

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312557

MELIA FENDLEY,
EMPLOYEE

CLAIMANT

PEA RIDGE SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 24, 2007

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

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

Respondents represented by the HONORABLE CURTIS L. NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Full Commission in the above-styled matter and has remanded for further findings with regard the claimant's entitlement to temporary total disability. *Fendley v. Pea Ridge School Dist.*, CA06-585 (Dec. 20, 2006). The Court of Appeals also instructs the Commission "to make specific findings relating to the purpose of Fendley's second surgery as it relates to her improved range-of-motion." Based on the Court's remand and our *de novo* review of the entire record, the Full

Commission affirms the administrative law judge's finding that the claimant proved she was entitled to additional temporary total disability compensation from August 24, 2004 until March 27, 2005.

I. HISTORY

Melia Dawn Fendley, age 33, testified that she was employed as a middle school teacher with Pea Ridge School District. The claimant testified that she taught reading, history, and physical education, and that the job required "probably 90 to 95 percent on my feet." The parties stipulated that the claimant sustained a compensable injury to her right ankle on September 26, 2003. The claimant testified, "As I was going to the library from my classroom, in the hall, there is an incline with carpet, and then the slick floor. And as I was going down the incline, after the edge of the carpet, right as I went to turn into the library, my ankle gave, and I fell to the floor."

An emergency physician assessed right ankle sprain on September 29, 2003.

A radiology report on September 29, 2003 gave the following impression: "Probable old trauma versus accessory

ossicle at the superior aspect of the navicular seen on the lateral projection. Otherwise, unremarkable examination."

A nuclear bone scan was done on November 12, 2003:

Whole body nuclear medicine exam was performed. Clinical history given is 30 year old female who twisted her right foot on 09/26/03 with pain just distal to the os calcis in the arch and medial surface. Patient also had previous history of fracture of the right ankle. Recent outside plain films done at St. Mary's apparently were negative....

Two abnormal areas of uptake are seen in the right foot. The more superior area in the region of the medial right ankle is most suggestive of old injury. There is an area of abnormal increased uptake with greater intensity in the region of the probable navicular, which repeat plain films performed today demonstrate no definitive evidence of acute injury....

A physician gave the following impression: "Findings on the nuclear medicine study suggestive of an acute injury in the right foot in the region of the navicular. However, the plain films repeated today are also unremarkable. MRI of the foot may be helpful for further evaluation, if indicated."

Dr. Dean E. Bright, a pediatric surgeon, examined the claimant and commented on November 13, 2003:

It was explained to the patient the recommendation for x-ray's to which four views of the right foot were taken. The x-ray's reveal a displaced non healing fracture of the dorsal navicular area of the right mid foot as well as a large os tibial externum accessory bone off the navicular tuberosity. Contralateral views of her left foot also reveal the same accessory ossicle. All other radiographic findings are within normal limits....It is quite obvious that the injury sustained the fracture of the dorsal navicular area and likely a probable tendon tear of the tibialis posterior tendon and irritation of the insertion point of this tendon involving the os tibial externum of the right mid foot....[P]atient chooses to go forth with surgical removal of the displaced bone fragments, accessory ossicle, and primary repair of the probable tendon tear of the tibialis posterior....Patient is to initially go non weight bearing on the right lower extremity via crutches and has been placed on oral Darvocet N-100 for mild pain control....

Dr. Bright gave the following diagnostic impression:

"1) Multiple fractures of the right mid foot navicular area and probable tendon tear of the tibialis posterior tendon....The patient is to pursue direct primary surgical repair of the tendon pathology and removal of bone fragments."

On a note dated November 13, 2003, Dr. Bright asked that the claimant be allowed a medical leave from work. Dr.

Bright noted that the claimant was tentatively scheduled for surgery on December 2, 2003 and the approximate return to work date was December 17, 2003.

Dr. Terry J. Sites saw the claimant on December 8, 2003:

This is a first time orthopedic evaluation by me of the above named patient, a 30 year old, 5'6", 115 lb teacher at Pea Ridge ... She apparently fell off the heel of her shoe while walking down an incline at school on 09-26-03 and injured her right foot....

At no time has she had her foot immobilized, and currently is using a single crutch on the ipsilateral side. She is off work, where she is a teacher and phys. ed. instructor....

The patient relates that when she was in college playing basketball approximately 8 years ago she sustained an injury at her right ankle. She believes she had x-rays, and was treated with observation for which she missed a few weeks of basketball, followed by a full recovery, and has had no intervening symptoms. She relates the pain she had then was in a distinctly different place than where her current pain is, and in the interim she was symptom free.

X-RAY: Review of multiple x-rays right foot - demonstrates what appears to be an accessory ossicle of the navicular more so than a navicular fracture, as seen on the oblique and AP views. Her lateral view shows what may be a fracture

at the dorsal aspect of her navicular at the talonavicular joint. There is no significant displacement. A bone scan and report show increased uptake in the area of the navicular. Her pain correlates with the area of the accessory ossicle and attachment of the posterior tibial tendon more so than any pain at the dorsal aspect....

Dr. Sites gave the following impression: "1. Right medial foot pain, subacute, associated with a posterior tibial tendon insertional injury at the navicular, with incomplete recovery....I am concerned about the posterior tibial tendon, and feel this is the cause of most of her discomfort. We will obtain an MRI to assist in the decision-making process as to what to do at this point in time....In terms of causation, based upon the objective findings above and within a reasonable degree of medical certainty, it is more likely than not that the injury sustained 09-26-03 is causing the patient's current right foot symptoms. She will continue at her current work restrictions, and I will see her back following the MRI. She has not reached maximum medical improvement."

The parties stipulated that medical expenses had been paid to January 9, 2004.

A physician noted on January 26, 2004, "She has been referred to Dr. Ruth Thomas at UAMS Little Rock for Rt foot pain. Appt not made yet per Dr Sites."

The claimant was seen at UAMS College of Medicine, Department of Orthopaedic Surgery. Dr. Ruth L. Thomas, Associate Professor Foot & Ankle Section, corresponded with the claimant on February 25, 2004:

As we discussed in clinic, your diagnosis is Type 2 accessory navicular. I believe that you injured the connection between the accessory bone and the parent navicular bone. As you have failed to improve after many months of non-operative management, I lean towards operative intervention.

My plan would be to remove the accessory navicular bone, shave off the prominent residual navicular bone and advance the posterior tibia tendon. I would also transfer the flexor digitorum longus tendon from the bottom of the foot to the top of the foot and then sew it back into its origin. This would be done through the navicular.

I feel comfortable in suggesting that your chances for significant improvement are as high as 85-90% with the described procedure. Discuss the surgical option with your family and let me know if you wish to proceed. I will check you back in one month.

Dr. Thomas noted on February 25, 2004, "Needs to remain off work for full month in 3D boot walker."

A pre-hearing order was filed on March 2, 2004. The claimant contended, among other things, that she was entitled to temporary total disability and medical treatment. The respondents contended that the claimant was not entitled to additional medical treatment or temporary disability.

The parties agreed to litigate the following issues: "1. Additional medical. 2. Temporary total disability from some date to a date to be determined. 3. Attorney's fees."

A hearing was held on Tuesday, April 13, 2004. The claimant contended at that time that she was entitled to temporary total disability compensation from November 13, 2003 to a date to be determined. The claimant testified that she had not returned to work and was unable to work, because her job required "Being on my feet all the time....It's very painful to be on my foot. Very, very, very painful."

The claimant subsequently testified that she underwent surgery by Dr. Thomas on April 30, 2004. The claimant described her rehabilitation following surgery as "slow and painful."

Dr. Thomas signed the following note dated May 13, 2004:

Ms. Fendley is a 30-year-old white female who is two weeks status post accessory navicular excision with FDL transfer to the navicular and medial displacing calcaneal osteotomy. She returns to clinic today for wound check. She has been nonweightbearing in a short-leg splint. She denies any pain at this time....

First postoperative visit. Looks good. Sutures out. Cast applied. Follow up in 4 weeks. When she returns in 4 weeks, Nonweightbearing Xrays of operated foot. If hardware intact and osteotomy appears to be healing, Pt will go into 3D boot WBAT as she becomes comfortable with a hapad arch support in the boot. She is to work on active ROM. 12 weeks postop she is to return with standing Xrays. Therapy to increase strength will be added then.

The assessment was, "Doing well status post above procedure."

The claimant continued to follow up with Dr. Thomas.

It was noted on June 9, 2004:

Ms. Fendley is a 30-year-old white female who is six weeks status post navicular excision with flexor hallucis longus transfer and calcaneal osteotomy. She returns to clinic today for a check. The procedures were done on the right foot. She denies any problems at this time....

After removal of the cast, her incision sites are clean, dry and intact. She is otherwise neurovascularly intact with palpable pulse and good sensation. X-rays: Three views of the right ankle were obtained that showed good positioning of the hardware and a healing osteotomy site.... We placed her in a boot walker for the next six weeks. We stressed to her that she should not put any weight on the foot when she is not in the boot walker. We also fitted the boot walker with a Hapad solid insert to help her support her arch. She will return to clinic in six weeks with repeat x-rays.

The assessment was, "Doing well status post above procedures."

An administrative law judge filed an opinion on June 21, 2004. The ALJ found, among other things, that the claimant proved she was entitled to additional medical treatment for her compensable injury subsequent to January 9, 2004. The ALJ found that the claimant proved she was entitled to temporary total disability "from November 13, 2003, to a date to be determined."

No appeal of the administrative law judge's opinion was taken and the parties subsequently stipulated that the opinion was final.

An x-ray of the claimant's right foot was taken on July 21, 2004, with the following impression: "1) Two bolts are

seen securing the calcaneus, with a defect visible consistent with the patient's history of osteotomy. 2) Degenerative spurring with secondary ossification along the superior posterior border of the navicular. This is stable when compared to prior examination."

Dr. Theresa O. Wyrick dictated the following on July 21, 2004:

Ms. Fendley is a 31-year-old white female who is 12 weeks status post accessory navicular excision with flexor hallucis longis transfer and calcaneal osteotomy on the right. She has been weightbearing as tolerated in a boot walker for the last 6 weeks. She reports that it is occasionally painful, but she has progressed to using a cane instead of crutches and is getting around well. She denies any further problems....

On physical examination today, her incisions are well healed. She is neurovascularly intact distally in the extremity. She has no swelling in the foot. She has some limited range of motion at the ankle and limited inversion and eversion and reports that the foot and ankle themselves feel stiff....

X-rays were reviewed today which show evidence of the osteotomy and no other acute abnormalities. The 2 screws are in good position....

The patient was told to come out of the boot walker over the next few weeks. She was also given a prescription for physical therapy which she will do in

her hometown of Springdale. We also got her in touch with the Snell orthotics representative who will refer her up to their Fayetteville office in order to get some orthotics for both of her shoes, which she will probably have to wear for approximately a year. She will return to clinic in 1 month, and she should have x-rays at that time. We will evaluate how her physical therapy is working for her pain and her range of motion. Dr. Thomas did see the patient and helped her to formulate the plan.

The assessment was "Twelve weeks status post removal of accessory navicular bone and flexor hallucis longis transfer and calcaneal osteotomy."

Dr. Thomas noted on August 18, 2004:

Four months status post excision of accessory navicular with FHL transfer and calcaneal osteotomy on the right. The patient has now been weightbearing in a regular shoe for the last month. She is into physical therapy. She feels like the foot is doing well, but she is concerned that she does not have dorsiflexion when she tries to roll over her foot and she just does not feel like her calf muscle is firing appropriately....

On examination, she is able to get up on her toes, but the medial half of the gastrocnemius does not feel strong. It is unclear if this is related to her complaints, but it feels tight when she tries to roll over the foot, but I am concerned that we might have a problem from her anesthetic block....

My plan will be to send her for an EMG ___
___ study in Fayetteville to get an

answer on this. In the interim, she is going to continue on her strengthening program which she states she has worked very hard on....There is obvious asymmetry with the left measuring 12.5 cm and the right 10.75 cm.

Dr. Thomas assessed "Accessory navicular bone."

The respondents controverted temporary total disability beginning August 24, 2004.

In a note dated August 26, 2004, a claims specialist informed the claimant's attorney that temporary total disability was being paid for the period of November 14, 2003 through August 23, 2004, less short-term and long-term disability.

The claimant saw Dr. Thomas on October 27, 2004:

Patient underwent excision of accessory navicula with FHL transfer and calcaneal osteotomy, right foot, back in April. Initially I was a little afraid that she might have a problem related to the nerve block but she presents today having full function. Her complaints, however, center around the posterior aspect of the calcaneus where she states she is having terrible pain. She states that if she touches it against anything it hurts and anything she tries to do causes a sense tightness in the area. X-rays were reviewed showing complete healing of the calcaneal osteotomy.

ASSESSMENT:

I think it would be appropriate at this point to remove the screws and get rid

of the residual pain. She is agreeable and accordingly, this will be scheduled as an outpatient procedure. I do not anticipate that it is going to slow her down much....

Dr. Thomas performed "Removal of screws from right heel" on November 15, 2004. The pre- and post-operative diagnosis was "Painful hardware, right heel."

The claimant testified that following the November 15, 2004 surgery, "I was to be off of my feet, no weight bearing for about two weeks, and then back to what I - what pressure I could put on it during that time."

A pre-hearing order was filed on March 2, 2005. The claimant contended that she was entitled to temporary total disability and that her attorney was entitled to fees for legal services. The respondents contended that they had paid all benefits which they were ordered to pay. The parties agreed to litigate the following issues: "1. Additional temporary total disability from August 2004 to a date to be determined. 2. Attorney's fees."

Dr. Thomas wrote to the claimant's attorney on April 27, 2005:

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.

A hearing was held on May 31, 2005. At that time, the respondents' attorney indicated that the respondents agreed to pay additional medical treatment which was authorized and reasonably necessary. The parties agreed to litigate the issue of the claimant's entitlement to temporary total disability from August 24, 2004 to a date to be determined.

The claimant testified on direct:

Q. Has the doctor released you?

A. No....

Q. Now, do you have any expectation to be released by the doctor?

A. Yes.

Q. When do you expect to be released?

A. June 15th.

Q. And are you planning to return to Pea Ridge to work?

A. I'm not sure at this time. The contract is being reviewed with them.

Q. Did you receive something about your contract?

A. Yes.

Q. What was that?

A. I received a recommendation for termination.

Q. And what were the reasons given for that?

A. No medical note from the doctor, and I wasn't able to fulfill my duties....

The respondents' attorney questioned the claimant:

Q. You were offered a contract as part of the last record for the 2004/2005 year; is that right?

A. Correct.

Q. Okay. Did you sign that contract?

A. I believe I signed the first contract that was not amended.

Q. Okay. Well, did you - did you sign a contract so that you would teach the 2004/2005 school year, which would end on May 27th of 2005?

A. Correct.

Q. Okay. Did you teach at all last year in the Pea Ridge School District?

A. No....

Q. So you don't know whether you're going to be offered one way or another a contract for the 2005/2006 school year, do you?

A. Correct....

Q. Now, have you worked at all since August 24th of last year, 2004?

A. No.

Q. Okay. How do you spend your days?

A. Basically doing my rehab. I have to do that twice a day, and then I do functions during the day, just normal at home functions....

Q. And what do you - what kind of rehab do you do at home?

A. I do running, walking, weights, balance, toe raises. I do a BAPS board, Pilates, exercise ball, inclined running or jogging for stability of the ankle.

The administrative law judge filed an opinion on August 17, 2005. The ALJ found, in pertinent part, that the claimant proved she was entitled to additional temporary total disability from August 24, 2004, until March 27, 2005.

The respondents appealed to the Full Commission, which filed an opinion on March 16, 2006. The Full Commission found, "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."

The claimant appealed to the Arkansas Court of Appeals. The Court of Appeals has reversed and remanded.

II. ADJUDICATION

An employee who has sustained a scheduled injury is to receive temporary total disability compensation during her healing period or until she returns to work, whichever occurs first. Ark. Code Ann. §11-9-521(a); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether an employee's healing period has ended is a question of fact for the Commission. *Armstrong, supra*.

The administrative law judge found in the instant matter, "The claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability from August 24, 2004, until March 27, 2005." The Full Commission now affirms this finding. The parties stipulated that the claimant sustained a compensable injury to her right ankle on September 26, 2003. The claimant treated with a podiatric surgeon and an orthopedist before beginning treatment with Dr. Thomas on February 25, 2004. Dr. Thomas diagnosed "Type 2 accessory navicular," recommended surgery, and kept the claimant off work. The claimant testified that she underwent surgery on April 30, 2004. Dr. Thomas reported that she performed an "accessory navicular excision with FDL transfer to the navicular and medial displacing calcaneal osteotomy." The claimant described post-surgical rehabilitation as "slow and painful."

An administrative law judge found that the claimant proved she was entitled to temporary total disability compensation from November 13, 2003 to a date to be determined. That opinion became final. On July 21, 2004, Dr. Wyrick's findings included "limited range of motion at

the ankle." The claimant continued to treat with Dr. Thomas, but the respondents controverted temporary total disability beginning August 24, 2004. The Full Commission recognizes Dr. Thomas' October 27, 2004 note, to wit: "X-rays were reviewed showing complete healing of the calcaneal osteotomy." Yet Dr. Thomas also planned additional surgery in the form of removal of screws from the claimant's right heel. Since the treating physician recommended additional surgery on that date, the record does not show that the claimant had reached the end of her healing period as of October 27, 2004.

On April 27, 2005, Dr. Thomas noted that the claimant had been compliant in physical therapy. Noting that she had last seen the claimant on March 27, 2005, Dr. Thomas stated, "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." At the hearing held on May 31, 2005, the claimant testified regarding her physical activities: "I do running, walking, weights, balance, toe raises. I do a BAPS board, Pilates,

exercise ball, inclined running or jogging for stability of the ankle.”

The administrative law judge found that the claimant proved she was entitled to additional temporary total disability compensation from August 24, 2004 until March 27, 2005. The Full Commission affirms this finding. The record, including the April 27, 2005 note from Dr. Thomas, indicates that the claimant reached the end of her healing period no later than March 27, 2005. The claimant is not entitled to temporary total disability after the end of her healing period. *Armstrong, supra*. The claimant did not contend that she was entitled to temporary total disability beyond March 27, 2005 and in fact asked the Full Commission to affirm the administrative law judge's finding that she was entitled to additional temporary total disability until March 27, 2005. In her brief to the Full Commission following the administrative law judge's opinion, the claimant stated that she had been released and was able to return to work. The record therefore demonstrates that Dr. Thomas' treatment, including the second surgery, was reasonably necessary to improve the claimant's range-of-

motion and to physically enable the claimant to return to work.

Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant proved she was entitled to additional temporary total disability compensation from August 24, 2004 until March 27, 2005. We therefore affirm the opinion of the administrative law judge. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant is entitled to

additional temporary total disability benefits from August 24, 2004, through March 27, 2005. Based upon my de novo review of the entire record, I find that the claimant has failed to meet her burden of proof.

Therefore, I find that the decision of the Administrative Law Judge should be reversed and this claim for additional benefits denied and dismissed.

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, 2004, 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.

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.

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 bases, 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. Accordingly, I 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 unable to return to work as a result of her compensable injury during that period of time.

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

KAREN H. MCKINNEY, Commissioner