

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503873

JULIE A. SIMMONS,
EMPLOYEE

CLAIMANT

CENTERPOINT SCHOOL DISTRICT,
SELF-INSURED EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED JUNE 28, 2007

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

Claimant represented by the HONORABLE C. BURT NEWELL,
Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's order and opinion filed November 20, 2006. The administrative law judge found that the claimant proved "she remained in her healing period following a scheduled injury and had not returned to work from June 7, 2006, through August 6, 2006. Respondents are responsible for temporary total disability benefits for that time period." After a *de novo* review of the entire record, the Full Commission

reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove she was entitled to temporary total disability compensation from June 6, 2006 through August 6, 2006.

I. HISTORY

The testimony of Julie Simmons, age 63, indicated that she became employed with Centerpoint School District in about 2001. Ms. Simmons testified that she had been a cook for the respondent-employer for about three years.

The parties stipulated that the claimant sustained a compensable injury on April 11, 2005. The claimant testified, "I was mixing brownies, and we were working short-handed and it was a hurry-up, get-it-done thing....The mixer is supposed to stop when you open the guard, but it didn't. I mean it turns another axis, and I don't know but I had my hand down in there. I was going to scrape the dough off the sides. And that paddle ran over my hand and my arm (gesturing)....Well, it cracked the bone in my arm, and it injured my hand, too. But they didn't really see to that. They were just doing the arm - the bone."

The record contains a School Employee's Contract given May 2, 2005. The Contract provided that Centerpoint School

District No. 43 agreed to employ Julie A. Simmons as a Food Service Worker for a period of 185 days beginning August 15, 2005 and ending May 25, 2006. The Contract provided that the claimant would be paid the rate of \$12,400.00 per year.

The record includes a School Employee's Contract given April 20, 2006. The Contract provided that Centerpoint School District No. 43 would employ the claimant as a Food Service Worker for a period of nine months, beginning August 14, 2006, at the rate of \$12,950.00 per year.

The claimant testified on re-direct:

Q. Ms. Simmons, your contract - The school year is August to May. Is your contract from August to May? Are you paid -

A. I'm paid year around.

Q. Your contract has always provided that whatever your salary is it's divided by 12 instead of 9?

A. Yes.

Q. And that's the way it's always been?

A. Yes.

The respondents' attorney stated at hearing that temporary total disability was paid through June 5, 2006.

The record indicates that Dr. Michael M. Moore diagnosed "R cubital tunnel syndrome" on June 6, 2006. Dr. Moore indicated that the claimant could return to work on

June 7, 2006. Dr. Moore indicated on a form dated June 6, 2006 that the claimant could return to work at full duty and that the claimant could work "up to surgery date."

The respondents' attorney cross-examined the claimant at hearing:

Q. Did Dr. Moore release you with no restrictions as of June 7th, 2006?

A. They told me not to use my hand or my arm. I mean that was a restriction....He didn't release me....

Q. You said you worked there about four years?

A. What year did I start?

Q. Just roughly?

A. I think it was.

Q. During the previous four summers -

A. This next year would have been my fifth.

Q. During the previous four summers, when you weren't working at the school, did you get part-time jobs or do any type of work during the summertime?

A. No.

Q. In this case, after Dr. Moore released you, you were free to do the same thing that you'd done the previous four summers, weren't you? I mean you could have went to work, if you'd wanted

to, or you could have done what you did the previous four summers?

A. Uh-uh. I couldn't go to work because I couldn't use my hand and my arm.

Q. Okay. From a medical standpoint, if Dr. Moore released you to return to work, would you agree with me that you could have went to work during that summer?

A. I don't know what I could have done with one hand....

Q. We've established that the time when he released you was actually outside the terms of your contract, wasn't it? The contract runs from August to May?

A. Yes.

Q. So you wouldn't even have been working at the school anyway - had you not been injured - in June, would you?

A. No.

The respondents' attorney stated that temporary total disability was resumed on or about August 6, 2006.

The claimant testified that she underwent surgery on or about August 7, 2006.

A pre-hearing order was filed on August 29, 2006. The claimant contended that she was entitled to temporary total disability compensation from June 6, 2006 through August 6, 2006. The respondents contended that the claimant was not

entitled to temporary total disability, "since claimant had been released to full duty. TTD was resumed August 7, 2006, when she underwent another surgery."

The parties agreed to litigate the following issues:

"1. TTD benefits. 2. Attorney's fees."

A hearing was held on October 20, 2006. Lewis Diggs, Superintendent of Centerpoint Schools, testified for the respondents:

Q. There was a little bit of confusion earlier about how her payments are disbursed. Could you clear that up?

A. The employees are just like a teacher's contract. They're paid for so many days. Like some are on 185-day contract; some are on 190. There's 240 workdays in a 12-month period of time, so what they do is, instead of getting the full amount per day through that 9 months, there's just a little bit each day held back. And it's divided by 12. Probably in her case, this last year, since she was off, we probably ran a sick leave and probably paid her, for the days she actually worked, her full amount and there was none held back. So, when she quit working, there was no more money coming to her because she'd already collected everything that she was due. That's probably why she didn't get a paycheck during the summer months.

Q. The money that would be paid during the summer would have come from that previous school year -

A. The previous school year, right.

Q. - preceding that particular summer.

A. Right.

Q. I believe Ms. Simmons is on a 185-day contract, isn't she?

A. I think so. That's what it usually is for the non-certified.

Q. Once the term of the contract ends in May and the school year ends, is there any kind of policy at the school preventing people from going out and getting part-time work or summer work?

A. No.

Q. Is there any work that a cafeteria worker would need to be doing at the school during the summer?

A. No.

The administrative law judge found, in pertinent part:

3. The claimant has proven by a preponderance of the evidence that she remained in her healing period following a scheduled injury and had not returned to work from June 7, 2006, through August 6, 2006. Respondents are responsible for temporary total disability benefits for that time period.

The respondents appeal to the Full Commission.

II. ADJUDICATION

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability compensation during her healing period or until she returns to work, regardless of whether she has demonstrated that she is actually incapacitated from earning wages. 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 or not a claimant's healing period has ended is a question of fact for the Commission. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that she remained in her healing period following a scheduled injury and had not returned to work from June 7, 2006 through August 6, 2006. Respondents are responsible for temporary total disability benefits for that time period." The Full Commission reverses this finding.

The parties stipulated that the claimant sustained a compensable injury on April 11, 2005. There are virtually no medical records before the Commission, but the claimant

testified that she "cracked the bone" in her right arm in a workplace incident. The claimant subsequently signed a contract providing that she would be employed a period of 185 days from August 15, 2005 through May 25, 2006. The claimant testified that she received pay 12 months a year reflecting the 8-month contract. In other words, although the claimant would not be employed under contract, she would still receive paychecks throughout the summer for the 8-month school year.

The claimant's contract technically ended on May 25, 2006, but the respondents still paid temporary total disability through June 5, 2006. Based on the only medical records before the Commission, Dr. Moore indicated on June 6, 2006 that the claimant could return to full work duties until an appointment could be made for the claimant to undergo surgery for right cubital tunnel syndrome. The claimant contended that she was entitled to temporary total disability compensation for the period June 6, 2006 through August 6, 2006. The respondents reinstated temporary total disability on August 6, 2006 and the claimant testified that she underwent surgery on August 7, 2006. The claimant's new

contract of employment essentially provided that she would return to work on August 14, 2006.

The claimant contends that she is entitled to temporary total disability compensation for the period of June 6, 2006 through August 6, 2006. The claimant relies on the *Wheeler* standard of adjudicating temporary total disability for scheduled injuries, that is, that the claimant (1) remained within her healing period, and (2) had not returned to work from June 6, 2006 through August 6, 2006. Yet, the respondents correctly point out that the failure to return to work must be for reasons related to the compensable injury. See, *Fendley v. Pea Ridge Sch. Dist.*, CA06-585 (12-20-2006). The Centerville School District kitchen was not open from June 6, 2006 through August 6, 2006. The claimant customarily did not seek employment during the summer months when the school district was closed. There is no evidence demonstrating that the claimant sought employment during the summer months, including the relevant period of June 6, 2006 through August 6, 2006.

The claimant argues that the respondents nevertheless paid some temporary total disability compensation after the school year ended. But that is not the question before us.

The Commission must consider whether the claimant (1) remained within her healing period and (2) had not returned to work. According to *Fendley, supra*, the claimant's failure to return to work must be causally related to the compensable injury. In the present matter, the Full Commission finds that the claimant's failure to return to work was not causally related to the compensable injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove she was entitled to temporary total disability compensation from June 6, 2006 through August 6, 2006. We therefore reverse the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

This case comes before the Commission on the respondents' appeal of the November 20, 2006, opinion of

the Administrative Law Judge finding that the claimant is entitled to temporary total disability benefits for the time period of June 7, 2006 to August 6, 2006. The Majority has reversed the decision of the Administrative Law Judge. Their sole reason for doing so is because they contend that the claimant's failure to return to work was based on the fact that she usually did not work in the summer, which coincides with the dates for which the claimant is requesting benefits. I strongly disagree with the Majority and find that their ruling is directly in contrast with the decision of Wheeler Construction Co., v. Armstrong, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). I further find that the Majority's decision imposes new standards on receiving temporary total disability benefits which have no legal basis. Therefore, I must respectfully dissent.

The claimant works as a cook for the respondents. The claimant sustained an admittedly compensable injury on April 11, 2005, after getting her right hand and arm caught in a mixer. The claimant testified that she went back to work in October 2005. The claimant began experiencing swelling, stiffness, and

pain in her arm. In December 2005, the claimant returned for additional medical treatment with Dr. McLeod, an orthopedic surgeon, and was referred to Dr. Michael Moore in Little Rock, Arkansas. The claimant testified that she was taken off work on March 9, 2006, and that she has not returned to work since. The claimant received indemnity benefits through June 6, 2006, at which time the respondents stopped paying temporary total disability benefits. The claimant began receiving temporary total disability benefits again on August 7, 2006, when Dr. Moore performed cubital tunnel syndrome surgery.

The claimant testified that Dr. Moore kept her on one-armed restriction until the time of her surgery. The claimant further testified that she was instructed not to use her hand or arm prior to having surgery. She also testified that prior to the surgery her arm was stiff, she could not lift anything weighing more than five pounds and that her arm hurt with any activity. Dr. Moore issued a note on June 6, 2006, indicating the claimant could return to work up to the date of her surgery.

The claimant further testified that she worked on a 9-month contract, but that employees received the options of being paid 9 or 12 times a year. She said she had always received her checks 12 times yearly. She further testified that she had never worked during summer vacations in the past. As such, it appears that she is a seasonal worker.

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 healing period is that period for the healing of an injury that continues until the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W. 3d 899 (2002) citing, Carrol General Hospital v. Green, 54 Ark. App. 102, 923 S.W. 2d 878 (1996). The healing period has not ended so long as treatment is administered for healing and alleviation of the

condition and continues until the employee is as far restored as the permanent character of the injury will permit. Milligan v. West Tree Serv., 57 Ark. App. 14, 941 S.W. 2d 434, 946 S.W. 2d 697 (1997), citing, Arkansas Highway & Transp. Dep't v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). The determination of when the healing period has ended is a factual determination for the Commission. Carrol, see, supra, citing, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W. 2d 776 (1996).

I find that the claimant in the present case has shown that she remained in her healing period for the time period in which she is requesting benefits. The claimant sustained an admittedly compensable injury for which the respondents paid benefits until June 7, 2006. It is undisputed that the claimant was unable to work during the time period immediately preceding this. There is absolutely no evidence to indicate that the claimant's symptoms subsided as of June 7, 2006, and the claimant was awaiting surgery for which the respondents are admittedly liable. Certainly this surgery would be treatment designed to improve the claimant's condition.

As such, the evidence clearly shows the claimant was in her healing period.

Likewise, in the present case, I note that the claimant was awaiting surgery when the respondents cut her off from receiving benefits. As previously discussed, the claimant testified she was on one armed duty while she was awaiting surgery. The claimant also testified that her arm would become stiff and painful and that she could only lift around five pounds. This is certainly consistent with the claimant's condition and need for surgery and clearly indicates that her reason for not working was because she remained in her healing period. Furthermore, I find that to now somehow conclude that the claimant's symptoms dissipated after the recommendation for surgery was given is simply not in accordance with the evidence. In fact, it is difficult to imagine the surgery would have even been recommended if the claimant was asymptomatic.

I note that Dr. Moore's note seemingly indicates that the claimant was released to return to work. In my opinion this note is simply inconsistent with the remainder of the evidence in the case.

Furthermore, I find that even if Dr. Moore released the claimant to work, the evidence still shows that pursuant to Wheeler, the claimant would still be entitled to benefits.

Dr. Moore's note seemingly releases the claimant to work. However, Dr. Moore, on the same date, also recommended the claimant needed surgery. Certainly he would not have recommended such if the claimant was not symptomatic. Furthermore, I note that Dr. Moore did not indicate the claimant was at MMI or that she had exited her healing period. In my opinion under the language of Wheeler, the fact that the claimant remained in her healing period and unable to work, is in itself enough to show entitlement to temporary total disability benefits.

Furthermore, given the claimant's condition and her job duties, her inability to return to full duty work is entirely consistent with the her condition. The claimant testified she was unable to use her right arm without extreme pain due to needing surgery. She also testified she was given a one-arm restriction which is typical of what we usually see with someone suffering

from her condition. I note her job, undisputedly, required her to perform heavy lifting. It is only logical that she would be unable to work in such an environment and there is no evidence the respondents gave her light duty work or offered her work of any kind. In fact, prior to the claimant seeing Dr. Moore, the respondents paid temporary total disability benefits, indicating that presumably, unless the claimant had some change in condition, she would be unable to work. No such change occurred and the fact remains that the claimant's condition was severe enough to warrant surgery. As such, I find the claimant has met her burden of proof in showing entitlement to temporary total disability benefits despite Dr. Moore's note.

However, the real dispute in this case is not whether the claimant remained in her healing period. Rather, the real argument surrounds the requirement that the claimant must not have returned to work to be entitled to benefits. More specifically, there is dispute over whether the claimant's sole reason for not returning to work was due to the employer being closed

for the summer. This logically brings into question whether a worker whose contract of hire is not year round is precluded from receiving benefits if they do not have a history of working the remainder of the year. After reviewing the record and Arkansas law, I find that a seasonal worker is not required to show that work is available or that they usually work during a time which is outside of the terms of their contract of hire in order to receive temporary total disability benefits during that period.

The Majority finds that because the claimant did not usually work in the summer, her reason for not returning to work was not related to her injury. Based on this finding they deny benefits. In supporting their argument they opine that the respondent employer's kitchen was not open in the summer and that the claimant did not usually work during the summer. Finally, they note that there was no evidence the claimant looked for work in the summer.

I must reject the Majority's argument, as there is simply no legal basis for their decision. Furthermore, to adopt their approach imposes a new legal

burden on all contract workers seeking benefits outside the dates of their contract of hire. It seems that the Majority is finding that seasonal workers seeking benefits outside the terms of their contract now have to show they usually work during other times periods not in the respondent employer's contract of hire or that they have to show that they have looked for work during that time period. There is simply no basis for these requirements and to now impose this standard flies in the face of how both scheduled and unscheduled injury benefits have always been paid. It also contradicts the language of Wheeler and ignores the language of Ark. Code Ann. §11-9-521(a), which only requires that the claimant show he is within his healing period and has not returned to work. In my opinion, to follow the Majority's rationale would preclude all seasonal employees from drawing temporary total disability benefits during a period outside their contract of hire and regardless of the terms of that contract or the payment schedule in that contract.

The Majority, in denying benefits, provides little rationale for their decision. The Majority

relies on the decision of Melia Fendley v. Pea Ridge School District, CA06-585 (12-20-2006). The Majority notes that in Fendley, the Court indicated that a worker must show that their reason for not working is related to employment. While I agree that is correct, the current decision is a gross misapplication of the principles set forth in Fendley.

In Fendley, the claimant sustained an admittedly compensable ankle injury. The claimant underwent surgery and was awarded some benefits in the form of additional medical treatment and temporary total disability benefits. The respondents subsequently cut the claimant off and asserted she was out of her healing period and able to return to work. The claimant remained under care and eventually underwent surgery to remove painful hardware. She requested a hearing regarding her entitlement to additional temporary total disability benefits. Evidence was presented to indicate that the claimant was able to perform some work, however, the claimant contended that she remained in her healing period and that she was not required to show she was unable to work. The Commission denied benefits

reasoning that the claimant's condition had stabilized and that the claimant had not shown an incapacity to earn wages. The Commission further reasoned that the claimant was released to some work. The decision also seemed to suggest that as the claimant had been released to perform some work, her reason for not returning to work was not related to her injury. The Court of Appeals, in reversing and remanding the decision, found that while the Commission was correct in finding that the employee's failure to return to work must be related to the injury, the Commission held the claimant to an inappropriate standard in finding she had to show she was incapacitated from earning wages. Notably, the Commission subsequently issued a decision awarding temporary total disability benefits for the time period of August 24, 2004, to March 27, 2005, which was the entire time period requested by the claimant. Id.; Fendley v. Pea Ridge School District, 2006 AWCC 55, Full Commission Opinion filed March 16, 2006, (F312557); Fendley v. Ridge School District, 2007 AWCC 44, Full Commission Opinion filed April 24, 2007 (F312557).

The Majority cites the Fendley decision as justification for their actions; however, this case is much different than Fendley in that the Court in Fendley was not addressing the same issue. In Fendley, the claimant's reason for not returning in no way revolved around the terms of her contract of hire. Rather, the respondents were arguing they had available work that the claimant was able to perform and for which she refused to perform based on her own perception of her abilities. Furthermore, the Court in Fendley was certainly not considering the issue of whether a seasonal worker is allowed to receive benefits during a period in which they are not usually employed. In my opinion, to now expand the holdings of Fendley to such a large degree is an egregious error. Rather, I find that the holding of Fendley is designed to prevent claimants that essentially are able to return to work and simply do not, from receiving benefits. In the instant case, even under the Majority's own analysis, the claimant would not have been able to return to work even had the employer been open. As such, the facts and holdings of Fendley simply do not apply.

Additionally, the statute regarding receipt of temporary total disability benefits seems to contradict the findings of the Majority. While it appears that the claimant's failure to return to work was influenced by the employer's closing, there is simply not a legal requirement that work be available to a claimant for a time period in which they are receiving temporary total disability benefits. Furthermore, there is no requirement that a claimant show that they work in periods of time outside that contract of hire. Rather, Ark. Code Ann. §11-9-521 provides in part,

(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 that injury, for that period of time set out in the following schedule. . .

Notably absent from that language is any requirement that a worker that is seasonal would be subjected to any other standard. Certainly if the legislature had intended such a provision to exist it would have been codified.

Furthermore, I note that the Commission is required under the provisions of Ark. Code Ann. § 11-9-704(c) (3) to strictly construe statutes. In Lawhon Farm Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998), the Supreme Court stated:

Strict construction means narrow construction. In Arkansas Conference Seventh Day Adventists v. Benton City Board of Equalization, 304 Ark. 95, 800 S.W.2d 426 (1990), and Thomas v. State, 315 Ark. 79, 864 S.W.2d 835 (1993), we wrote that strict construction requires that nothing be taken as intended that is not clearly expressed. The doctrine of strict construction is to use the plain meaning of the language employed. Holaday v. Fraker, 323 Ark. 552, 915 S.W.2d 280 (1996). Even when statutes are to be strictly construed, however, they must be construed in their entirety, harmonizing each subsection where possible. MenArk Pallett Co. v. Lindsey, 558 Ark. App. 309, 950 S.W.2d 468 (1997).

In this instance there is simply no language in Ark. Code Ann. §11-9-521 or any other statute, including the provisions regarding seasonal workers, which imposes different standards for receipt of temporary total disability benefits on seasonal workers.

Notably, in the present case, the Majority does not indicate the claimant does not remain in her healing

period. Yet, it appears that they have imposed requirements on her that would, in effect, still require her to show that she was unable to work. In particular, the Majority notes that the claimant did not attempt to seek employment during the summer months as evidence that she was off work due to the contract of hire rather than her condition. As I have previously noted, the claimant is not required to show that she cannot return to work in order to receive benefits. In fact, if the claimant were looking for work during the summer months this Majority would almost certainly use that as evidence to show that she had exited her healing period or that she failed to return to work for some other reason deemed unrelated to her condition. Furthermore, and as previously discussed, the claimant's condition was such that she could not return to work during the summer due to her condition.

In the present case, the fact that the claimant usually did not work in the summer is of no consequence. It is obvious the respondents cut the claimant off because they felt that Dr. Moore had released her to work; not because she did not work in the summer. This is evidenced by the fact that they paid her benefits after the time

period contained in her contract of hire. While the Majority opines this is not the issue on appeal, in my opinion, it is evidence that temporary total disability benefits are traditionally paid regardless of whether one usually works outside their contract of hire.

Furthermore, I note that in Wheeler, see, supra, the Court of Appeals addressed a similar situation. In Wheeler, the claimant sustained a burn injury to his right arm. The claimant received treatment temporary total disability benefits until he was incarcerated on August 30, 1996. During the incarceration the claimant received ongoing treatment and eventually underwent surgery in February 1997. The surgeon indicated it would take at least three months for the claimant to return to work. The claimant returned to work in June 1997. The Commission found the claimant was entitled to receive temporary total disability benefits for the time period of August 8, 1996, through May 30, 1997, and that pursuant to Ark. Code Ann. §11-9-812, his daughter was allowed to recover temporary total disability benefits for the time period of his incarceration. On appeal the respondents argued that the claimant's daughter was not entitled to recover benefits

because the claimant's inability to work was due to his incarceration and not due to his injury. The Court rejected the argument and indicated the claimant was not required to show that he was unable to work. They further indicated that the claimant's incarceration was immaterial as the claimant remained in his healing period and had not returned to work. Id.

In Wheeler, there was no evidence to show that the claimant was offered work or had work available at the time of his incarceration. Certainly, since the claimant was working immediately before he was incarcerated, that was a predominant factor in why he did not work after being incarcerated. Yet despite that, he was still awarded benefits. Certainly, in this instance the circumstances are far less extreme. The claimant remained in her healing period and did not return to work during the time period in question. The overwhelming weight of the evidence shows the claimant was not able to perform work that was similar to that she performed for the respondent employer. Furthermore, there is no evidence that she refused an offer of suitable work. As such, when considering the facts of Wheeler, it is clear she is entitled to benefits.

Likewise, the Majority is simply engaging in impermissible conjecture and speculation in asserting that the claimant would not have sought other employment during her break if not for her injury. In fact, they seem to be requiring her to show that she looked for work, when in fact, under Wheeler she had no obligation to do so.

The fact of the matter is that if the claimant had not sustained an injury, she would have continued to draw her salary throughout the summer months without interruption. She also would have been able to seek other work if she had so chosen. Yet, because of her injury she could not lift more than five pounds and suffered from pain and swelling while awaiting surgery. There is no doubt that the claimant's surgery was designed to improve her condition indicating that she remained in her healing period while awaiting the surgery.

When considering the individual facts of this case, it is apparent that even if the Majority's approach towards Fendley is correct, the claimant would still be entitled to temporary total disability benefits because it is not disputed that she is entitled to temporary total disability benefits for the period within the contract of

hire. As the claimant's pay was scheduled year round to deny her temporary total disability benefits would, in effect, deny her compensation that she was admittedly due.

Under the claimant's contract, she worked some nine months of the year, but was paid on a 12 month pay plan. In other words, during the summer months, the claimant would receive pay for work that had already been performed. As such, one would assume that the claimant's weekly benefit amount would be calculated on a nine month calendar. In fact, I note that in Magnet Cove School District v. Barnett, 81 Ark. App. 11, 97 S.W.3d 909

(2003) the Court dealt with such an issue. The claimant in that case was a teacher who was under contract to work 188 days per year and paid \$26,500 per year in 12 monthly installments. The Court held that the claimant should have her weekly wage rate calculated by using the ninth month period as specified by the contract of hire. Id.

Yet, in this case the claimant's temporary total disability rate was apparently calculated on a 12 month calendar, despite the fact that she only worked nine months a year, thus reducing her wage rate. (Despite this error, I note the claimant's wage rate is not on appeal). Now the

Majority is denying her temporary total disability benefits for the time period in which she was to be compensated for wages that would have accrued during her contract of hire. This is simply wrong since it results in the claimant having a reduced wage rate and not receiving payment for temporary total disability based on wages that were owed to the claimant for work already performed pursuant to the contract of hire. In fact, I note that there is no argument that during the school year the claimant was unable to work because of her compensable injury, therefore it stands to reason that she should also receive temporary total disability benefits for the summer time during which she would have received payment for work performed earlier in the year pursuant to the terms of her contract of hire.

In summary, I find that the Majority, in an effort to circumvent the lesser standards required to receive temporary total disability benefits for scheduled injuries, has simply adopted a new, unfounded approach for considering scheduled injuries of contract workers. This is simply not supported by Fendley or Wheeler and ignores strict construction of the statutory language for receipt of temporary total disability benefits of a scheduled

injury. However, even if one agreed with Majority's reading of Fendley, it is clear that this decision is erroneous as the claimant is not being compensated in the form of wages or temporary benefits for a time period in which she was admittedly entitled to temporary total disability benefits. Therefore, I must respectfully dissent.

PHILIP A. HOOD, Commissioner