

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G308279

KEAHA HENDLEY	CLAIMANT
MERCY HOSPITAL FORT SMITH	RESPONDENT
MERCY HEALTH CARRIER	RESPONDENT

OPINION FILED OCTOBER 14, 2014

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by RANDY MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 24, 2014, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 19, 2014, and a pre-hearing order was filed on March 19, 2014. A copy of the pre-hearing order has been marked Commission's Exhibit No. 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 this claim.

2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her left shoulder.

4. The claimant's weekly compensation rates are \$322 for temporary total disability and \$242 for permanent partial disability.

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

1. whether the claimant is entitled to additional medical in the form of physical therapy.

2. whether the claimant is entitled to temporary total disability benefits from October 16, 2013, to December 16, 2013.

3. whether the claimant's attorney is entitled to an attorney's fee.

Claimant's contentions are:

"Claimant sustained a compensable injury while working for Respondent on or about October 10, 2013. At that time, Claimant suffered an injury to her left shoulder while in the course and scope of her employment."

Respondents' contentions are:

"Respondents contend that claimant has received all benefits to which she is entitled. Respondents further contend that claimant has failed to comply with medical treatment."

The claimant, in this matter, is a thirty-four-year-old female who sustained an admittedly compensable injury to her shoulder on October 10, 2013. At that time, the claimant was employed by the respondent as a certified surgical technologist. The claimant's compensable left shoulder injury occurred while she was retracting a patient's knee during a hip replacement surgery. The claimant

testified that she experienced a “tearing sensation” and then an “instant burn” to follow.

The claimant reported her injury to her supervisor, Melissa Castleberry, the following morning. The claimant was sent to see Dr. Terry Clark for her compensable left shoulder injury on Sunday, October 11, 2013. Following is a portion of that medical report:

“HISTORY OF PRESENT ILLNESS: Keaha’s primary problem is pain located in the left shoulder. She describes it as burning. She considers it to be excruciating. It has been one day since the onset of the pain. Keaha says it seems to be constant. She has noticed that it is made worse by using it. She also notes that it is accompanied by swelling. She feels it is getting worse. Her pain level is 10/10.

Her pain is primarily in the posterior aspect of the shoulder and the trapezius area...

DIAGNOSIS: 1. Shoulder strain, left (840.9).
2. Strain left trapezius/infraspinatus/teres major.

DISCUSSION: we discussed the usual course of treatment for this type of injury.

PLAN OF CARE: I have directed Keaha to begin physical therapy. Restricted duty.”

The claimant was also prescribed medications and placed on a restricted duty status which included restrictions of “Lifting should be limited to ten pounds or less. Pushing and pulling should be limited to twenty pounds or less. Overhead work may not be performed. Limit use of left shoulder.”

On October 14, 2013, the claimant returned to work for the respondent. Following is a portion of her direct examination testimony regarding her work activities upon her return:

“Q. And what did they have you do on the very first day you came back?”

A. They had me scrub in and work a hysterectomy.

Q. And describe what you have to do when you do a hysterectomy.

A. You have to do a lot of pulling and pushing in tight spaces and lots of -- it's lengthy standing in one position and pulling, resistance for retraction.

Q. How were you able to handle that retraction on that day?

A. I went immediately to my supervisor and told her that I was in extreme pain. And it was actually excruciating pain. The burn felt like someone had lit a match in my shoulder and I couldn't move it.

Q. Do you remember approximately what date that was?

A. On the 14th.”

On October 16, 2013, the claimant's employment was terminated by the respondent. Following is a portion of the claimant's hearing testimony regarding her termination after inquiry by this administrative law judge and questioning by the respondent's attorney:

“THE COURT: I haven't heard -- and I guess the trigger for this allegation of TTD was the termination of the claimant. I haven't heard much of anything about the reason for the claimant's termination. I just want to make everyone aware of that. You may not want to tell me any more than what you have told me about it. I don't know if there's some allegation of gross negligence that was 10 involved. I don't know. But, I mean, that seems to be the trigger date, but you're not talking about it.

MR. MURPHY: The termination -- that's a good point, Judge.

Q. (BY MR. MURPHY) As I understand from your conversation that you had with Mercy, you were terminated because of a reason, that was at least conveyed to you, that you were being noncompliant with medical treatment?

A. No.

Q. What did you tell me in your deposition that the reason was for your termination?

A. She told me that I wasn't being terminated. I was being relieved of my position.

Q. Okay.

A. That's -- those were her exact words.

Q. What did she tell you as far as the reason?

A. That was her reason. It wasn't working out and that she was letting me go because it wasn't working out. I wasn't being terminated. I was being relieved of my position.

THE COURT: This is six days after the admittedly compensable injury?

Q. (BY MR. MURPHY) You were told you were abandoning your position?

A. She felt like I was.

Q. That was the only the reason that the supervisor, Ms. Castleberry, had conveyed to you, is that right?

A. Yes.

Q. But you also were told at some point regarding your workers' compensation medical that you were -- I am sorry -- it was felt

that you were noncompliant with the medical treatment?

A. Yes.

Q. You actually got a letter in that regard, is that correct?

A. Yes, I did.”

The claimant was again seen by Dr. Clark on October 22, 2013.

Following is a portion of the medical record from that visit:

“HISTORY OF PRESENT ILLNESS: Keaha’s primary problem is pain located in the left shoulder. She describes it as burning. She considers it to be excruciating. It has been twelve days since the onset of the pain. Keaha says that it seems to be constant. She has noticed that it is made worse by using it. She feels it is improving slightly. Her pain level is 7/10.

She is not started PT yet (first appointment is tomorrow). She tried retracting with her LUE in the OR but had increased pain...

DIAGNOSIS: 1. Shoulder strain, left (840.9).
2. Strain left trapezius/intraspinatus/teres major.

DISCUSSION: we discussed the usual course of treatment for this type of injury.

PLAN OF CARE: Start PT as scheduled. Add meloxicam.”

The claimant again remained on work restrictions that were described in the medical document as follows:

“Lifting should be limited to ten pounds or less. Pushing and pulling should be limited to twenty pounds or less. Overhead work may not be performed. Limit use left shoulder. No retracting with left upper extremity.”

At the hearing the claimant testified that she had called to delay and reschedule her physical therapy appointment. Following

is her direct examination testimony regarding her physical therapy appointment:

“Q. All right. Was there a recommendation for physical therapy at that time?”

A. Yes.

Q. And what was your hesitation at the time about having physical therapy?

A. That I would accrue more damage to the injury that I had already sustained. With a tearing feeling and knowing that with my symptoms, I had probably torn something significant, such as a rotator cuff, that it would do more injury than it would do any good for me.

Q. Did you express that to someone at Mercy?

A. Yes.

Q. What did you want to do instead of physical therapy?

A. I wanted an MRI.

Q. And would they agree to that?

A. No.

Q. Did you ultimately agree that you would do the physical therapy?

A. Yes, I did.

Q. And did you check with the therapist to confirm that you had an appointment?

A. Yes, I did. And the day that I called, Mercy had cancelled my appointment.

Q. Okay. So we're here today in front of this Judge. What would you -- what are you asking for?

A. I want physical therapy.”

The claimant also testified on cross examination about her physical therapy being delayed and rescheduled as follows:

“Q. And you did show up for work on October 14th and you were working, and you felt like you couldn't do the light-duty work, is that right?”

A. Yes.

Q. And then you didn't show up on October 15th?

A. I called in, yes.

Q. And the physical therapy that Dr. Clark initially said was authorized and the appointments were made, but you delayed that on your own?

A. Yes. And then they cancelled me.

Q. Well, that was in November?

A. No.

Q. Well, I got that -

A. That was the end of October, the same -- they cancelled me on -- I had an appointment on the 28th -- or that's when I rescheduled. And they, themselves, called and cancelled that appointment. And I was wanting to know why. And they said it was because they had discontinued my care.

Q. That's right. That ultimately happened?

A. Right.

Q. But as -- we don't need to go over this again for the Judge I don't think, but we'll do it. The initial delay was on your own, is that right?

A. Yes.

Q. Physical therapy appointments were set at Mercy physical therapy, and you didn't go

because you were concerned about your shoulder?

A. Yes.

Q. All right. And that happened on more than one occasion, is that right?

A. No.

Q. Pardon me?

A. No. I only cancelled one -- or rescheduled one appointment.

Q. I'm sorry?

A. I only rescheduled one appointment."

The claimant found new employment December 16, 2013, as a labor and delivery surgical technologist. At the time of the hearing, the claimant was still employed in that position and testified that her new employer was honoring her work restrictions regarding her left shoulder.

On January 8, 2014, the claimant was seen at the Hastings Indian Hospital by Dr. Phyllis Nolan-Smith. At that time, the claimant continued to complain of left shoulder difficulties. Dr. Nolan-Smith also indicated that the claimant needed to be referred and treated with physical therapy.

The claimant has asked the Commission to consider whether she is entitled to additional medical treatment in the form of physical therapy. Here, the claimant has proven that she is entitled to that additional medical treatment that was originally ordered by Dr. Clark and again ordered by Dr. Nolan-Smith in January 2014.

The claimant has also asked the Commission to consider her entitlement to temporary total disability benefits from October 16, 2013, to December 16, 2013, at which time the claimant found new employment. The claimant was terminated during a period of time in which she was under work restrictions placed upon her for her admittedly compensable left shoulder injury. The respondent terminated the claimant thereby denying the claimant employment within her restrictions. To the claimant's credit, she sought new employment and was employed by her new employer on December 16, 2013, while remaining under those restrictions. The respondents shall pay the claimant temporary total disability benefits from October 16, 2013, to December 16, 2013.

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 at the pre-hearing conference conducted on March 19, 2014, and contained in a pre-hearing order filed March 19, 2014, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her

admittedly compensable left shoulder injury in the form of physical therapy.

3. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from October 16, 2013, to December 16, 2013.

4. The claimant has proven by a preponderance of the evidence that she is entitled to an attorney's fee in this matter commensurate with the benefits awarded herein and the Arkansas workers' Compensation Act.

ORDER

The respondents shall pay the costs associated with the claimant's additional medical treatment in the form of physical therapy and shall pay the claimant temporary total disability benefits from October 16, 2013, to December 16, 2013.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the 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 pursuant to Ark. Code Ann. §11-9-715.

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.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE