

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312557

MELIA FENDLEY, EMPLOYEE	CLAIMANT
PEA RIDGE SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2006

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on August 17, 2005, finding that the claimant is entitled to additional temporary total disability benefits from August 24, 2004, through March 27, 2005. Based upon our de novo review of the entire record, we find that the claimant has failed to meet her burden of proof. Therefore, we find that the decision of the Administrative Law Judge should be and hereby is reversed

and this claim for additional benefits is denied and dismissed.

The claimant sustained an admittedly compensable injury on September 26, 2003. This claim was the subject of a previous hearing and order finding that the claimant was entitled to additional medical treatment subsequent to January 9, 2004, and finding that the claimant was entitled to temporary total disability benefits from November 13, 2003, through a date yet to be determined. The respondents issued the claimant a check for temporary total disability benefits for the period November 14, 2003, through August 23, 2004. The claimant contends that she is entitled to additional temporary total disability benefits. Conversely, respondents contend that as of August 24, 2004, the claimant was no longer totally incapacitated from earning wages. We agree with respondents.

It is undisputed that the claimant sustained an injury to her ankle on September 27, 2003. Pursuant to the previous hearing and Opinion, the claimant was awarded temporary total disability benefits from November 13, 2003,

through a date yet to be determined. On or about November 12, 2004, the claimant underwent outpatient surgery to remove the hardware from her right heel. The only restrictions placed upon the claimant by her treating surgeon, Dr. Ruth Thomas, which were introduced into evidence appear in the Physician's Orders for the claimant's outpatient procedure. These orders do not restrict the claimant from working. In fact these orders only provide:

1. Discharge when fully alert and has another person available to drive home.
2. Elevate foot above heart level for 48-72 hours.
3. Provide patient a copy of post-op foot care instructions.
4. Crutches or walker needed with instruction.
Weight bearing status: Weight bear as tolerated
5. Provide a post operative wooden shoe for all patients who will be allowed to put full weight on the operated foot after surgery.
6. Medications: Document on Physician Order Sheet.
7. Call 686-5830 for post-op follow-up appointment for Already sched appt

The Physician's Order Sheet, referred to above, did not prescribe any therapy, medications, or laboratory

studies. In addition, the Outpatient Surgery Discharge Instructions did not list any work restrictions for the claimant. In fact, these instructions advised the claimant that she would be able to resume most normal activities the day after surgery. The only special instructions provided the claimant on her discharge instructions were: "(1) Weight bearing as tolerated (2) Remove bandages and stitches in 2 wks." Although the discharge instructions reflect that the claimant had a follow-up appointment with Dr. Thomas on April 19, 2005, there is no explanation in the record as to why this post-surgical follow-up visit was scheduled five months after surgery. The only conclusion which can be drawn from this lengthy delay between surgery and the post-surgical follow-up appointment is that the surgery was minor and no complications or other problems required immediate, consistent, or prolonged medical attention. While the record does not contain any medical records or reports of the claimant's post-surgical treatment, the claimant did introduce a letter from Dr. Thomas to the claimant's

attorney which is dated April 27, 2005. In this letter, Dr. Thomas writes:

I have reviewed Ms. Fendley's chart. As you know she underwent reconstruction surgery right foot, April 16, 2004. She is employed as a physical education teacher. Ms. Fendley insisted to me that she could not do her work duties because of prolonged weakness following the surgery. Our reports suggest that she worked hard in therapy trying to regain her strength. Even on her last clinic visit of March 27, 2005 she demonstrated 2cm atrophy of the right calf when compared to the non-operative side. I believe Ms. Fendley could have performed some type of employment if it did not require the full strength of her operated calf. Accordingly, sitting and teaching would have been appropriate; demonstrating physical activities such as gymnastics and running would not have been appropriate. I hope this information is helpful.

The burden of proof rests upon the claimant to prove the compensability of her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417,

557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704(c)(4) (Repl. 1996); Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Since claimant's injury is a scheduled injury, temporary total disability benefits are only appropriate when claimant is still within her healing period and while she has not returned to work. See, Ark. Code Ann. §11-9-521(a) (Supp. 1999); Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3D 822 (2001). The healing period is defined as that period for healing of the injury resulting from the accident which continues until the employee is as far restored as the permanent character of

the injury will permit. J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2D 51 (1990). If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Id.

Although the standard for temporary total disability for a non-scheduled injury which is set forth in Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981), which only allows benefits when a claimant is within his healing period and when he suffers a total incapacity to earn wages, was not held to apply for scheduled injuries, the standard set forth in Wheeler Construction Co. v. Armstrong, 73 Ark. App. ___, ___, S.W.3d ___ (2001), cannot be considered in a vacuum. Clearly, that portion of the test for temporary total disability benefits for a scheduled injury which allows for such benefits when a claimant has not returned to work, does not stand alone. Ark. Code Ann. §11-9-521 provides that a claimant is entitled to temporary total disability benefits "during the healing period or until the employee returns to work,

whichever occurs first..." Obviously, the employees inability to return to work must be related to the compensable injury. An employees failure to work or return to work cannot extend ones entitlement to temporary total disability benefits, if the reasons for not working or returning to work is not causally related to the compensable injury.

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally

incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

With regard to her post surgical medical treatment, the claimant testified that Dr. Thomas placed her in physical therapy in order to strengthen her right leg. The claimant testified that she attended physical therapy, but she did not provide any dates of that treatment, nor did she introduce any medical records confirming the treatment she received during therapy, or evidencing the nature of her healing.

The claimant is a fifth grade history teacher who is responsible for four history classes, one reading class, and one physical education class. Claimant maintains that teaching required her to be on her feet 90% of her time and that she was unable to teach at the time of the hearing. However, the claimant also testified that as part of her rehabilitation of her ankle injury, she runs 25 minutes, walks 25 minutes, lifts weights, performs Pilates, and does toe raises, as well as various other leg strengthening exercises everyday.

There is no evidence in the record that the claimant was ever restricted from working as a teacher during the 2004/2005 school year. The claimant carries the burden of proof with regard to her claim for additional temporary total disability benefits. The claimant was provided a contract of employment to teach for the 2004/2005 school year which ran from August 12, 2004, through May 27, 2005. The claimant's treating physician opined that the claimant could have performed her teaching duties so long as she did not have to demonstrate physical activities during P.E. that required gymnastics or running. In stark contrast to this restriction of no demonstration of gymnastics or running, the claimant admitted during cross-examination that she runs and performs Pilates exercises on a regular basis, thus evidencing her ability to perform these activities. While the claimant testified that she was on her feet 90% of the time at work, there is no evidence that she was required to stand or walk 90% of the time in order to perform her duties as a fifth grade teacher. The claimant was clearly capable of teaching during the 2004/2005 school year.

Moreover, there is no credible evidence in the record that the claimant was restricted from working by her treating physician. On the contrary, claimant's treating physician clearly stated that the claimant could have worked. The claimant did not introduce any evidence referencing that she was off work, or that she continued to require medical treatment to improve her condition. While the claimant testified that she continued to undergo physical therapy, such testimony does not equate to a finding that the claimant remained within her healing period. Medical maintenance to retain a person at their level of healing does not necessarily mean that the condition has not stabilized. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits from August 24, 2004, through March 27, 2005, as she has failed to prove that she was totally incapacitated from earning wages during that period of time. Therefore, we find that the decision of the Administrative Law Judge

should be reversed and this claim for benefits denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The Majority finds that the claimant did not show she was in her healing period or that the reason for her failure to return to work was related to her compensable injury. They also conclude that because she is not totally incapacitated from working, she should be denied additional temporary total disability benefits. For the following reasons, I must respectfully dissent from the Majority's opinion.

In my opinion, the claimant has shown that she remained in her healing period from the time period of August 24, 2004 to March 27, 2005. I note that the Majority's opinion primarily focuses on whether the claimant remained in her healing period after her surgery on November 15, 2004. In my opinion, the record shows that the claimant continued to receive treatment in advance of her surgery and that her condition had not stabilized. A note from August 18, 2004, indicates that the claimant was undergoing physical therapy and that she had obvious asymmetry. The note indicated the claimant complained she did not have dorsiflexion. The claimant continued to complain of severe pain in her foot and received ongoing treatment. Ultimately, the claimant's physician recommended surgery. I find that since the claimant continued to receive treatment and ultimately had to undergo surgery to correct her condition, she remained in her healing period and was unable to work until the time of her surgery in November 2004.

I further find that the claimant remained in her healing period after the time of her surgery and until March 27, 2005. The Majority notes that the claimant was not prescribed any additional treatment, therapy, or testing after her surgery. In my opinion, these findings are erroneous.

The Majority asserts that the claimant was essentially able to return to her normal daily activities the day after her surgery. However, the claimant was instructed to elevate her foot above heart level for 48-72 hours after the surgery, which to me, indicates she was not immediately able to resume her normal activities. Further, the claimant's discharge note indicated that she could bear weight as tolerated. However, apparently, her condition was such that she was still issued crutches and a wooden shoe in order to help her in healing. I also note the Majority's own opinion acknowledges that the claimant was scheduled for a follow up visit two weeks after her surgery in order to remove her stitches. To me this indicates that the claimant's condition had not yet stabilized. Additionally,

even as of March 27, 2005, the claimant's treating physician indicated that there was obvious asymmetry of two centimeters in the claimant's right calf. Further, it appears that Dr. Thomas only recommended that the claimant perform work where it would not require full strength of her leg. Accordingly, I find that the claimant's condition had not stabilized.

With regard to the Majority's assertion that the claimant was not prescribed additional therapy or treatment after the time of her surgery, I note that as mentioned before, the claimant was scheduled for at least two doctor's visits after her surgery. While the medical records do not specifically indicate the claimant was prescribed therapy, the claimant testified she did go through therapy. In fact, I note that at the time of the hearing, the claimant testified that she was still undergoing therapy. I also note that on March 27, 2005, the claimant's treating physician, Dr. Thomas noted that the claimant was going to therapy for her condition. In my opinion, one can infer from the claimant's testimony and from this notation, that she was

prescribed to undergo therapy in order to improve her condition.

With regard to the claimant's ability to return to work, I find that the claimant was unable to return to work. Additionally, in my opinion, the Majority holds the claimant to a stricter standard than necessary in order for her to show she is entitled to temporary total disability benefits. The Majority opines that because the claimant was unable to show she was totally incapacitated from working she is not entitled to receive temporary total disability benefits. However, since the claimant suffered from a scheduled injury, she is not required to show that she is totally incapacitated from earning wages in order to receive temporary total disability benefits. Rather, a claimant who has suffered a scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work. Ark. Code Ann. § 11-9-521(a) (Repl. 2002); Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The Court of Appeals has further indicated that a claimant suffering from a scheduled injury

is to receive temporary benefits during his healing period regardless of whether he has demonstrated that he is unable to earn wages. Wheeler; supra.

The Majority also notes that the claimant's delay in returning to work should also be related to the compensable injury. I agree with the Majority's assertion. However, I find that the claimant's only reason for not returning for work was due to her weak leg. Since this weak leg was directly caused by the admittedly compensable injury, I find that she has shown that her failure to return to work is directly caused by her work-related injury.

The Majority notes that the Physician's Orders after the claimant's surgery did not restrict the claimant from working or recommend any additional therapy, medications, or further testing. They further note that the claimant was instructed she could return to most normal activities the day after the surgery and could weight bear as tolerated. They further opine that since the claimant's follow up visit for the surgery was five months after the surgery, it was minor in nature. In my opinion, the evidence

shows that the claimant did not return to work and was unable to return to her prior duties as a school teacher.

The Majority relies on the doctor's note opining that the claimant could return to work to at least some extent. However, in my opinion, the language of that note indicates only that the claimant could return to duties in which she was able to "sit and teach". Since the claimant's duties were that of a fifth grade teacher, I find that it is not likely she would be able to perform her job duties without having to stand for prolonged periods of time. The claimant testified that her job required her to stand approximately 90% of the time. She said she was required to go to the board in front of the room, to the reading tables in the back, and also to go from child to child in order to monitor them. She also said she was required to oversee playground time and to walk from station to station to watch the children. When one considers that the claimant's job was to teach fifth-graders, I find that testimony to be very credible. It is also undisputed that during at least one hour of the day the claimant was required to teach physical

education. Since the claimant could admittedly not perform work requiring full strength in her leg, I find she would especially have difficulty in teaching that subject.

The Majority notes that the claimant was able to resume some normal activities around home and was able to engage in some physical activities. However, in my opinion, that evidence is insufficient to show the claimant had the ability to return to work. The claimant admitted she could perform normal household chores. However, the claimant also said that she was still required to wear orthotic devices in her shoes and indicated that she was still attempting to complete her rehabilitation because she suffered from marked atrophy. She further indicated that the atrophy caused problems with her balance and said she had been focusing on completing her therapy while at home. I note that the claimant's complaints are corroborated by the medical evidence. Furthermore, the claimant testified that she continued to receive long term disability. In my opinion, the claimant's testimony that she was still drawing disability, that she continued to undergo therapy, she was

still wearing orthotic shoes, and that she had difficulty due to atrophy in her legs, all indicate that she remains in her healing period and that she has been unable to return to work. Accordingly, I would have affirmed the decision of the Administrative Law Judge awarding additional temporary total disability benefits.

_____For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner