

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307908

DONNA EVANS,  
EMPLOYEE

CLAIMANT

SMURFIT-STONE CONTAINER,  
EMPLOYER

RESPONDENT

CRAWFORD & COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 15, 2007

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

Claimant represented by the HONORABLE MARK FREEMAN,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE J. LESLIE  
EVITTS, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed April 19, 2006. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The stipulations agreed to by the parties  
at the pre-hearing conference conducted on  
November 9, 2005, and contained in a pre-  
hearing order filed November 14, 2005, are  
hereby accepted as fact.

2. Respondent is liable for payment of  
claimant's evaluation by Dr. Maxwell on August  
20, 2004.

3. Respondent is liable for payment of claimant's evaluation by Dr. Trovillion and the physical therapy he ordered for claimant's right ankle at Health South.

4. The respondent is not liable for payment of any physical therapy from Health South associated with her lumbar spine, hip, or knee.

5. Respondent is liable for payment of claimant's evaluation at the emergency room at St. Mary's Hospital on June 25, 2005.

6. Respondent is liable for payment of Dr. Cooper's medical treatment prior to the Commission's change of physician order of November 8, 2005.

7. Respondent is liable for payment of all mileage for treatment associated with her compensable ankle injury. Respondent is entitled to a credit for all mileage benefits previously paid.

8. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for payment of a home health aide.

9. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning August 1, 2004 and continuing through March 10, 2005.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the

findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the April 19, 2006 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent with the Majority's finding that the claimant did not offer sufficient evidence to establish that physical therapy for a condition related to her lumbar spine, hip, and knee were causally connected to her compensable injury of July 18, 2003. Likewise, I dissent from the Majority's finding that the respondent was not liable for payment of in-home personal assistance in that these requested services were not in the nature of medical treatment for her compensable injury. Finally, I

disagree with the Majority's conclusion that the claimant was not entitled to temporary total disability benefits from August 1, 2004 through March 10, 2005.

The claimant sustained an injury to her right foot. Foot injuries are included in the scheduled injuries set out in Ark. Code Ann. §11-9-521. The significance of this injury being scheduled is that Arkansas Courts have held that in scheduled injury cases, a claimant is entitled to receive temporary total disability benefits during the healing period when the employer has not returned them to work. See, Wheeler Construction Company v. Armstrong, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). The holdings in that case are based upon Ark. Code Ann. §11-9-521 (a), which provides in relevant part:

"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 that period of time set out in the following schedule:"

There is no dispute that the respondent did not return the claimant to employment during the period

of August 1, 2004 through March 10, 2005. During the hearing, there was considerable discussion on the claimant's job restrictions and whether the limitation on her not wearing a steel toed shoe could be accommodated under the respondent's employment policy. Most of the parties' Appellate Briefs are devoted to a discussion of that point. However, I believe that whether the claimant's physical restrictions could be accommodated is irrelevant to the resolution of this issue. The only questions are whether or not the claimant was within her healing period, and, if so did her employer return her to work. Under the holding of the Wheeler decision, which is the controlling authority on this issue, the claimant would be entitled to receive temporary total disability benefits during the period in question if she was within her healing period and the respondent did not return her to work. Why the respondent did not return her to work is not relevant.

It has been held that a claimant reaches the end of his or her healing period when the employee is as far restored as the permanent nature that the injury will permit and, if the underlying condition causing the disability has become stable and *that nothing in the way of treatment* will improve that condition. (Emphasis

added). See Arkansas State Highway Department v. Breshears, 25 Ark. App. 244, 613 S. W. 2d 392 (1981). When that standard is applied to the present claim, it is apparent to me that the claimant was not at the end of her healing period on August 1, 2004.

In making that assertion, I am aware that Dr. Jason Pleimann, an orthopedic surgeon in Fayetteville, Arkansas, who was the claimant's original treating physician, opined in a report dated July 29, 2004, that the claimant had reached her full maximum medical improvement. However, Dr. Pleimann also states that the claimant was still having significant problems with her foot. In that report, he noted that the claimant's foot was mildly swollen and that palpation caused diffused pain. He also stated that she was still unable to do significant work on her feet. Similar findings are also set out in Dr. Pleimann's prior reports.

Because of the claimant's continued problems, she sought a consultative examination from Dr. Jerry Maxwell, a podiatrist in Edmond, Oklahoma. In a report dated August 20, 2004, Dr. Maxwell stated his belief that the claimant's problems were being caused by the hardware which Dr. Pleimann had inserted in her foot in order to stabilize her original fracture. He felt that

removing the plate and a period of physical therapy would be necessary to improve the claimant's condition.

Since Dr. Pleimann was not willing to provide it, and the respondent would not designate another physician to provide the treatment, the claimant sought additional medical treatment from Dr. Robert Trovillion, a Fayetteville podiatrist. The claimant saw Dr. Trovillion on September 27, 2004, and in a report of that date, he recommended that the claimant undergo a period of extensive physical therapy focusing on improving the claimant's range-of-motion, muscle strength, and decreasing her scar tissue. The claimant underwent this recommended physical therapy (which the respondent refused to pay for but was later ordered to for by the Administrative Law Judge) and she testified that she received considerable benefits from the treatment.

I find that the claimant's physical condition was not stable on August 1, 2004, as evidenced by the course of treatment recommended first by Dr. Maxwell and later by Dr. Trovillion. The claimant's condition did, in fact, improve dramatically following this treatment. Since the prescribed treatment did improve her

condition, it seems clear to me that her healing period had not ended during the period in question.

I therefore find that the claimant was still within her healing period at all relevant times to this case, that her employer did not provide her employment during this period, and that she is entitled to the requested temporary total disability benefits. For the aforementioned reasons, I respectfully dissent from the Majority's denial of those benefits.

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PHILIP A. HOOD, Commissioner