, 2006. She next went to work for Creative Food of Osceola where she worked from August 1, 2006, through August 31, 2006. Although the claimant maintained she was released for full-duty on September 27, 2006, there is no medical evidence to support this contention. However, the medical does reflect that the claimant was still within her healing period and had physical restrictions imposed upon her activities at all times prior to returning to work on July 17, 2006.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392

(1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

However, our workers' compensation laws provide a different standard when a claimant's injury is a scheduled injury. In the instant claim, the claimant's injury is scheduled. Therefore, the claimant is entitled to temporary total disability so long as she is within her healing period and has not returned to work. *See, Ark. Code Ann. §11-9-521(a); Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The claimant was within her healing period at the time she returned to work for a different employer on July 17, 2006. Accordingly, the claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability beginning May 17, 2006, and continuing through July 17, 2006.

Alternatively, as an affirmative defense, respondents contended that the claimant was provided light-duty work, within the physical restrictions imposed upon her by her physicians, and that she is not entitled to any temporary total disability.

Ark. Code Ann. §11-9-526 (Repl. 2002) provides:

If an injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless, in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

Dorothy J. Cook was called as a witness by the respondents. Ms. Cook was the claimant's supervisor. Her testimony which is extremely illuminating is set out, in part, below:

BY JUDGE GREENBAUM:

Q Ms. Cook –

A Yes, sir.

Q – she worked for a number of days, is that correct?

A Yes, sir.

Q And would you say that the majority of the time that she worked when she was off with restrictions, she was doing rework or sweeping?

A The majority of the time I would have to say rework.

Q And when she came back to work on the 16th and complained to you – and I take it she did complain to you that she couldn't sweep?

A Yes, she did come to me.

Q Was there rework available?

A No, sir.

Q Is it your testimony that the only work that was available was for her to sweep eight hours?

A That's all I had as far as light duty, that's it.

Q Is sweeping for eight hours, is that right?

A Correct. (Tr.57-58)

Farris Dwayne Lucius was also called as a witness by the respondent. Mr. Lucius is the Human Resource Manager. It was his opinion that the work provided to the claimant was suitable employment. I found it incredulous that he felt that an employee could sweep one-handed for a full work shift.

Rather than conduct a further analysis of the record in this cause, suffice it say that I find that the employer did not make work available to the claimant within her physical restrictions. Specifically, I find that the claimant's refusal to perform the manual task of sweeping an eight (8) hour shift not to be unreasonable. The claimant is entitled to temporary total disability at all times that she was within her healing period until she returned to gainful employment on July 17, 2006.

AWARD

Respondent, AIG Claim Services, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$243.00 per week beginning May 17, 2006, and continuing through July 17, 2006.

All benefits having accrued, respondent is to pay same in lump sum and without discount.

Additionally, claimant's attorney, Mr. Joe M. Rogers, is hereby awarded the maximum statutory attorney's fee on this entire Award, one-half (½) to be paid by the respondents and one-half (½) to be paid by the claimant pursuant to Ark. Code

Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge