

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F709316

|   |            |
|---|------------|
| RICHARD FIELDS, Employee                  | CLAIMANT   |
| M.J. MITCHELL ENTERPRISES, INC., Employer | RESPONDENT |
| AMERICAN HOME ASSURANCE COMPANY, Carrier  | RESPONDENT |

OPINION FILED JANUARY 4, 2008

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

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

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 12, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 11, 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 employee/employer/carrier relationship existed among the parties on July 13, 2007.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$440.00.

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

1. Claimant's entitlement to temporary total disability benefits.
2. Unpaid medical in the form of an emergency room bill.
3. Attorney fee.

At the time of the hearing the parties had resolved the issue of the emergency room bill with the respondent accepting liability for payment. The claimant also clarified his request of temporary total disability benefits to include the period of July 14, 2007 through September 21, 2007, with the exclusion of August 28, 2007 when he attempted to return to work.

The claimant contends that as a result of his compensable injury he is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through September 21, 2007, with the exception of August 28, 2007.

The respondents contend 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 his 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 October 11, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$440.00 is also hereby accepted as fact.

3. Claimant is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through August 2, 2007.

4. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

### FACTUAL BACKGROUND

The claimant is a 23-year-old man who began working for the respondent in May 2007 as a landscaper. Claimant's job duties included overseeing temporary employment and the performance of physical labor involving landscaping such as planting trees and shrubs and operating heavy equipment.

Claimant and the other employees of the respondent frequently worked out of town for ten days at a time, staying in a hotel. On July 13, 2007, claimant and other employees of the respondent were working on a job site in Columbia, Missouri. On that date the claimant picked up a bundle of seven to nine shovels and "threw" them onto his shoulder to carry them and the weight of the shovels caused a dislocation of his left shoulder. Claimant previously had problems with his left shoulder which resulted in surgery when he was 17 years old. Claimant testified that he had no additional problems with his left shoulder until the injury on July 13.

Claimant was taken to the emergency room at Columbia Regional Hospital where he was diagnosed as suffering from a dislocation. X-rays were taken of the claimant's shoulder and he was given an injection for pain as well as other medication. Claimant was also given a shoulder immobilizer which he was instructed to wear until he could be evaluated by an orthopaedic surgeon.

Claimant was brought back to Arkansas by his employer and he was sent to Dr. Vandergriff for an evaluation on August 2, 2007. Dr. Vandergriff diagnosed claimant's condition as a chronic left shoulder dislocation and recommended an evaluation by an orthopaedist. As a result, claimant was evaluated by Dr. Allard on August 13, 2007, who diagnosed claimant's condition as a recurrent traumatic shoulder dislocation and indicated that reconstruction surgery would probably be necessary. He indicated that this surgery should be performed by a shoulder sub-specialist such as Dr. Park or Dr. Collins in Little Rock. As a result of Dr. Allard's recommendation, claimant came under the care of Dr.

Pearce. Dr. Pearce ordered an MR arthrogram of claimant's left shoulder which revealed a labrial deficiency and tear. Dr. Pearce has treated claimant with a home strengthening program and physical therapy.

The respondent accepted claimant's injury as compensable and paid for medical treatment. However, respondent has not paid claimant temporary total disability benefits. Claimant has filed this claim contending that he is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through September 21, 2007 with the exception of August 28, 2007 when he attempted to return to work.

#### ADJUDICATION

The injury to claimant's left shoulder is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he 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 is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through August 2, 2007.

First, I find that claimant has remained within his healing period for the period of time he is requesting benefits. After claimant's initial medical treatment at the emergency room, he was referred for follow-up treatment from an orthopaedic surgeon. Before claimant was evaluated by an orthopaedic surgeon he was first evaluated by Dr. Vandergriff on August 2, 2007. She referred claimant to Dr. Allard who indicated that reconstruction surgery should be performed by a shoulder sub-specialist. As a result, claimant eventually came under the care of Dr. Pearce who has not performed surgery but has recommended treatment in the form of home strengthening and physical therapy. Dr.

Pearce's medical reports of August 23 and September 13, 2007 indicate that claimant has not yet reached maximum medical improvement. Based upon this evidence, I find that claimant has remained within his healing period.

However, I do not find that claimant has remained totally incapacitated from earning wages subsequent to August 2, 2007. At the time of claimant's initial medical treatment at the emergency room on July 13, 2007, claimant was given a shoulder immobilizer and a form was completed indicating that claimant could return to work as of July 17, 2007. No limitations were noted on the return to work form. However, claimant had been instructed to wear the shoulder immobilizer until he could be evaluated by an orthopaedic surgeon. Therefore, even though no specific limitations were noted, claimant was obviously limited in the work he could perform by the shoulder immobilizer. Claimant testified that following the emergency room visit he was sent by Mike Mitchell, the owner of the respondent, to Mitchell's home. Claimant was instructed to perform work using a weed eater at Mitchell's home. Claimant testified that he performed this work for a short period of time before informing Mitchell that the work was causing his left shoulder to hurt. It seems reasonable that it would be difficult to use a weed eater for eight hours per day while at the same time being unable to use the left shoulder due to the immobilizer. Thus, even though the claimant attempted to return to work, I nevertheless find based upon the evidence presented that claimant suffered a total incapacity to earn wages as of July 14, 2007.

Claimant was next evaluated by Dr. Vandergriff on August 2, 2007. Dr. Vandergriff did not limit claimant's return to work to one arm, but instead indicated that claimant could return to work with lifting of no more than 15 pounds and no lifting the arm above the horizontal position. Claimant was next evaluated by Dr. Allard on August 13, 2007, who continued claimant's work restrictions of no work above the shoulder and no heavy pushing or pulling and no lifting more than 15 pounds until he could be seen by a shoulder sub-specialist.

Claimant was next evaluated by Dr. Pearce on August 23, 2007, who also indicated that claimant could return to work as of that date. However, Dr. Pearce limited claimant's ability to return to work to using his right arm only. Claimant attempted to return to work for the respondent on August 28, 2007, and was instructed by Mitchell to wear the immobilizer on his left arm to prevent him from using that arm in accordance with the doctor's restrictions and to prevent further injury. Claimant informed Mitchell that he did not want to wear the sling and when Mitchell would not permit the claimant to work without the immobilizer claimant terminated his employment with the respondent.

Claimant subsequently returned to Dr. Pearce on September 13, 2007, and Dr. Pearce again indicated that claimant could return to work performing right arm duty only. Claimant became employed by another employer on September 21, 2007.

Based upon the evidence presented, I find that claimant did not suffer a total incapacity to earn wages beginning on August 2, 2007, the date he was released to return to work by Dr. Vandergriff with restrictions. Each of claimant's subsequent treating physicians, including Dr. Allard and Dr. Pearce, indicated that claimant was capable of working with restrictions. When Dr. Pearce indicated that claimant's work restrictions would limit him to the use of his right arm only, respondent provided claimant with work within those restrictions. In order to prevent claimant from using his left arm in violation of the work restrictions, respondent asked the claimant to wear the immobilizer. Claimant did not want to wear the immobilizer and terminated his employment. While Dr. Pearce had not indicated that claimant was required to wear his immobilizer, he also had not indicated that claimant should not wear it at that time. In a report dated September 13, 2007, Dr. Pearce noted that claimant was wearing the sling at work but indicated that he could discontinue doing so. There is no evidence in the medical reports which would indicate that claimant's use of the immobilizer on August 28 would be a violation of the work restrictions placed upon him by Dr. Pearce. In fact, it would appear that the use of

the immobilizer would prevent claimant from exceeding the work restrictions which had been imposed by Dr. Pearce. I do not believe this evidence would indicate that claimant suffered a total incapacity to earn wages.

In short, in order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. I find based upon the evidence presented that claimant has remained within his healing period throughout the requested period of time. However, claimant only suffered a total incapacity to earn wages from July 14, 2007 through August 2, 2007, the date he was released to return to work with restrictions by Dr. Vandergriff. Accordingly, claimant is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through August 2, 2007.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through August 2, 2007. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the

claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$297.75.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE