

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F604343

STELLA FARRAR, EMPLOYEE

CLAIMANT

TYSON FOODS, INC.,
A SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED MARCH 5, 2008

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 E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed April 18, 2007.

The Administrative Law Judge entered 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 24, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 12, 2006 through August 15, 2006.

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.

Thus, we affirm and adopt the 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 12, 2006 through August 15, 2006. Based upon a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence her entitlement to temporary total disability benefits from July 12, 2006 through August 15, 2006, and therefore, I must respectfully dissent.

The claimant sustained an admittedly compensable injury on November 30, 2005. The claimant, who was working as a quality control technician in the respondent's poultry plant, was injured when she stepped in a drain while carrying out her job duties, injuring her lower back. Initially, the claimant was diagnosed with a lumbar strain. Later, she came under the care of Dr. Luke Knox, a Fayetteville neurosurgeon, who attributed her problems to

degenerative joint disease and bulging discs at the L2 through S1 level. He specifically discussed that she had a "rather pronounced compressive pathology at 4-5 bilaterally." The respondent accepted liability in this claim and has provided the claimant certain benefits.

Since the occurrence of the compensable injury, the claimant has received significant medical treatment, particularly in the form of physical therapy. According to the claimant's testimony and the medical evidence of record, she received some temporary benefit from the physical therapy treatments, but her symptoms of significant pain, lack of mobility and similar problems recurred. In spite of her physical difficulties, the claimant continued to perform her job and was still employed by the respondent at the time of the hearing.

The issue presented for determination is the claimant's entitlement to temporary total disability benefits from July 12, 2006 to August 15, 2006. The claimant contends that she did not work during that period of time based upon the advice of her treating physician. The

restrictions the claimant was under at the time were to avoid significant bending and lifting of more than ten pounds. The respondent contends that the job provided to the claimant, while her normal duties, did not require her to exceed those limitations.

The claimant went to work for the respondent in 1998. According to the claimant's testimony, approximately six months after being hired, she was promoted to the position of quality technician. The claimant extensively described her job duties at the hearing. This description is set out as follows:

A. The first thing you do is gather all materials that you're going to need - all your paperwork. You gather scales. You gather a cart. We have just like a utility cart that we pull out on the line with our scale and then we set it up on the line. Then you walk around with a clipboard and you take what they call a float. You check everything. All the product that's there, you write down -- you document all the numbers, dates, and the product numbers. Then you do weights. I'm sorry, you do your metal detector. You have to run your standards through, and the standards run through a conveyor belt, through a metal detector.

Q. Okay. What are standards?

A. Standards are pieces of metal that are on a card like a credit card and you run this through the metal detector and when the metal detector detects it, it throws it off the line into a metal box, and the metal box is probably about -- oh, 18 inches wide and about 3 foot tall (indicating), and then it will drop those standards down to the bottom of the box and then you have to pull those standards out.

Q. Pull them how?

A. You have to reach -- you have to -- The boxes are locked. You have to reach down, squat down, and you unlock the locks and then you pull any product that has fallen when the metal detectors -- when the standards go through. You take the product out and you run -- you pick it up and you get back on the line and then you run it through three times -- each package. You'll run it through the metal detector, pick it up, run it back through again until it clears, or making sure that it does. If it kicks off again, then there's a problem with it.

Q. So when you said run it through and pick it up, run it through and pick it up, three times, when you're saying "pick it up," is that when you have to get down --

A. Yes.

Q. -- and get it from the bottom of the box?

A. Yes.

Q. And then what happens?

A. You do this every 30 minutes, and then you monitor your line. You walk around and make sure that all the product is okay and inspect product in between and do pallet checks, make sure that the pallets are dated and coded correctly.

Q. When you're inspecting product, how do you do that?

A. You just go up to the cases and look at it. Sometimes there will be, you know, a high case, sometimes it's low cases, just whatever they have, but you wait until they pour it out and actually check date codes on the bags, you know, to make sure that they're sealed, they're not burned or anything. A visual inspection is what I do in the product.

Q. All right. So you said sometimes they're high and sometimes they're low.

A. Uh-huh.

Q. If they're low do you have to bend over to look at them?

A. Yes.

Q. All right. Now, when you -- Go ahead and tell me what you do next.

A. Well, that's basically, you know, what I do every day.

Q. Now, when you're checking the product you said something about pulling the product off the line. When is that done?

A. It's done right after it goes past the medical detector because I have to wait until it goes through a check wear and it's actually ready to go into the case -- ready to go into the case for the customer. So I pull it off. I pull my cart up to the lines and the lines are all different heights. They're supposed to be pretty much standard heights. And the carts that we have, like I say, are utility carts which are not quite as tall as they should be because you have to do a lot of bending over, and my cart is probably 18 inches wide and it's set up close to the line and I have to reach over my cart and pull the product to me (demonstrating with right hand).

Q. Now, when you had to reach over the cart to get the product, did you have to bend to do that?

A. Yes, I have to reach and bend and I have to stretch over to the line to do it. I had to switch over to doing it this way because when I injured my back I wasn't able to pick up -- usually I pick up five consecutive bags, but because I couldn't -- I wasn't able to pick up the weight -- I had to turn my cart where I could just pick it up off the line. So I was having to do more repetitive because I was having to do more of it. You know, instead of picking

up all five at one time, I was having to do each bag individually.

Q. All right. Now, you mentioned earlier that the metal detector part was done every 30 minutes. Was the pulling of product off the line done every 30 minutes also?

A. Yes.

Q. And was there anything else during your day that you did for your work?

A. Well, you have to pull paperwork and you have to, you know, keep the lab clean -- straight. We have our weights, what we call our weights, that we use in the boxes underneath the counter and on occasion I would go through and straighten them because if you don't they get so messed up that you lose them.

Q. Okay. So out of the eight hours that you weren't on break, how much of your time would be spent doing the metal detector and pulling the product off the line?

A. Out of the eight hours? Well, it takes at least 10 minutes to do one complete check, you know, with the -- checking the weights and the --

Q. And the one complete check is done how often?

A. Every 30 minutes.

Q. Now, when you were talking about the visual inspection that you would do, when are you doing those?

A. You do that when you're doing weights and also when you're doing a float. Now, the float is done once an hour. If you find anything wrong with the product then you have to take it back to the lab and get your supervisor or your lead, someone, to look at it and make judgment on it if you feel like it's -- you know, it's not good quality or something.

As the above description makes clear, while the claimant's job did not require her to do any heavy lifting, it did require her to spend most of her time on her feet, and required her to frequently bend, stoop, reach, and otherwise extend her back. The claimant testified that performing her job duties caused her a significant amount of pain and discomfort. However, she stated that she was concerned that she would lose her job if she did not continue to perform it. The claimant, who was 61 years of age at the time of hearing, testified that her supervisors had advised her she had that the lightest duty job available in the respondent's facility.

Immediately following her injury, the claimant

came under the treatment of Dr. Konstantin Berestnev. After directing the claimant to undergo physical therapy, Dr. Berestnev continued to monitor the claimant's condition. In a report dated February 8, 2006, he released her to return to work with the restrictions of avoiding lifting more than 20 pounds and to avoid climbing. However, he did not indicate that she was at the end of her healing period.

When the claimant's ailments did not resolve, she eventually came under the treatment of Dr. Luke Knox, a Fayetteville neurosurgeon. Dr. Knox likewise directed the claimant to undergo treatment and provided similar medication and injection therapy. In a report dated June 26, 2006, Dr. Knox reviewed the claimant's condition and explained his prognosis for her. The relevant part of his report reads as follows:

Nevertheless, I believe the culprit of her complaint is the bulging disc at L4-5 which appears to be secondary to an exacerbation of her preexisting condition. I have arranged for Stella to go through a physical therapy program. I would like to see her back in clinic in six weeks. I am going to continue Stella on the same work restrictions, at ten-

pound lifting restriction, and *she is to avoid significant bending, stopping, and lifting.* I suspect that there may be a component of her inability to go back to her previous employment. *She may elect to take a leave of absence while she is allowing her lumbar spine to heal.*" (Emphasis added).

According to the claimant's testimony, a nurse case manager with the respondent attended the examination she had with Dr. Knox on June 26. According to the claimant, she, the nurse, and Dr. Knox discussed extensively what her job entailed, whether she was physically able to perform the work, and whether it would be in her best interest to remain off work for some period of time. This conversation was apparently the basis for Dr. Knox's comment that the claimant could "elect to take a leave of absence..." The claimant's testimony regarding this conversation is supported by the notes from the nurse case manager who attended this examination and which were made a part of the record. In the note dated June 26, 2006, the nurse outlined that the claimant had "tried to persuade" the doctor to put her off during his recommended course of physical therapy

because her symptoms were being aggravated by her work. The nurse then states, "Dr. Knox addressed this and gave her the option to be off during the six weeks PT (illegible) but said it wasn't medically necessary."

Dr. Knox further explained his position in regard to this "optional" time off in a letter dated February 19, 2007. In that letter, he stated as follows:

"As I recall, I thought that it would probably be better for her not to work in the meantime. I did think it was safe for her to pursue her employment with a 10-pound lifting restriction and to avoid significant bending, stooping, and lifting. All in all, it would probably be in her best interest if she avoided work altogether."

Even after the claimant was advised by Dr. Knox that she could, if she chose, take time off from work to allow her injury to heal, she continued working. It was not until July 12, 2006, that the claimant began missing work. She did not return to work until August 16, 2006.

Based on the medical evidence, coupled with the claimant's testimony and the treatment note from the respondent's nurse case manager, I find that the claimant

has met her burden of proving by a preponderance of the evidence her entitlement to temporary total disability benefits from July 12, 2006 through August 15, 2006.

A claimant with an unscheduled injury is entitled to receive temporary total disability benefits when he or she is within their healing period and when they suffer a total incapacity to earn wages. Arkansas State Highway and Transportation Department v. Beshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Here, there is no question that the claimant was still within her healing period during the times she missed work. In fact, in a report dated November 3, 2006, Dr. Knox specifically stated that the claimant had not reached her point of maximum medical improvement. It was not until November 27, 2006, when Dr. Knox issued a report finding that the claimant had sustained a 10% impairment to the body as a whole, could it be construed that she had reached the end of her healing period. Therefore, the claimant has indisputably established the first of the two requirements for establishing her entitlement to temporary total disability benefits.

The next question is whether the claimant was incapacitated from earning wages. In this regard, the respondent contends that they had provided the claimant a job within her restrictions and that her refusal to work during the period in question disqualifies her from receiving benefits. In making that argument, the respondent is relying on Ark. Code Ann. §11-9-526 which provides, in essence, that if an employee refuses employment within their restrictions, they would not be entitled to receive compensation unless this refusal is justifiable.

I find that the work offered by the respondent was not within the doctor's restrictions and, even if it had been within the doctor's restrictions, the claimant's failure to report to work was justifiable. Dr. Knox's medical reports specifically stated that, in addition to a 10-pound weight lifting restriction, the claimant should avoid "significant bending, stooping, and lifting." The excerpt from the claimant's testimony shown above, makes it clear that while the claimant's job might not have exceeded her lifting restrictions, she was clearly doing significant

bending and stooping. Further, the claimant testified that those activities were what exacerbated her symptoms. As Dr. Knox's letter makes clear, he was of the opinion that the claimant should avoid these activities and would benefit from the time off work.

The claimant testified that she felt she needed the time off to allow herself to heal. This reason is clear justification for the claimant not working for what was a relatively brief period. It is significant that the claimant continued to work for the vast majority of the time while she was recovering from this injury. However, it also clear that the demands of her job caused her symptoms to become steadily worse and required her to continue undergoing medical treatment. Dr. Knox clearly left it up to the claimant to use her judgment as to whether it was appropriate for her to work. The claimant should not be penalized because she followed her doctor's advice. In this regard, I note that even the respondent's nurse case manager acknowledge that Dr. Knox gave the claimant the "option" to determine whether she could continue working. Also, it does

not appear from the nurse's notes, or any other documents in the record, that the respondent in any way advised the claimant that she should not follow the doctor's advice. Based on the above, I find that the respondent did not offer the claimant work within her restrictions, and even if the offered work had been suitable, the claimant's refusal to work during the period in question was justified.

In conclusion, I find that the claimant has proved by a preponderance of the evidence her entitlement to temporary total disability benefits from July 12, 2006 through August 15, 2006.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner