

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F804469

MICHELLE M. OLSON,
EMPLOYEE

CLAIMANT

CENTRAL ARKANSAS NURSING CENTER,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 6, 2010

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

Claimant represented by the HONORABLE LAURA BETH YORK,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed June 30, 2009. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. There was an April 8, 2008, compensable injury.
2. The temporary total disability rate is \$232.
3. The claimant has proven by a preponderance of the
evidence that additional medical treatment after
September 2, 2008, is reasonable and necessary for
the compensable shoulder injury.
4. Respondents are responsible for the medical
treatment.

5. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from September 8, 2008, to a date to be determined.

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 June 30, 2009 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant was entitled to additional medical treatment and temporary total disability benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant worked for the respondent employer as a CNA. On April 8, 2008, she sustained an admittedly compensable injury to her shoulder while helping transfer a patient from a chair to a bed. The claimant sought medical treatment and was diagnosed with a left shoulder strain and X-rays taken at the time were negative. The claimant sought medical treatment on April 11, 2008, and was again diagnosed

with a left shoulder strain and released to return to work on light duty.

The claimant returned to work for the respondent employer and worked for three days on light duty passing out ice and water, taking vital signs and talking to residents. After three days, the claimant did not return to work. She was offered a float position, but she did not attempt the float position after September 2, 2008.

The claimant continued to seek medical treatment after April 2008, including an MRI of her cervical spine and left shoulder. In May 2008, the claimant was seen by Dr. David Collins and an arthrogram of the left shoulder was performed. It was negative. Dr. Collins noted in his report of May 29, 2008, that there is no evidence of a full or partial thickness tear and no surgery was recommended. He further stated that "Fortunately, there does not appear to be an extreme injury to the musculotendinous osteoarticular or ligamentous structures about the left shoulder girdle." However, the claimant continued to complain and an EMG/NCV was performed on June 13, 2008, which showed a severe strain of the left rhomboid major muscle, but no evidence of peripheral nerve entrapment, neuropathy, plexopathy, myopathy or radiculopathy.

On September 2, 2008, the claimant was evaluated by Dr. Scott Bowen. He indicated continued rehabilitation and physical therapy was the only thing he knew that would help. He also indicated that the claimant could work doing office type work, one arm duty and that the claimant's prognosis was fair. Additional treatment was not authorized and the claimant testified at the hearing that she did not receive any other treatment after September 2, 2008. She indicated that it was going to be an out-of-pocket expense for her and she was only willing to get treatment if someone else was paying, but not if she had to pay for it herself.

The claimant's deposition was taken. In her deposition, the claimant denied any problems with her shoulder prior to April 8, 2008. However, medical records were introduced that she had sought emergency room treatment for her left shoulder on April 6, 2007.

Teresa Norwood, personnel manager for Dardanelle Nursing Center, testified at the hearing. Ms. Norwood stated that after April 2008, she had conversations with the claimant from time to time about coming back to work. Ms. Norwood testified that she had a conversation with the claimant in October and November 2008 about coming back to work, but the claimant never showed up. She further testified that she talked to the claimant about having a

float position, and a float position was a light duty job. According to Ms. Norwood, the float position "can be designed however it needs to be in order to accommodate whatever the light-duty restriction is." Ms. Norwood further testified on cross-examination that:

Q Did you ever offer an explanation of what a float position entailed?

A Yes. If she was in order to do float duty, I had told her numerous times what they would be doing.

Q Okay. What would she be doing?

A She would be doing whatever she could do with her good arm, which would have been her right arm.

Q So you are telling me that you told her she could do whatever she could with one arm?

A Yeah, we would work with her once we go the physician's order, you know stating what she could and couldn't do.

Ms. Norwood reiterated that the claimant told her she could only do one-hand duty and that she told the claimant that she could modify the float position as needed in order to accommodate the claimant's restrictions, but the claimant never came in and tried to do the float position. Ms. Norwood went on to explain that there were a number of

things the claimant could have done one-handed, such as cleaning nightstands, cleaning closets, do certain vitals, use a touch screen to do percentage of meals and daily care.

Ms. Norwood testified that the light-duty job would be modified to fit the restrictions on the doctor's note that the claimant would bring in when the claimant came in ready to start back to work. However, the claimant never came back to even try to do light duty.

Ms. Vicki Fowler, the administrator of the respondent employer, also testified. She knew that Ms. Norwood offered work to the claimant in September 2008. She also confirmed that a float position is modified for all of their light-duty cases, including one-arm duty. She further testified that there were a number of duties that the claimant could have performed one-handed if she had returned, but she never came back and gave it a try after September 2, 2008. Ms. Fowler testified that people in float positions do different things depending on their limitations.

The claimant admitted that she talked to Teresa a couple of times after September 2, 2008, and was informed that she had a float position available for the claimant. The claimant never came back to work and tried the float position. Evidence was presented that the claimant could

drive, cook, care for her three children, help them with homework, do the dishes, do the laundry, and shop.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002).

However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. The claimant had an EMG/NCV test was performed on June 13, 2008, which showed a severe strain of the left rhomboid major muscle, but no evidence of peripheral nerve entrapment, neuropathy, plexopathy,

myopathy or radiculopathy. The claimant saw Dr. Scott Bowen on September 2, 2008 and he indicated that continued rehab and physical therapy was the only thing to help the claimant. The claimant has failed to even follow through with Dr. Bowen's recommendation because she was willing to have someone else pay for her treatment but was not willing to pay for it herself. Therefore, I must dissent from the majority's award of benefits.

The majority has also awarded the claimant temporary total disability benefits. 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 Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. See, Ark. Code Ann. §11-9-102(4) (D) (Supp. 2005). Although objective medical findings are not directly necessary for the Commission to award temporary total disability benefits, such findings are required for the underlying injury to be compensable. Williams v. Prostaff Temporaries, 64 Ark. App. 128, 979 S.W.2d 911 (1998), aff'd, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). When an

injured employee is totally incapacitated from earning wages and remains in her healing period, he 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; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. McWilliams, supra; Mad Butcher, supra. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

In my opinion, the claimant has failed to prove by a preponderance of the evidence that she was entitled to temporary total disability benefits. The evidence demonstrates that the respondent employer had light duty work available for the claimant after September 2, 2008 and the claimant flatly refused to even try to return to work. Ms. Norwood testified that the light duty job would be modified to fit the restrictions the claimant's doctor had given her, if only the claimant would bring it in when she was ready to start back to work. In this case, the claimant never came back to even try light duty. Ms. Fowler confirmed that a float position was modified for all light-duty cases, including one-arm duty. The claimant admitted that she talked to Teresa a couple of times after September 2nd and was informed that they had a float position available. However, the claimant never came back to work and tried the float position. Yet, the claimant can drive, cook, care for her children, help with homework, do dishes, laundry and shop. In my opinion, if the claimant is able to perform these household duties, she is able to perform one-armed, modified, light-duty for the respondent employer. Therefore, I find that the claimant has failed to meet her burden of proof. Accordingly, I must dissent from the

majority's finding that the claimant is entitled to additional temporary total disability benefits.

KAREN H. MCKINNEY, COMMISSIONER