

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305756

ANGEL POST,
EMPLOYEE

CLAIMANT

WHIRLPOOL CORPORATION,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED OCTOBER 5, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE RANDOLPH SHOCK, Attorney
at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE TOM HARPER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed April 12, 2004. The administrative law judge
found that the claimant was entitled to temporary total
disability compensation from May 7, 2003 through May 11,
2003, from May 15, 2003 through August 19, 2003, and from
October 1, 2003 through November 12, 2003. The
administrative law judge found that Ark. Code Ann. §11-9-526
did not bar the claimant from receiving temporary total
disability. After reviewing the entire record *de novo*, the
Full Commission affirms the opinion of the administrative
law judge.

I. HISTORY

The testimony of Angela Faye Post indicated that she became employed with Whirlpool Corporation in 1998. Ms. Post testified that she was working the "big bird" job on May 6, 2003, where "You take units, the motors, from the line, and you put them on the main lines to go in ice boxes." The parties initially stipulated that the claimant sustained a compensable injury to her right wrist, "in the form of a sprain or strain," on May 6, 2003. The claimant testified, "I picked up a unit, turned to put it on the line, and my wrist popped....Pain went up through my arm, pain in my wrist where it popped." The claimant testified that she received first aid, and that she was treated with ice and returned to work for the remainder of the day.

The claimant presented to Available Medical Care on May 7, 2003. A roentgenological examination of the right hand taken May 7, 2003 indicated, "On these images, no fracture, dislocation or significant degenerative change is identified." A physician diagnosed tendonitis of the right wrist and indicated that the claimant was able to return to work on May 12, 2003. A medical record dated May 12, 2003 indicated, "restrict from heavy lifting or rapid repetitive deviation or strenuous deviation R wrist."

The parties agreed that the claimant worked from May 12, 2003 through May 14, 2003. The claimant testified regarding her return to work on May 12, 2003:

Q. What job were you put on that day?

A. They sent me to cold pack test and what I did in there was plug up the ice box; I put a sticker on the wire, a warning label on the wire, did the fan test.

Q. What's the fan test?

A. Well, when you plug up, see if the fan runs or not, and you put the label on.

Q. Now, are you having to use both hands when you perform this work?

A. Yes. Repeated ice boxes eight hours, every box.

Q. What are you doing with your right hand repeatedly for eight hours?

A. If I could catch the box coming down the line, I could plug it up with my left hand, but if it got in front of me, I would have to plug it up with my right hand. I would tear the labels off and put the labels on with my right hand.

Q. Did this cause you any discomfort?

A. It hurt; it swelled.

The claimant agreed on cross-examination that she was a union member. The respondents' attorney referred at hearing to a "book," not in evidence, where, according to the attorney, "if you have a medical disqualification or if you

request disqualification for medical reasons, Whirlpool has to put you on a job within your restrictions? You know that, don't you?" The claimant replied in the affirmative.

The claimant was seen at Available Medical Care on May 15, 2003, at which time she was diagnosed with tendinitis right wrist. The claimant testified that a physician took her off work until she could see Dr. Martimbeau. The claimant was referred to Dr. Claude L. Martimbeau, an orthopaedic surgeon, who reported on May 19, 2003:

Ms. Post is a 33-year-old lady who is complaining of right wrist pain. She hurt her wrist at work when she twisted her wrist wrongly and felt a pop. Since then, she has had acute pain over the wrist.

Examination of the wrist shows pain along the extensor pollicis longus with a positive Finkelstein. The neuro status is intact. The x-ray is normal.

The diagnosis is acute tendinitis of the right wrist.

I gave her an injection of Cortisone along the pollicis longus. I also gave her a splint. She will be off work. She will take Bextra and Darvocet. I will see her back in two weeks.

The respondents' attorney asserted at hearing that a union representative, Rick Shelby, had offered "appropriate light duty" for the claimant. The claimant testified, "I just told him I would think about it, but I did not say anything to the effect that I would not come back to work on

restricted duty. I was scheduled for an appointment with the doctor. He told me it didn't matter what I did; I could continue with my doctor if I wished; it didn't matter."

On June 2, 2003, Dr. Martimbeau diagnosed "tendinitis, right wrist, mostly the extensor tendon." Dr. Martimbeau kept the claimant off work, and the record indicates that the claimant began physical therapy. Dr. Martimbeau diagnosed "chronic tendinitis, right wrist" on June 16, 2003. Dr. Martimbeau noted on July 8, 2003 that the claimant "seems to have improved....She is having better motion with less pain." Dr. Martimbeau diagnosed "tendinitis, right wrist" and stated, "She will remain off work."

On August 20, 2003, Dr. Martimbeau performed a tendon release of the right wrist. Dr. Martimbeau's pre-operative and post-operative diagnoses were "DeQuervain's tenosynovitis right wrist." The administrative law judge stated at hearing that the respondents provided temporary total disability compensation from August 20, 2003 through September 30, 2003.

The claimant returned to Dr. Martimbeau on October 1, 2003. Dr. Martimbeau diagnosed "status-post tendon release, right wrist," returned the claimant to physical therapy, and

kept the claimant off work. On November 12, 2003, Dr. Martimbeau diagnosed "status-post residual minimal tenosynovitis of the right wrist." Dr. Martimbeau noted, "The patient will return to work without restriction using her brace. She will be seen back p.r.n."

A pre-hearing order was filed with the Commission on December 10, 2003. The parties agreed to litigate the following issues:

- (1) Whether the claimant's de Quervain's tenosynovitis was causally related to the employment incident of May 6, 2003 and represents a compensable injury within the meaning of the Act.
- (2) The claimant's entitlement to benefits attributable to de Quervain's tenosynovitis in the form of medical services and temporary total compensation benefits from May 7, 2003 through November 12, 2003.
- (3) Whether the provisions of Ark. Code Ann. §11-9-526 barred the claimant from receiving temporary total disability compensation.

The respondents' attorney questioned Dr. Martimbeau at a deposition taken January 21, 2004:

Q. In the last paragraph of your report of May 19, you say you injected her with cortisone; you gave her a splint; she will be off work. Did you actively take her off work, or did she tell you she wanted to be off work?

A. I put her off work.

Q. Did you know what type of work she was doing?

A. She was doing - not exactly in all the details, but other than physical and repetitive motion from her wrist.

Q. If she, at the time she saw you, had been restricted at Whirlpool against any heavy lifting or rapid, repetitive deviation of the right wrist in her job, would she have been able to do that job, in your opinion?

A. Yes. As long as it's not too demanding for her wrist. As long as -

Q. All right.

A. - there is no - any kind of repetitive motion involving her wrist.

Q. So if Whirlpool had appropriate light duty for her, she could have done light duty?

A. Yes. Like a one-handed job.

Q. Or sitting -

A. Sitting work.

Q. - doing nothing.

A. Yeah, oh, yeah....

Q. Well, let me ask you this: You keep referring in some of these reports that she will remain off work. Did you ever explore with her the fact that she could go back to light duty, or did she tell you she didn't want to go back to work at all, or what transpired?

A. I cannot remember. Usually either myself or the - my nurse address the problem when they really cannot work or some - most of the time, the company call (sic) or ask - ask us.

Q. Have you treated Whirlpool employees before?

A. Oh, yeah.

Q. And you - are you familiar they have a light-duty program?

A. Yes. We - we put - I put a lot of my patients on the light duty, and usually Whirlpool, they - they ask or they call my nurse and they - they check, and we have no problem with that.

Q. But you just never had that discussion with Ms. Post about going back to light duty?

A. I think that what she indicated is - she was indicating to me that there was not light duty -

Q. Available for her?

A. - available for her....

Q. But your recollection is that Ms. Post told you that Whirlpool had no such work for her?

A. I think so. Probably, yeah....

Q. And you suggested the possibility of tendon release?

A. That's correct.

Q. Which you did on August 20th?

A. That's correct....

Q. How long after the surgery would you normally keep someone off from any kind of work, or could they go back to work immediately if they weren't stressing their right wrist?

A. Not - not if it implies surgery or involves surgery of the wrist. Usually, the only time I - I could control the swelling and the inflammation around the joints, so it's - it's usually easily three to six weeks, depending on the extent of

the surgery and the importance of the inflammatory process.

Q. Okay. So absent any unusual circumstances then, end of September probably?

A. That's correct.

Q. You next saw her on October 1st?

A. That's correct.

Q. You still kept her off work. Now, was that off regular duty or light duty or any kind of work?

A. Light - the same. I cannot - I guess we can refer to the same situations since it's the same problem. It's mostly a one-handed job.

Q. So on October 1, then, had you know (sic) of the light duty with no stress on the wrist, she probably could have gone back to work then?

A. If it's a one-handed job....

Q. And then the last note that I have is October - I'm sorry - November 12, 2003.

A. Right.

Q. That's when you released her to go back to work without restriction?

A. And also using her brace.

The claimant's attorney examined Dr. Martimbeau:

Q. Let's begin with your May 19, 2003 office visit. The history that she gave you of the onset of her problem, lifting and twisting her wrist and feeling a pop and immediate pain, is that history consistent with the underlying - with your diagnosis?

A. Yes....

Q. On that day, your office note indicates that she is - she will be off work and you will see her again in two weeks; is that correct?

A. That's correct.

Q. There is not a light duty release at that point, is there?

A. No.

Q. Okay. In fact, throughout, until you released her to return to work with the brace on November 12, 2003, you consistently kept her off work completely; is that correct?

A. That's correct.

Q. She was never given a restricted release or a light duty release of any sort from your office, was she?

A. No.

Q. And to your knowledge, were you ever contacted by her employer and asked about a light duty release for this patient?

A. No.

Q. Had they done so, you might have been willing to accommodate that after you had found out more about the position; is that correct?

A. That's right.

Q. All right. So in any event, what you're telling your patient between May 19, 2003 and November 12, 2003, is that she's off work?

A. That's correct.

During the deposition, the claimant's attorney submitted into the record a May 19, 2003 note from Dr. Martimbeau's office which stated, "off work - return to office in two weeks - unable to work due to pain and swelling rt wrist."

Hearing before the Commission was held on February 17, 2004. According to the administrative law judge, the respondents were "now willing to stipulate that the claimant's de Quervain's tenosynovitis was now a compensable injury arising out of this accident on May 6, 2003." The respondents indicated that they would provide reasonably necessary medical treatment for this compensable condition. The parties agreed to litigate the claimant's entitlement to temporary total disability compensation from May 7, 2003 through August 19, 2003, excepting the dates May 12-14, 2003; and the claimant's entitlement to temporary total disability from October 1, 2003 through November 12, 2003.

The respondents' attorney examined Ann Duplantis, a nurse in the respondents' medical department:

Q. Was I correct in my statement that if she requested restricted duty, pursuant to her doctor's advice, Whirlpool had to offer that to her under this agreement?

A. Correct.

Q. Do you deal with people on light duty at Whirlpool?

A. Yes. Every day.

Q. What is Whirlpool's policy with regard to someone in Ms. Post's condition?

A. We put them to work and we accommodate them....

Q. [Dr. Martimbeau] says that he discussed this with her and she said there was no light duty available. She says she didn't discuss it with him at all. Why didn't you call him?

A. Well, on the 29th, you referenced at that time her union rep, Rick Shelby, my boss, Scott Worden, we had the discussion. Even though she had went out, she had seen Slabbert and then a surgeon, if she would, you know, come back in to work, restricted duty, we would have sent her to James Kelly, the hand specialist, for evaluation and, you know, follow treatment, but she chose, you know, not to at that time; wasn't, you know, wasn't interested in restricted duty. I felt like we had made the effort to bring her back to work.

Ms. Duplantis agreed on cross-examination that she never received a "release" from Dr. Martimbeau to return the claimant to work.

The administrative law judge (ALJ) found, "The claimant is entitled to additional temporary total disability benefits from the periods beginning May 7, 2003 and continuing through May 11, 2003, beginning again on May 15, 2003 and continuing through August 19, 2003, and beginning again on October 1, 2003 and continuing through November 12,

2003. Specifically, during these periods of time the claimant continued within her healing period from the effects of her compensable scheduled injury and had not returned to employment." The ALJ found that the respondents failed to prove that the claimant was barred, pursuant to Ark. Code Ann. §11-9-526, from receiving temporary total disability. The respondents appeal to the Full Commission.

II. ADJUDICATION

The claimant sustained a compensable injury to her right wrist, a scheduled injury. A loss of earnings on account of a scheduled injury is conclusively presumed. Ark. Code Ann. §11-9-521(a); Minnesota Mining & Mfg. v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999). For scheduled injuries, the injured employee is to receive temporary total disability compensation until she reaches the end of her healing period or until she returns to work, whichever occurs first. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Ark. Code Ann. §11-9-526 provides:

If any 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.

In the present matter, the Full Commission affirms the administrative law judge's award of temporary total disability compensation. The parties stipulated that the claimant sustained a compensable right-wrist injury on May 6, 2003. The preponderance of evidence indicates that the claimant remained within her healing period beginning no later than May 7, 2003 through at least November 12, 2003. The claimant was clearly taken off work by her physicians during that time, except for a three-day period from May 12-14, 2003. The claimant, who we find to be a credible witness, testified that she attempted to perform her work during that three-day period, but that the work aggravated her injured right wrist with pain and swelling.

The record plainly shows that Dr. Martimbeau kept the claimant off work from May 19, 2003 until November 12, 2003. Dr. Martimbeau never released the claimant to light duty. We note that the plant nurse and possibly a union representative may have attempted to bring the claimant back to work on approximately May 29, 2003, pursuant to an unspecified "restricted duty" policy. The respondents did not call the union representative as a witness. But even if restricted duty had been offered to the claimant, the Full Commission notes the claimant's credible testimony that she

had already unsuccessfully attempted to return to work. The claimant testified that she used both hands at work, and the preponderance of evidence does not show that appropriate light duty was offered to her. The record does not show that one-handed work within the claimant's legitimate physical restrictions was available with the respondents. Further, the record shows no contact by the respondents with the treating physician, Dr. Martimbeau. Finally, we note the testimony of Ann Duplantis that, as a condition of returning to "restricted duty," the respondents were going to interrupt the claimant's reasonably necessary treatment with Dr. Martimbeau and require her to treat with another physician. Based on the record before us, the preponderance of evidence does not show the claimant unjustifiably refused suitable employment while she was within her healing period from the compensable injury.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's award of temporary total disability compensation from May 7, 2003 through May 11, 2003, from May 15, 2003 through August 19, 2003, and from October 1, 2003 through November 12, 2003. We affirm the administrative law judge's finding that Ark. Code Ann. §11-9-526 did not bar the claimant from receiving

temporary total disability. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion. My de novo review of this claim reveals that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as described above. Furthermore, I find Ark. Code Ann. §11-9-526 bars the claimant from receiving temporary total disability benefits. Therefore, the decision of the Administrative Law Judge should be reversed and this claim dismissed.

The claimant's wrist injury is a scheduled injury, which is governed by Ark. Code Ann. Ann. §11-9-521(a). The

Court of Appeals has interpreted this statute to mean that when an employee has suffered a scheduled injury, temporary total disability benefits are only appropriate when the claimant is still within her healing period and while she has not returned to work. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). However, Arkansas Code Annotated §11-9-526 provides that if an injured employee refuses offered employment suitable to her capacity, she shall not be entitled to any compensation during the continuance of the refusal, unless the refusal is justified. See, International Paper Co. v. McGoogan, 255 Ark. 1025, 504 S.W.2d 739 (1974). Whether the claimant was offered suitable employment during that time that she was still within her healing period must be given serious consideration. The claimant was, in fact, offered suitable employment during her healing period, which she refused. The majority finds that the evidence fails to show that the claimant unjustifiably refused suitable employment. I must respectfully disagree. The majority finds that the work offered to the claimant required the continued use of her right arm and hand, which would have exceeded the appropriate medical restrictions imposed by Dr. Martimbeau; that the respondents failed to contact Dr. Martimbeau; and

that the respondents were trying to force claimant to change physicians in order to work on restricted duty.

The preponderance of the evidence shows, however, that the claimant was offered suitable employment during her healing period for the above described injury, and that her refusal to accept such employment was unjustifiable. Specifically, upon his examination of the claimant on May 7, 2003, the claimant's personal physician, Dr. Slabbert, examined her, diagnosed her with tendinitis, and released her to return to work. Subsequently, upon his examination of the claimant on May 12, 2003, company physician, Dr. Carson made a diagnosis which was consistent with that made by Dr. Slabbert, namely tendinitis. In his medical record of that visit, Dr. Carson wrote, "[Claimant] wants to be released." Accordingly, Dr. Carson released the claimant to restricted work duty as is also described above. The claimant worked with these restrictions for three days and then she did not return to work. On May 19, 2003, the claimant was seen by Dr. Martimbeau, who diagnosed her with acute tendinitis and took her off of work entirely. However, the claimant admits that she never discussed with Dr. Martimbeau the possibility of her returning to work with restrictions. Moreover, in his deposition of January 21,

2004, Dr. Martimbeau recalled that the claimant had indicated to him that no light duty was available. When asked whether in his opinion the claimant could have returned to work with certain restriction such as those imposed by Dr. Carson, Dr. Martimbeau stated, "Yes. As long as it's not too demanding for her wrist." Dr. Martimbeau was questioned further as follows:

Q. So if Whirlpool had appropriate light duty for her, she could have done light duty?

A. Yes. Like a one-handed job.

...

Q. ... [B]asically, your testimony is that your recollection is that Ms. Post told you there was no light duty available for her at Whirlpool; am I correct at that?

A. I think so.

Q. She certainly did not tell you or otherwise imply that when she saw you, that she was already on light duty, did she?

A. No.

The testimony of the company nurse, Ann Duplantis, reveals that the respondent was obligated under AFL-CIO contract agreements to provide the claimant with restricted duty pursuant to her doctor's orders. Furthermore,

Ms. Duplantis testified that the claimant would have been accommodated according to Dr. Martimbeau's instructions had he provided any. However, Dr. Martimbeau testified that his office did not attempt to contact the respondent concerning restricted work duty for the claimant. Likewise, Dr. Martimbeau testified that the respondent did not contact his office regarding the same. When asked why the respondent had not contacted Dr. Martimbeau, Ms. Duplantis stated:

Well, on the 29th, you referenced at that time [in testimony with the claimant] her union rep, Rick Shelby, my boss, Scott Worden, we had the discussion. Even though she had went out, she had seen Dr. Slabbert and then a surgeon, if she would ...come back in to work, restricted duty, we would have sent her to James Kelly, the hand specialist, for evaluation and ... follow treatment, but she chose ... not to at that time; wasn't interested ... in restricted duty. I felt like we had made the effort.

Q. Through [her union rep] Mr. Shelby?

A. Yes.

Q. So up until the day of surgery, you could have accommodated her, and then when Martimbeau, in his deposition, said she could go back to light duty, you could have accommodated her with those restrictions?

A. Yes.

Ms. Duplantis admitted that an injured employee cannot return to work without a release, either full or restricted, from a physician. When questioned about such a release in the claimant's case, Ms. Duplantis stated:

Q. And Ms. Post never had a full release until she stopped treatment; is that correct?

A. She had a release from Slabbert on the 12th.

Q. You're correct. Once she returned to Dr. Slabbert on the 14th or 15th, she never had a release after that until she had completed the treatment with Dr. Martimbeau; is that correct?

A. She never came back.

The claimant did not return to work after she initiated treatment with Dr. Martimbeau and throughout her healing period from her surgery. The claimant is still employed with the respondent. Furthermore, the respondent stood ready to accommodate any work restrictions imposed on the claimant by her physician. And, although it is perhaps possible that Dr. Carson would not have placed the claimant on appropriate restrictions had she returned to his care and to her job, this conclusion is, at best, speculative. Even if plausible, speculation and conjecture cannot take the place of proof, Ark. Dept. Of Correction v. Glover, 35 Ark.

App. 32, 812 S.W.2d 692 (1991). Furthermore, there is no evidence that Dr. Carson is not a competent physician, nor is there evidence which supports the assumption that Dr. Carson would have proceeded inappropriately with the claimant's care had he been given the opportunity to treat her further. It is more likely than not, especially in light of the respondent employer's contractual union obligations, that the claimant's work restrictions would have been accommodated in accordance with a physician's instructions, and that had that treating physician been Dr. Carson, he would have restricted the claimant's activities appropriately. Moreover, regardless of whether the respondent failed to contact Dr. Martimbeau's office regarding the claimant or visa versa, the fact remains that the claimant indicated to Dr. Martimbeau that no light duty was available to her. The claimant admitted in testimony, however, that she had been offered light duty by way of her union rep, Mr. Shelby. Dr. Martimbeau testified that the claimant was capable of working with appropriate restrictions during that time in which she claimed that no light duty was available. Again, the claimant did not return to Dr. Carson for further examination, thereby giving him no opportunity to reevaluate her condition and respond

accordingly. Finally, the only restrictions of which the respondent was aware were those given by Dr. Carson on May 12th. Therefore, it is unfair to assume that the respondent would not have honored Dr. Martimbeau's restrictions had the respondent employer known of any.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she was justified in refusing an offer of restricted duty by the respondent during that period of time for which she claims additional temporary total disability benefits.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner