

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606875

JESSICA NEAL,
EMPLOYEE

CLAIMANT

SPARKS REGIONAL MEDICAL CENTER,
SELF-INSURED EMPLOYER

RESPONDENT

MANAGEMENT CLAIMS SOLUTIONS, INC.,
TPA

RESPONDENT

OPINION FILED JANUARY 31, 2008

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

Claimant represented by the HONORABLE EDDIE H. WALKER,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE R. SCOTT
ZUERKER, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and respondent cross-appeal
opinions and orders of the Administrative Law Judge
filed February 12, 2007 and February 28, 2007. In said
orders, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this claim.
2. On May 8, 2006, the relationship of
employee-employer-carrier existed between the
parties.

3. The claimant was involved in a job related event on May 8, 2006.

4. The claimant is entitled to a weekly compensation rate of \$488.00 for temporary total disability and \$366.00 for permanent partial disability.

5. The claimant sustained a compensable injury to her left shoulder on May 8, 2006.

6. The parties stipulated that the claimant worked six (6) hours for the respondent on May 25, 2006, and four and a half hours (4.50) hours on May 21, 2006.

7. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her neck on May 8, 2006. (See Discussion above).

8. The respondent shall pay for all reasonable and necessary medical care for the treatment of this claimant's compensable injury.

9. The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability from May 10, 2006 to September 8, 2006. (See Discussion above).

10. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability from May 10, 2006, to September 6, 2006. See discussion above.

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.

Since the claimant's injuries 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).

Therefore we affirm and adopt the February 12, 2007 and February 28, 2007 decisions 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 concurs, in part, and dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion. Specifically, I agree that the claimant sustained compensable neck and left shoulder injuries on May 8, 2006, and is entitled to reasonable and necessary medical care for the treatment of these compensable injuries. However, I respectfully dissent from the Majority's finding that Ark. Code Ann. §11-9-526 is a bar to the claimant receiving temporary total disability benefits from May 10, 2006 to September 8, 2006. Based upon a de novo review of the record in its entirety, I find that the claimant has shown by a preponderance of the evidence her entitlement to temporary total disability benefits from May 10, 2006 until September 8, 2006, and therefore, 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 May 8, 2006, for which she was actively treating, with pain medications, physical therapy, steroid injections and regular 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. Armstrong has noted that the claimant may need surgery to correct her cervical injury. Therefore, I find that the claimant has shown by a preponderance of the evidence that she was in her healing period at least until she returned to work for the respondent, and possibly beyond.

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 he 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 actively treating for her neck and shoulder injuries. The claimant was taking narcotic pain medication, attending physical therapy, and her doctors had limited the use of her shoulder and neck. The claimant testified that she was suffering from muscle spasms that caused migraines, and that she frequently had to lie down in a dark place. Although the claimant's doctors released her to return to light duty work at various intervals during the time period in question, the evidence clearly shows that due to her neck and shoulder injuries the claimant was unable to perform even light-duty work. Therefore, I find that the claimant is entitled to temporary total disability benefits.

The Majority, by affirming and adopting the Administrative Law Judge, has erroneously found 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. Pillow v. Sanyo Manufacturing Co. Workers' Compensation Commission Full Opinion filed October 10, 2007 (F404094). 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 offered the claimant two types of jobs. First, the claimant was offered a two-day clinic assignment in May. The record shows that he claimant was unable to report to the clinic on the first day of the assignment because, due to pain from neck and

shoulder injuries, she had taken prescribed narcotic pain medication too close to the assigned work-time for her to avoid non-compliance with the restrictions of her nursing license. The claimant testified that violation of the terms of her nursing license could cause her to lose her nursing license altogether. The next day, as she had not taken the prescribed narcotic pain medication, the claimant was able to successfully complete the full clinic shift. However, before it could be determined whether or not clinic shifts would, in fact, be suitable light-duty assignments, the respondent informed the claimant that clinic work was no longer available to her because she had been deemed unreliable. I find that the respondent's determination that the claimant was unreliable based on the facts in evidence to be arbitrary and unreasonable. Ms. Tina Good, the supervisor in charge of light duty assignments testified that the respondent's own policy allows nurses to miss five (5) days of work before accruing "points" on their record. The claimant testified that she had not had an attendance problem in the past, and Ms. Good agreed that she had no knowledge of the claimant having a history of attendance problems. Therefore, I find that the respondent cannot argue Ark. Code Ann. §11-9-526 as a

bar to claimant's entitlement to temporary total disability benefits, as the respondent, without good reason, did not allow the claimant to attempt what might have been a suitable light duty position.

Second, after the respondent unreasonably terminated the claimant from clinic assignments, the respondent offered the claimant a position working in the hospital laundry room. Based on my review of the DVD submitted by the respondent, I find that the laundry room assignment cannot be considered a bonafide offer of suitable employment. Assigning a registered nurse with neck and shoulder injuries to work in a hospital laundry room with the job duty of feeding large blankets into an industrial roller iron with one arm while on narcotic pain medication is simply unreasonable. However, it should be noted that, although I find that the claimant would have been justified in refusing the laundry room assignment altogether, the claimant showed up, tried to perform the work, and was physically unable to do so.

Furthermore, I find that the DVD offered by the respondent bolsters the claimant's credible testimony that she was physically unable to perform the laundry room work. Even if the claimant were able to perform the laundry room job duties without using her

left shoulder, which the respondent alleges is possible, I find that the motions required to perform the laundry room assignment, bending, lifting, folding and turning, are entirely inappropriate for a person with a neck injury. Also, the claimant was taking prescribed narcotic medications that would render the required motions more difficult, if not in fact, dangerous, due to the claimant's location approximately six inches from a large industrial roller iron. Accordingly, I find that the laundry room assignment was patently unsuitable, and as such, Ark. Code Ann. §11-9-526 is not a bar to claimant's entitlement to temporary total benefits.

Additionally, I find that the clinic assignments the respondent offered the claimant in June and July, were also not offers of suitable employment, and that the claimant was justified in her refusal to accept them. The claimant testified that she is a registered nurse who, due to the requirements of her license, cannot perform patient care while under the influence of narcotics. As the respondent was well aware of the claimant's physical restrictions, the fact that she had been prescribed narcotic medications to be taken every four hours and as the respondent had actually used the fact that the claimant could not report to one day

of the May clinic assignment due to her use of the narcotic medication as justification for withdrawing the offer of that type of employment, I cannot find that the respondent made bonafide offers of suitable employment in June or July. Even if the June and July offers had been bonafide, the evidence shows that the claimant's medical status had changed in the time period between the May clinic assignment, which the claimant was able to perform before she was unreasonably terminated from that type of employment, and the offers of clinic assignments in June and July. In June, the claimant was taken totally off of work by Dr. Rhomberg, and was given the restriction of "allowed to take narcotic medication" a restriction that was not in place during the May clinic assignment.

Accordingly, I find that the claimant is entitled to temporary total disability benefits from May 10, 2006 to September 8, 2006, and I concur with the Majority's finding that the claimant is not entitled to temporary partial disability benefits during the same time period. Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. Ark. State Hwy.

Dept. v. Breshears, 272 Ark. 244, 613 S.W. 2d 392

(1981). Here, the claimant was totally incapable of returning to work, and in fact, did not return to work, and is therefore entitled to temporary total disability benefits, not temporary partial disability benefits. However, I would note that due to Ms. Good's testimony that she did not attempt to find the claimant work to replace the income from her per-diem shifts, the claimant would have been entitled to temporary partial disability benefits had the respondent provided suitable light duty work within the claimant's physical restrictions.

In conclusion, I find that the claimant has met her burden of proof by a preponderance of the evidence for a compensable left shoulder injury as well as a compensable neck injury, and is entitled to reasonable and necessary medical treatment for those injuries. I find that the claimant was in her healing period and totally disabled from work from May 10, 2006 through September 8, 2006, and is entitled to temporary total disability benefits for those dates. 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