

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308150

DELOISE O'DONOGHUE, EMPLOYEE	CLAIMANT
PETRO STOPPING CENTER, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 16, 2005

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

Claimant appeared PRO SE.

Respondents represented by HONORABLE MICHAEL RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed March 11, 2004. The administrative law judge found that the claimant was temporarily totally disabled from July 18, 2003 through August 5, 2003. The administrative law judge found that the claimant "has a permanent partial disability in the amount of 50% to the left index finger." After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove she was entitled to temporary total disability compensation or permanent partial disability. We therefore reverse the opinion of the administrative law judge.

I. HISTORY

Delois O'Donoghue testified that she began working as a waitress for Petro Stopping Center in approximately April 2003. The parties stipulated that the claimant sustained a compensable injury to her left index finger on July 17, 2003. The claimant testified, "At the station, there's a little trash can about like this and this, and it's real deep. And I was pulling the garbage back up with my hand like this, and the pan - the aluminum pan that was real long came down and, you know, just scooped it out." An emergency physician record on July 17, 2003 indicated that the claimant's left index finger had been "incised." A flap wound was closed with a wound adhesive. The clinical impression was "laceration" to the left index finger.

The administrative law judge examined the *pro se* claimant:

Q. Let me ask you now, ma'am, did you ever go back to work at the -

A. No, sir.

Q. - Petro?

A. To be honest with you, it wasn't the place really I should have ever been employed. And -

Q. Uh-huh.

A. And I thought I could just stick it out, but I knew if I went back on light duty what it would be like.

Q. Were you released to light duty?

A. Yes, sir.

Q. By who? The emergency room physician or by the doctor?

A. By the lady, the practitioner.

Debra Shivers, an APN Clinic Director at Coast-to-Coast HealthStop, noted on July 23, 2003 that the claimant was off work. Ms. Shivers kept the claimant off work until a July 25, 2003 follow-up appointment.

Debra Shivers again saw the claimant on July 25, 2003. Ms. Shivers indicated at that time that the claimant could return to work, "must keep wound clean & dry." Ms. Shivers checked a space beside the sentence, "The claimant has suffered no permanent impairment due to his/her work-related injury."

The claimant was seen at Coast To Coast Medical on July 29, 2003. The claimant was again returned to light duty on that date and was instructed to keep her left hand clean and dry.

Debbie Shivers wrote on August 5, 2003, "I examined Ms. Delois Donoghue today and released her back to full duty. Her wound is healing without infection. She will not need to be seen again unless she has any problems." Ms. Shivers indicated on a Work Status Report, "The claimant has

suffered no permanent impairment due to his/her work-related injury."

A pre-hearing order was filed on January 27, 2004. The pre-hearing order indicated that the parties would litigate the issues of temporary total disability compensation and permanent physical impairment. Hearing before the Commission was held on February 12, 2004. The respondents' attorney cross-examined the claimant:

Q. Now, after this accident, you did go to and get treatment and the insurance company paid for it; is that right?

A. Well, they did - well, I know they have. I haven't checked the hospital, but I haven't received a hospital bill. So I - I hope they have.

Q. Okay.

A. I'm pretty sure they have.

Q. And then you said you were released to go back to work light duty?

A. Yes, sir.

Q. And did you ever go back to work light duty?

A. No, sir. Because I knew what it would be like.

Q. But they had light duty jobs for you at the restaurant, but you don't think you could have them?

A. Well, I don't know if they had light duty. The doctor just - no, sir.

Q. So without even trying it, you just decided not to go back to work?

A. Well, while I was working there one night, you know, I turned my tips in - and I tried to be honest because I - I go to church and I try to live that way. I was took like for \$60 on my times. I mean, there was just lots of things that happened there. And I just - it just built up and built up until - well, this just broke the straw.

Q. Okay. So you had some other reasons for not going back to work?

A. Right. Well, I would have stayed probably another week or so probably - maybe. I don't know. Maybe a year. It just - the surroundings wasn't what I needed.

The administrative law judge (ALJ) found, "The claimant was temporarily totally disabled from engaging in gainful employment and within her healing period as a result of her compensable injury from July 18, 2003 through August 5, 2003." The ALJ found that the claimant reached the end of her healing period on August 5, 2003. The ALJ found, "The claimant has a permanent partial disability in the amount of 50% to the left index finger." The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Temporary Disability

Ark. Code Ann. § 11-9-501(a) provides:

(1) Compensation to the injured employee shall not be allowed for the first seven (7) days' disability resulting from injury; excluding the day of injury.

(2) If a disability extends beyond that period, compensation shall commence with the ninth day of disability.

(3) If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

A loss of earnings on account of a scheduled injury is conclusively presumed. See, 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).

The administrative law judge found in the present matter, "The claimant was temporarily totally disabled from engaging in gainful employment and within her healing period as a result of her compensable injury from July 18, 2003 through August 5, 2003." The Full Commission reverses this finding. The claimant sustained a compensable scheduled injury on July 17, 2003. Although the claimant testified that she was released to light duty after receiving medical treatment, Debra Shivers noted on July 23, 2003 that the claimant was off work and kept the claimant off work until July 25, 2003. Ms. Shivers released the claimant to return to work on July 25, 2003. The claimant was therefore off work because of her scheduled injury from July 18, 2003 until July 25, 2003. As we interpret Ark. Code Ann. §11-9-

501(a), *supra*, the claimant was off work for only seven days. The claimant was statutorily ineligible to receive temporary total disability compensation, because compensation "shall not be allowed for the first seven (7) days' disability resulting from injury; excluding the day of injury." There is no evidence in the record indicating that the claimant could not have returned to light duty for the respondents on July 25, 2003. The Full Commission therefore reverses the administrative law judge's award of temporary total disability compensation.

B. Permanent Impairment

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Ark. Code Ann. § 11-9-521 provides:

(a) 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 the period of time set out in the following schedule:  
(7) First finger amputated, forty-three (43) weeks[.] (b) (1) Compensation for amputation of the first phalange shall be one-half ( $\frac{1}{2}$ ) of the compensation for the amputation of the entire digit.

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c) (1).

The administrative law judge found in the present matter, "The claimant has a permanent partial disability in the amount of 50% to the left index finger." The Full Commission reverses this finding, in that there is no probative evidence indicating that the claimant has sustained any anatomical impairment. The claimant suffered a left index finger incision on July 17, 2003, and the wound was closed with an adhesive. Debra Shivers wrote on July 25, 2003 that the claimant had suffered no permanent impairment as a result of the injury. Ms. Shivers noted on August 5, 2003 that the claimant's wound was healing without infection. Ms. Shivers again noted that the claimant had suffered no permanent impairment. The record does not indicate that the claimant sustained any disfigurement or an amputation, and the preponderance of evidence does not otherwise show that the claimant sustained any anatomical impairment as a result of the compensable injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove that she was entitled to temporary total disability compensation

or permanent anatomical impairment as a result of the compensable injury. The Full Commission therefore reverses the administrative law judge's award of temporary total disability and permanent partial disability. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

Dissenting Opinion

I respectfully dissent from the Majority opinion in this case. I find that the Claimant was temporarily and totally disabled from July 18, 2003 through August 5, 2003 and that she sustained a permanent partial disability in the amount of 50% to her left index finger.

Claimant's injury occurred on July 17, 2003 and she received emergency medical treatment on that date. Later, her laceration became infected due to the dirty rag she was given to stop her wound from bleeding and she was treated with antibiotics. In addition to the emergency room visit, Claimant was seen at the Coast to Coast Medical Clinic in West Memphis on July 23<sup>rd</sup> and July 25<sup>th</sup>, 2003. On Claimant's last follow-up

appointment, on July 29, 2003, she was released to light duty work. However, Respondent did not put forth testimony of any supervisory personnel to support its contention that there was light duty work available. Likewise, Claimant testified that she did not feel that she could physically discharge her duties only using one hand during her healing period.

The Majority concluded that Claimant's healing period ended on July 25, 2003 and that Claimant was released to light duty on that date, thereby making her statutorily ineligible to receive benefits pursuant to Ark. Code Ann. § 11-9-501 (a). However, this conclusion is contrary to the medical records and Claimant's testimony. Claimant was within her healing period and off work as a result of her injury from July 18, 2003 through July 29, 2003, a total of eleven (11) days. On July 29, 2003, she was released to limited duty work, which she could not perform. Claimant was not fully released to work full duty until August 5, 2003. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Therefore, I find that Claimant is entitled to payment of temporary total disability benefits for the period of July 18, 2003 through August 5, 2003.

I find that Claimant's injury to her left index finger has resulted in a permanent impairment to her finger. The Administrative Law Judge observed Claimant's finger and

stated that "it reflects a significant and noticeable disfigurement with respect to more than one-half of the terminal phalange." He went on to state that he observed "a noticeable 'kernel' in the finger at the site of the injury." Therefore, I find that the Administrative Law Judge's finding that Claimant sustained a 50% impairment to her left index finger was correct and should be affirmed.

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SHELBY W. TURNER, Commissioner