

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711999

TABALINA CORDERO,
EMPLOYEE

CLAIMANT

ROGERS SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2008

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

Claimant represented by the HONORABLE JASON HATFIELD,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE Curtis L.
Nebben, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross-appeals an
opinion and order of the Administrative Law Judge filed
May 13, 2008. 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 January 30,
2008, and contained in a pre-hearing order filed
that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned
sufficient wages to entitle her to compensation at
the rate of \$203.00 for total disability benefits

and \$153.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for medical treatment received from Dr. Rhodes. Dr. Rhodes' medical treatment was unauthorized.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning February 14, 2008, and continuing through June 3, 2008.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits from February 14, 2008 through June 3, 2008.

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

We therefore affirm the May 13, 2008 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner McKinney concurs, in part and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant

failed to prove by a preponderance of the evidence that she was entitled to the medical treatment received from Dr. Rhodes and that that medical treatment was unauthorized. However, I must dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to temporary total disability benefits beginning February 14, 2008, and continuing through June 3, 2008. In my opinion, the claimant has failed to meet her burden of proof.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Highway & Trans Dept v. Breashers, 272 Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains in her healing period, she is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and

if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission. Ark. Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that she remained within her healing period and that she suffered a total incapacity to earn wages (citing Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The claimant sustained an admittedly compensable injury on October 4, 2007, when she slipped and fell on a wet floor. The claimant was released to light duty work at that time with lifting restrictions with no more than 10 pounds. The respondents accommodated the claimant and gave her a job available within her restrictions. However, the claimant voluntarily left and refused employment. Therefore, in my opinion, pursuant to the provisions of Ark. Code Ann. §11-9-526, the claimant is barred from receiving

additional temporary total disability benefits. Although the doctor took the claimant off work for the period of February 14, 2008, through June 3, 2008, the claimant cannot prove that she was incapacitated from earning wages during that time period.

Therefore, for all the reasons set forth herein, I must respectfully concur, in part and dissent, in part, from the majority's opinion.

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree that the claimant has proved by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning February 14, 2008, and continuing through June 3, 2008. However, as I find, based on a de novo review of the record, that the claimant has in fact proved her entitlement to an additional period of temporary total disability benefits starting October 9, 2007 through the date of the temporary total disability benefits awarded by the majority, I must respectfully dissent on this issue.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981).

"Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). 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. Mad Butcher Inc. v. Parker, 4 Ark. App. 124, 628 S.W. 2d 582 (1982). See Searcy Indus. Laundry, Inc. v. Ferren, 92 Ark. App. 65, 211 S.W. 3d 11 (2005). Here, the claimant has shown that she sustained compensable neck and left shoulder injuries on October 4, 2007 for which she was actively treating, with prescription medications, physical therapy, chiropractic and medical doctor visits. The medical evidence of record shows that no doctor has indicated that the claimant has reached maximum medical improvement, and in fact, Dr. Knox, once the claimant finally got to see him on February 14, 2007, through the change of physician procedure, immediately recommended an aggressive physical therapy program and immediately placed the claimant in off-work

status. Therefore, I find that the claimant has shown by a preponderance of the evidence that she has remained in her healing period from the date of injury through June 3, 2008.

I also find that the claimant has shown by a preponderance of the evidence that during this time period she was totally incapacitated from earning wages. A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that she was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984). Here, the claimant was taking pain medication, attending physical therapy, and Dr. Vandergriff had given her a 10 pound lifting restriction. The claimant testified that she was suffering from muscle spasms, which are corroborated by medical records, tingling and numbness in her upper extremities as well as severe neck and back pain. Although Dr. Vandegriff initially released the claimant with a ten pound lifting restriction, the claimant's work environment made continuing nearly impossible. The claimant's chiropractor, Dr. Rhodes, took the claimant totally off

work from October 10 to October 15, 2007. Although Dr. Rhodes eventually released the claimant to light-duty work, the evidence clearly shows that due to her neck and back injuries the claimant was unable to perform even light-duty work. Therefore, I find that the claimant is entitled to temporary total disability benefits.

Furthermore, although not specifically addressed by the majority, the respondent has erroneously argued that the claimant is barred from receiving temporary total disability benefits due to Ark. Code Ann. §11-9-526, which states that if any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless, in the opinion of the Workers' Compensation Commission, the refusal is justifiable. Ark. Code Ann. §11-9-526 (2007). An offer of suitable employment is a condition precedent to applying Ark. Code Ann. § 11-9-526. Webb v. Webb, Workers' Compensation Commission Full Opinion filed June 29, 2000 (E906144). Work must be available within the employee's physical restrictions. McCuller v. Democrat Printing & Lithograph Co., Workers' Compensation Commission Full Opinion filed April 28, 1998 (E608050).

Moreover, the claimant must unjustifiably refuse employment which is suitable to his capacity. Barnette v. Allen Canning Company, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

Here, the respondent did not offer the claimant suitable employment. The respondent-provided doctor stated that suitable employment would be that which did not involve lifting over 10 pounds. The claimant credibly testified that part of her job was lifting pans containing chicken or fish nuggets which weighed anywhere from 13 to 18 pounds. The preponderance of the evidence of record clearly shows that the claimant was required to lift chicken nugget pans and wash dishes, both activities, which anyone with any common sense and a cursory knowledge of the size of cafeteria pans, would know requires lifting in excess of 10 pounds. The testimony of Ms. Carr, the claimant's supervisor, clearly shows that the work offered to the claimant was unsuitable.

In conclusion, I find that the claimant was in her healing period and totally disabled from work from October 10, 2007 through June 3, 2008, and is entitled to temporary total disability benefits for all of those dates, not limited to temporary total disability benefits starting February 14, 2008 as awarded by the

majority. Furthermore, I find that Ark. Code Ann. §11-9-526 is not a bar to the claimant's receipt of temporary total disability benefits, as not only did the respondent not offer suitable employment, the claimant did not unjustifiably refuse suitable employment.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner