

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F702776

YOLANDA SERRANO, Employee	CLAIMANT
PINNACLE FOODS CORPORATION, Employer	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 16, 2008

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 25, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 30, 2008, 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 time of 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 June 21, 2008.
3. The respondents have controverted this claim in its entirety.

Prior to the hearing the parties agreed to a number of stipulations. These are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on June 21, 2006.

3. The claimant suffered a compensable injury to both of her shoulders while working for respondent on or about June 21, 2006.

4. Respondent has paid for medical treatment through the claimant's visit to Dr. Cooper on September 10, 2007, and the functional capacities evaluation of April 1, 2008.

5. Respondent will pay claimant temporary total disability benefits for the period August 1, 2007 through August 13, 2007.

6. Respondent will pay claimant temporary total disability benefits for the period of March 28, 2007 through May 23, 2007, minus a credit of \$1,428.57 for disability benefits previously paid to claimant.

7. Respondent agrees that claimant may return to Dr. Sites for further evaluation.

8. Claimant earned sufficient wages to entitle her to compensation at the rate of \$341.00 for total disability benefits.

9. Respondent informed claimant that as of August 24, 2007, no light duty work was available.

Even though the respondent stipulated that claimant suffered an injury to both of her shoulders, respondent has not stipulated that claimant suffered a compensable injury to her bilateral elbows. At the hearing claimant reserved the compensability of an injury to her elbows as an issue. While the medical reports indicate that claimant made complaints of both her shoulders, arms, and elbows, it should be noted that the only compensable injury at issue in this case involves claimant's bilateral shoulders.

Following the additional stipulations by the parties, the only issue remaining to be litigated is claimant's request for temporary total disability benefits beginning August 24, 2007 and continuing through a date yet to be determined as well as a controverted attorney fee on those benefits.

The claimant contends that she is entitled to temporary total disability benefits beginning August 24, 2007 and continuing through a date yet to be determined. Claimant was informed by respondent on that date that no light duty work was available within her restrictions. Specifically, claimant contends that the respondent had a duty to fully develop a disability rating which had been requested by Dr. Cooper on September 10, 2007. Claimant also contends that she was not allowed to return to Dr. Sites for a rating and to determine whether there were any other treatments that would improve her condition.

The respondents contend that claimant is not entitled to additional temporary total disability benefits. Respondents contend that claimant reached maximum medical improvement as July 6, 2007, or alternatively as of August 13, 2007. Respondent contends that by those dates claimant had elected not to have surgery, claimant's physicians had issued permanent restrictions, and no additional medical treatment was recommended.

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 and previously set forth above in this opinion are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits beginning August 24, 2007 and continuing through a date yet to be determined.

FACTUAL BACKGROUND

_____The claimant began working for the respondent on January 21, 1997 as an assembler with job duties requiring her to place food items on trays for packaging. Claimant testified that on approximately June 21, 2006, she developed pain in both of her shoulders. Claimant reported those problems to the respondent and was sent to Dr. Larry Weeks, chiropractic physician, for medical treatment on June 26, 2006. Dr. Weeks' initial diagnosis of claimant's condition was musculoskeletal neck, shoulder, and mid-back pain. Claimant continued to receive medical treatment from Dr. Weeks on a regular basis until September 14, 2006.

While claimant continued to receive medical treatment from Dr. Weeks, she also received a referral from Dr. Weeks to Dr. Cooper. Claimant was initially evaluated by Dr. Cooper on July 14, 2006, and was diagnosed as suffering from bilateral shoulder and arm pain. Dr. Cooper gave claimant an injection, prescribed medication, and placed claimant on work restrictions of no lifting more than five pounds and no lifting above the mid chest. The medical records indicate that claimant continued to be evaluated by Dr. Cooper for problems relating to her bilateral shoulders, arms, and elbows. On July 28, 2006 Dr. Cooper gave claimant injections in both of her elbows for epicondylitis. Throughout this period of time Dr. Cooper also continued the original work restrictions.

By August 25, 2006, claimant's right shoulder pain had increased which based on an x-ray report led Dr. Cooper to attribute the pain to osteoarthritis and impingement. Dr. Cooper injected the claimant's shoulder on that date and continued her work restrictions.

Claimant was subsequently evaluated by Dr. Christopher Arnold, an orthopaedic surgeon, on October 5, 2006. Dr. Arnold ordered MRI scans of both the claimant's shoulders and referred claimant to Dr. Morse for an evaluation of cervical spondylosis. In a subsequent report dated October 19, 2006, Dr. Arnold indicated that the MRI scans of claimant's shoulders did not reveal a tear. Instead, he attributed claimant's bilateral

shoulder pain to probable AC arthrosis, rotator cuff tendinitis, and possible subcoracoid impingement. Dr. Arnold provided claimant with an injection in her right AC joint and noted that it provided her “near complete relief.” Dr. Arnold also imposed restrictions of no lifting, pushing, or pulling more than 15 pounds.

In a report dated November 7, 2006, Dr. Arnold noted that claimant’s shoulder was still symptomatic despite the prior injection. As a result, surgery on the claimant’s right shoulder was discussed. However, Dr. Arnold indicated that he wanted claimant to be evaluated by Dr. Morse for her cervical condition prior to the surgery.

Claimant was evaluated by Dr. Morse on November 17, 2006. A nerve conduction study of claimant’s right upper extremity revealed no evidence of carpal tunnel syndrome. Dr. Morse also indicated that an x-ray of the claimant’s cervical spine revealed cervical spondylosis. Dr. Morse indicated that he doubted claimant’s pain was coming from her cervical spine, but nevertheless ordered an MRI scan. He suspected that claimant’s neck pain was musculoskeletal in nature.

At some point after her visit with Dr. Morse the claimant decided not to undergo the surgery recommended by Dr. Arnold. This is reflected in Dr. Cooper’s report of December 18, 2006. Dr. Cooper also notes that the claimant’s cervical MRI scan had revealed arthritis at the C5-6 level and he did not believe this condition was related to claimant’s injury. Dr. Cooper noted that the claimant wanted a second opinion and as a result he referred her to Dr. Sites.

Claimant was evaluated by Dr. Sites on January 18, 2007. Dr. Sites diagnosed claimant’s condition as: (1) bilateral shoulder pain with rotator cuff tendonopathy and impingement; (2) acromioclavicular joint arthropaty; (3) cervical spondylosis; and (4) repetitive stress activity from work. Dr. Sites went on to recommend that claimant perform no repetitive activities and no line work for eight weeks in order to allow her shoulders to rest.

Because the visit to Dr. Sites was only for a second opinion, claimant subsequently returned to Dr. Cooper on March 21, 2007. Dr. Cooper noted that the claimant had taken a two week vacation, but had returned to work for the respondent at her regular job working more than 40 hours per week. He noted that Dr. Sites' recommendation had not been followed because claimant saw Dr. Sites only for a second opinion. Nevertheless, Dr. Cooper opined that Dr. Sites' plan of treatment was reasonable and indicated that claimant should be off work in an effort to see if it would improve her condition. He noted that if claimant's condition was not improved she was probably a surgical candidate. As a result of Dr. Cooper's recommendation, the claimant was off work from March 28, 2007 through May 23, 2007, and respondent has agreed to pay temporary total disability benefits for that period of time minus a credit for disability benefits previously paid.

On May 23, 2007, Dr. Cooper indicated that claimant's condition had improved approximately 50 percent. He also noted that a return to work trial was appropriate, but limited claimant's lifting to 20 pounds, no repetitive lifting, and indicated that she should rotate her job every hour.

In a report dated June 6, 2007, Dr. Cooper noted that if claimant's job was rotated her condition was okay. However, if she performed the same job her symptoms returned. As a result, Dr. Cooper directed that claimant be rotated among tasks every hour with no repetitive jobs and no lifting more than 20 pounds. Significantly, Dr. Cooper also indicated that he would probably make those restrictions permanent.

In a report dated July 6, 2007, Dr. Cooper indicated that claimant was getting along well in her job and he did make the prior restrictions permanent. Those permanent restrictions were no lifting more than 20 pounds, no repetitive lifting, no abduction above 90 degrees, and rotation of job duties.

_____By August 1, 2007, claimant was complaining of additional pain in her shoulder, elbows, and hands due to the non-rotation of her job duties. Because of claimant's

continued complaints Dr. Cooper referred her to Dr. Sites. In a report dated August 13, 2007, Dr. Sites indicated that claimant believed that she could perform her job with restrictions as long as her jobs were rotated. Dr. Sites also indicated that claimant could return to work as of August 14, 2007. Claimant was subsequently informed on August 24, 2007 that no additional light duty work was available. Claimant had one additional visit with Dr. Cooper on September 10, 2007, at which time he indicated that claimant would probably need to follow up with Dr. Sites in order to receive a disability rating. Claimant subsequently underwent a functional capacities evaluation on April 1, 2008, which reveals that claimant gave an unreliable and inconsistent effort.

Claimant has filed this claim contending that she is entitled to additional temporary total disability benefits beginning August 24, 2007 and continuing through a date yet to be determined.

ADJUDICATION

_____The accepted compensable injury to claimant's bilateral shoulders 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 she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). The healing period ends when an employee is as far restored as the permanent character of an injury will permit, and if the underlying condition causing the disability has become stable and nothing further will improve that condition, the healing period has ended. *High Capacity Products v. Moore*, 61 Ark. App. 1, 962 S.W. 2d 831 (1998). The question of when the healing period has ended is a question of fact for the Commission. *K II Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W. 3d 414 (2002).

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 remained within her healing period or that she suffered a total incapacity to earn wages subsequent to August 24, 2007.

First, I find that claimant's healing period for her injury had ended prior to August 24, 2007. Surgery had been recommended on claimant's right shoulder by Dr. Arnold in 2006. Although claimant chose not to undergo that procedure she did receive other medical treatments for her shoulder injury. These included physical therapy, injections, medication, work with restrictions, and no work at all. By the time of her visit with Dr. Cooper on July 6, 2007, Dr. Cooper assigned claimant permanent restrictions of no lifting more than 20 pounds, no repetitive lifting, no abduction above 90 degrees, and a rotation of her job tasks. Claimant was subsequently evaluated by Dr. Cooper on August 1, 2007 and September 10, 2007. Dr. Cooper provided no additional medical treatment for claimant's condition other than some medication on September 10. Likewise, Dr. Sites at the time of his evaluation of claimant on August 13, 2007 offered no additional medical treatment and indicated that claimant could return to work.

In short, even though claimant sought additional medical treatment from Dr. Cooper on one date in September 2007, the medical records do not indicate that claimant was receiving any active medical treatment to improve her condition. Instead, the medical evidence indicates that claimant's underlying condition causing her disability had become stable and no additional treatment was improving that condition. As a result, claimant's treating physician assigned permanent restrictions.

Based upon the foregoing evidence, I find that claimant did not remain within her healing period subsequent to August 24, 2007.

Furthermore, even if one were to find that claimant remained within her healing period subsequent to that date, claimant still has the burden of proving by a preponderance of the evidence that she suffered a total incapacity to earn wages. Here, claimant had

been released to return to work by Dr. Cooper with restrictions which he noted were permanent. Likewise, Dr. Sites in his report of August 13, 2007 indicated that claimant could return to work as of August 14, 2007, with restrictions. According to the medical reports as well as claimant's testimony at the hearing, she could have continued to work for the respondent with restrictions had work been provided. While the respondent did not provide claimant continued work within her restrictions, that fact alone does not prove that claimant suffered a total incapacity to earn wages. Certainly, the respondent's failure to return claimant to work at a job within her permanent restrictions is a factor which may be considered in a claim for permanent partial disability benefits relating to a loss in wage earning capacity.

In summary, in order to be entitled to temporary total disability benefits, 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. Here, the medical evidence indicates that claimant's underlying condition had become stable and no additional medical treatment was offered by claimant's treating physicians subsequent to August 24, 2007 which would improve her condition. Instead, claimant had been assigned permanent restrictions by both Drs. Cooper and Sites. In addition, both Dr. Sites and Dr. Cooper had indicated that claimant could return to work with restrictions and according to claimant's testimony she could have continued to work for the respondent had a job been available. Based upon the testimony of the claimant and the opinions of claimant's treating physicians, claimant did not suffer a total incapacity to earn wages. As previously noted, the respondent's failure to provide the claimant a job within her work restrictions is a factor which may be considered in determining whether claimant is entitled to permanent partial disability benefits for a loss in wage earning capacity.

ORDER

_____ Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning August 24, 2007 and continuing through a date yet to be determined. Therefore, her claim for additional compensation benefits is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$243.75.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE