

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709316

RICHARD FIELDS, EMPLOYEE CLAIMANT

M. J. MITCHELL ENTERPRISES, INC.,  
EMPLOYER RESPONDENT

AMERICAN HOME ASSURANCE CO.,  
INSURANCE CARRIER RESPONDENT

OPINION FILED JUNE 25, 2008

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 FRANK B.  
NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as  
modified.

OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed January 4, 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  
October 11, 2007, and  
contained in a pre-  
hearing order filed that

same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$440.00 is also hereby accepted as fact.

3. Claimant is entitled to temporary total disability benefits beginning July 14, 2007 and continuing through August 2, 2007.

4. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

After reviewing the entire record de novo, the Full Commission finds that the Administrative Law Judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed as modified.

At the hearing, the claimant contended entitlement to temporary total disability benefits from July 14, 2007 through September 21, 2007, with the exclusion of August 28, 2007, when he attempted to return to work. The Administrative Law Judge awarded temporary total disability benefits from July 14, 2007

through August 2, 2007. For the reasons stated below, we find that the claimant proved by a preponderance of the evidence entitlement to temporary total disability benefits from July 14, 2007 through September 21, 2007 (excluding August 28, 2007). Therefore, we modify the Administrative Law Judge's opinion to provide for an additional award of temporary total disability benefits from August 3, 2007 through September 21, 2007 (excluding August 28, 2007).

On July 13, 2007 the claimant was employed as a landscaper in Columbia, Missouri. On that date, he picked up a bundle of shovels and dislocated his shoulder. The claimant was treated in the emergency room in Columbia and given a shoulder immobilizer (sling) to wear until he could be seen by an orthopedic surgeon.

The claimant returned to Arkansas and attempted to return to work on July 17, 2007, operating a weed-eater, at the personal residence of the owner of the company. The work caused the claimant difficulty and he and the owner agreed that the claimant would not return to work again until his "shoulder was a hundred percent".

The claimant's medical treatment in Arkansas began with Dr. Cathleen Vandergriff at the Arkansas Occupational Health Clinic, which was arranged by the workers' compensation insurance carrier. She saw the claimant on August 2, 2007, and made the same recommendation that had been made in the emergency room, an evaluation by an orthopedic surgeon. On that date, she said the claimant could "return to work today with no lifting greater than 15 pounds and no lifting the arm above the horizontal position to do work." However, the claimant was unable to return to work at this time because the employer was working out of town and he was waiting on the workers' compensation insurance company to make him an appointment with an orthopedic surgeon. He was told by the representatives of the insurance company that he should not leave town until the appointment had been made and the employer agreed. The employer told the claimant that "it would better on everybody if I just stayed home and made it until the next time we go out" and to "go ahead and see my doctor".

The workers' compensation insurance case manager made the appointment with an orthopedic surgeon,

Dr. Mark M. Allard, on August 13, 2007. Dr. Allard opined that the claimant needed to have his shoulder reconstructed and that this procedure should be performed by a "shoulder sub specialist". He stated that the procedure "should not be undertaken by a general orthopedic surgeon". Dr. Allard said that the "operation should be done by either Dr. John Park in Fayetteville, or Dr. David Collins in Little Rock".

For reasons which are not apparent in the record, the claimant was not seen by either of the sub-specialists recommended by Dr. Allard, but was sent to Dr. Charles E. Pierce, on August 22, 2007. Dr. Pierce did not perform the reconstruction recommended by Dr. Allard, but instead conducted a diagnostic procedure in the form of a MR arthrogram which made the claimant worse. The test showed "anterior labral deficiency and tear with a capsular stripping anteriorly". Dr. Pierce prescribed home strengthening and physiotherapy. He said that the claimant was to perform only right arm duty on August 23, 2007.

On August 28, 2007, the claimant returned to work under the restrictions of right hand work only. He was instructed by his employer to bring his sling to

work and to wear it, which he did until noon. The claimant was digging holes with his right hand and the sling was causing extreme pain in the shoulder. He asked the employer if he could work without the sling and was informed that he would either wear the sling or not work. The claimant called the doctor's office and was told that he did not have to wear the sling in order to work. The claimant could not continue working while wearing the sling and the employer would not let him work without it, so the claimant left the job. Other than the doctor in the emergency room advising the claimant to wear the sling until he could be seen by an orthopedic surgeon, none of the treating physicians had advised the claimant to wear the sling.

The claimant was re-evaluated by Dr. Pierce on September 13, 2007. At that time, he was limited to lifting of 30 pounds to the waist with no overhead work. At the time of the hearing, the claimant continued under the treatment of Dr. Pierce and had not reached the end of his healing period.

On September 21, 2007, the claimant returned to work for another employer as a door person, which only required sitting on a stool and checking

identification. This was seasonal work and the claimant obtained another job working for Express Lube Car Care, changing oil. This job required overhead reaching and the claimant was required to take another position with this employer which did not require overhead work. The claimant continued with this employment at the time of the hearing.

In order to be entitled to temporary total disability benefits for this unscheduled injury, the claimant must prove by a preponderance of the evidence that he remained in the healing period and that he suffered a total incapacity to earn wages during the period of time in question. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The Administrative Law Judge correctly found that the claimant remained in the healing period and the respondents do not dispute this finding on appeal. However, the Administrative Law Judge found that, as of August 2, 2007, the claimant was no longer totally incapacitated from earning wages. The only relevant event which occurred as of August 2, 2007 was the claimant's evaluation by Dr. Vandergriff. On that date, the claimant received his second recommendation for an

orthopedic evaluation, which he did not have until August 13, 2007. Dr. Vandergriff did restrict the claimant's work to lifting up to 15 pounds and no lifting of the arm above the horizontal position. However, the claimant was not given an opportunity to return to this light-duty work until August 28, 2007. Before this date, the employer was working out of state and the claimant was required to stay in Arkansas to wait for his appointment with the orthopedic surgeon. He was told by representatives of the workers' compensation insurance company not to leave the state while waiting on this appointment, and the employer agreed. The claimant had suffered a severe injury to his shoulder with a surgery recommendation for reconstruction and an orthopedic opinion that the surgery was of sufficient complexity as to require an orthopedic surgeon with a sub-specialty in the area. Clearly, during this period of time, the claimant was under active medical treatment and was awaiting an appointment with an orthopedic surgeon for possible reconstructive surgery. He could not be expected to return to work for another employer. All indications were that he was going to return to work for his

employer of injury when circumstances permitted, and the first time circumstances permitted was on August 28, 2007.

On August 28, 2007, the claimant did, in fact, return to work. The claimant was instructed by his employer to bring and wear the sling which had been given to him in the emergency room on the day of his injury. The claimant had not used this device for over a month and it was not something that had been prescribed to him for use by any of the doctors in Arkansas. Despite the claimant's complaints concerning the use of the sling, the employer unreasonably insisted that it be worn. Because the claimant could not continue to work under these conditions, he left the job. The claimant returned to employment appropriate to his limitations on September 21, 2007, with another employer.

Based on the above, we find that the claimant proved by a preponderance of the evidence that he remained in the healing period and suffered a total incapacity to earn wages, within the meaning of the workers' compensation law, during the period July 14, 2007, through September 21, 2007 (excluding August 28,

2007). The claimant is, therefore, entitled to an award of temporary total disability benefits from August 3, 2007 through September 21, 2007, in addition to the temporary total disability benefits previously awarded by the Administrative Law Judge. The Full Commission thus affirms, as modified, the January 4, 2008 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and we adopt the Administrative Law Judge's 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

---

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion increasing the award of temporary total disability benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits beyond August 2, 2007.

The claimant sustained a compensable injury to his left shoulder on July 13, 2007, when his shoulder popped out of place. As a result of this injury the claimant received treatment at the Columbia Regional Hospital in Columbia Missouri where he was removed from

work until July 17, 2007. The claimant did not seek additional treatment until August 2, 2007, when he was examined by Dr. Cathleen Vandergriff, in Springdale, Arkansas. Dr. Vandergriff opined that the claimant should be examined by an orthopedics specialist due to this not being the first or last time that his shoulder has popped out. Dr. Vandergriff released the claimant to return to light duty work at that time with no lifting the arm above the horizontal position and no lifting greater than 15 pounds. The claimant was next evaluated by Dr. Mark Allard, with Ozark Orthopaedics on August 13, 2007. Although Dr. Allard opined that the claimant needed to undergo reconstruction surgery, he too released the claimant to return to work with the same restrictions placed upon the claimant by Dr. Vandergriff. Dr. Allard recommended that the claimant be examined by an orthopaedic surgeon with a sub-specialty in shoulders. On August 23, 2007, the claimant was examined by Dr. Charles Pearce with Arkansas Specialty Orthopaedics. Dr. Pearce recommended an MR arthrogram of the left shoulder at that time, but did release the claimant to work with only right arm duty. On the Physician's Status Report, Dr. Pearce specifically

wrote: "® arm duty only - strict!" Following the arthrogram, on September 13, 2007, Dr. Pearce relaxed the restrictions placed upon the claimant to no lifting greater than 30 pounds to the waist, no overhead work with the left arm, and does not need to wear sling.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation not simply because he has a compensable injury, but rather during the period of time that he is within his healing period for the compensable injury **and** while he is totally incapacitated to earn wages as a result of that injury. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981).

Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test. It is undisputed that the claimant remains within his healing period during the period of time for which he has requested temporary total disability benefits. The issue then becomes whether the claimant was total incapacitated to earn wages as a result of his compensable injury. With the exception of his treatment at the emergency room, each and every one of his treating physicians consistently released him to return to light duty or restricted work. Accordingly, it is patently obvious that beginning on August 2, 2007, when the claimant was released to light duty by Dr. Vandergriff, he has never been totally incapacitated from earning wages. Moreover, the record reflects that light duty work was made available to the claimant by respondent employer, but he deemed such work to be punishment and he stopped working. When he was released by Dr. Vandergriff, the crew with whom the claimant worked was on an out of town job and he did not leave town to join up with them. With regard to the claimant's attempt to return to work on August 28, 2007, the respondent employer insisted that the claimant

utilize his sling in order to prevent him from violating Dr. Pearce's "strict" restriction of right arm duty only. The claimant disagreed with this requirement, a dispute arose, and the claimant quit his job. The claimant did not return to any type of employment until September 22, 2007, when he secured employment with another company.

The majority has awarded the claimant temporary total disability benefits from July 14, 2007, through September 21, 2007, with the exclusion of August 28, 2007, when the claimant return to work for one day. In my opinion, the claimant ceased being totally incapacitated from earning wages when he was first released to light duty on August 2, 2007. The only difference between the claimant's ability to work on August 2, 2007, and when he finally obtained employment with another employer on September 21, 2007, was his willingness to work. Otherwise, the claimant was still within his healing period and he was under a doctor's light duty restrictions. As is clear from the claimant's ability to secure new employment while under a doctor's light duty restrictions, the claimant was never totally incapacitated from earning wages once he was released to

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

---

KAREN H. MCKINNEY, Commissioner