

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706862

STEPHANIE DODSON

CLAIMANT

**POPEYE'S CHICKEN
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED JULY 30, 2008

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This matter was submitted on the record to consider whether the claimant is entitled to temporary total disability or temporary partial disability benefits from August 6, 2007 through December 13, 2007.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including June 24, 2007.
3. On June 24, 2007, the claimant sustained a compensable injury to her left foot.
4. Respondents accepted the June 24, 2007, injury as compensable and paid temporary total disability benefits through August 5, 2007.

5. Claimant earned an average weekly wage of \$161.50, entitling her to a compensation rate of \$108.

6. Claimant's treating physician released her to return to work on July 30, 2007, but claimant did not return to work.

7. Respondents did not offer employment to the claimant after July 30, 2007. Claimant did not contact respondents about returning to work after July 30, 2007.

8. Claimant last saw her treating physician on September 13, 2007, and did not return for her follow-up visit scheduled for December 13, 2007.

9. At the time of the injury, claimant was working two jobs. She returned to work at her construction work job in August 2007 and worked more hours than usual for them.

The claimant contends that she is entitled to additional temporary total disability or temporary partial disability benefits from August 6, 2007 through December 13, 2007, relying on the *Wheeler Construction* case.

Respondents contend benefits were paid through August 5, 2007. Respondents contend the claimant did not return to work for the respondent employer from August 6, 2007 through December 13, 2007; however, she did have another full time job laying flooring and continued that job during the period in question. Respondents contend the claimant is not entitled to additional temporary total disability or temporary partial disability benefits.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, 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 of this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including June 24, 2007.

3. On June 24, 2007, the claimant sustained a compensable injury to her left foot.

4. Respondents accepted the June 24, 2007, injury as compensable and paid temporary total disability benefits through August 5, 2007.

5. Claimant earned an average weekly wage of \$161.50, entitling her to a compensation rate of \$108.

6. Claimant's treating physician released her to return to work on July 30, 2007, but claimant did not return to work to the respondent employer.

7. Respondents did not offer employment to the claimant after July 30, 2007. Claimant did not contact respondents about returning to work after July 30, 2007.

8. Claimant last saw her treating physician on September 13, 2007, and did not return for her follow-up visit scheduled for December 13, 2007.

9. At the time of the injury, claimant was working two jobs. She returned to work at her construction work job in August 2007 and worked more hours than usual for them.

10. The claimant has failed to prove by a preponderance of the evidence that she

remained in her healing period or did not return to work from August 6, 2007 through December 13, 2007.

11. No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

DISCUSSION

The claimant, 18 years old, worked at the respondent employer for about a month before the June 24, 2008, incident. The claimant was washing dishes and another employee was going to clean the floors. A large trash can was filled with hot water and was being wheeled to another area when the can wheel hit a drain without a covering and the water spilled onto the claimant's left leg and foot. The claimant was taken to Concentra and then to Children's Hospital and treated for burn injuries. The claimant last sought medical treatment on September 13, 2007.

The claimant confirmed that she attempted to return to work on July 18, 2007, but she was not able to work because she could not wear a shoe. The claimant did not return to work for the respondent employer; however, she did return to work for the flooring contractor where she had previously worked. The claimant testified that it was probably in August 2007 that she returned to work for the contractor and added more hours. The claimant testified that she called the respondent employer a couple of times about returning to work but did not get a schedule and she did not return to work for the respondent employer.

The claimant is currently working for Popeye's in Jacksonville where she is a cashier and crew member and she also works at Wal-Mart, working at Popeye's about

20 hours a week and about 33 hours per week at Wal-Mart.

ADJUDICATION

The claimant contends she is entitled to temporary total disability or temporary partial disability benefits from August 6, 2007 through December 13, 2007. The claimant contends that she remained in her healing period and the respondent did not return her to work. Respondents contend that the claimant returned to work for another employer, making more money than she was making for the respondent employer and is not entitled to temporary total disability or temporary partial disability benefits.

Ark Code Ann. §11-9-521(a) now provides:

An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule. . . .

The Court of Appeals gave us some guidance in *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). In *Wheeler*, the claimant also received a burn injury and he was being treated for that condition and being paid his regular wages until he was incarcerated. The respondents contended the claimant was not entitled to temporary total disability benefits, contending that he was unable to work because he was incarcerated and not because of his injury. The claimant in *Wheeler* continued to be treated for his burn while he was incarcerated and finally was able to return to work. The Court of Appeals affirmed the Arkansas Workers' Compensation Commission's holding that the claimant was entitled to temporary total disability benefits

while he remained in his healing period and had not returned to work. In *Wheeler*, the issue in dispute was when the claimant's healing period ended.

In the present case, the claimant's treating physician released her to return to work on July 30, 2007, and temporary total disability benefits were paid by the respondent through August 5, 2007. The claimant testified in her deposition that while she did not return to work for the respondent employer, she did return to work for another employer, a flooring contractor, and she worked more hours. The claimant testified that she was paid a higher hourly wage for the flooring contractor than she was paid for the respondent employer.

Strict construction of Ark. Code Ann. §11-9-521(a) is now mandated by Act 796. Strict construction requires that nothing be taken as intended that is not clearly expressed. *Thomas v. State*, 315 Ark. 79, 864 S.W.2d 835 (1993). The doctrine of strict construction is to use the plain meaning of the language employed. *Holaday v. Fraker*, 323 Ark. 522, 915 S.W.2d 280 (1996).

The plain meaning of the language in Ark. Code Ann. §11-9-521(a) is that an employee who sustains a scheduled injury is to receive temporary total disability or temporary partial disability benefits during the healing period or until the employee returns to work, whichever occurs first. In the present case, the claimant was released to return to work on July 30, 2007 and actually returned to work in early August 2007 for the flooring contractor. I find the medical records and the claimant's testimony provide the evidence to find that the claimant has failed to prove that additional temporary total disability or temporary permanent disability benefits are owed by respondents from

August 6, 2007 through December 13, 2007. While the claimant did not return to work for the respondent employer, she did return to work for another employer and was no longer eligible to receive temporary total disability or temporary partial disability benefits. There is no requirement that the claimant must return to work for the respondent employer. The claimant's medical revealed that she returned to the doctor on September 13, 2007; however, that visit was a follow-up and there was no treatment, only that the "foot looks good." A follow-up appointment was planned in three months, but the claimant did not keep that appointment. The claimant testified in her deposition that some particular work shoes have caused her some foot pain but she has not sought any medical treatment. The medical provides that actual treatment was concluded by July 30, 2007 and that the claimant was no longer in her healing period.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period or did not return to work from August 5, 2007 through December 13, 2007. The claim for temporary total disability or temporary partial disability benefits is respectfully denied and dismissed.

No indemnity benefits have been awarded here. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**