

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F906308

IRINEA GUTIERREZ BERRUN,
EMPLOYEE

CLAIMANT

TYSON POULTRY, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

TYNET,
TPA

RESPONDENT

OPINION FILED OCTOBER 3, 2011

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 E. DIANE
GRAHAM, Attorney at Law, Fort Smith, 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
June 20, 2011. In said order, 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 April 20, 2009, the relationship of
employee-self insured employer existed
between the parties.
3. On April 20, 2009, the claimant sustained a

compensable injury to her back.

4. On April 20, 2009, the claimant earned an average weekly wage of \$428.00. This would entitle her to appropriate weekly compensation benefits of \$285.00 for total disability and \$214.00 for permanent partial disability.
5. There is no dispute over liability for medical services for the claimant's compensable injury through January 21, 2010.
6. The medical services provided and recommended to the claimant by and at the direction of Dr. Rodney Routsong for her low back or lumbar difficulties, on and after January 22, 2010, represents reasonably necessary medical services for the claimant's compensable injury of April 20, 2009. Specifically, the claimant has proven by the greater weight of the credible evidence that these medical services were necessitated by or connected with her compensable injury and were reasonable in light of the potential benefit offered in reducing or controlling her chronic difficulties from this permanent compensable injury. Pursuant to Ark. Code Ann. §11-9-508, the respondent is liable for the expense of these medical services.
7. There is no dispute over temporary total disability benefits accruing through November 28, 2010.
8. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to additional temporary total disability benefits for the periods of November 29, 2010 through December 27, 2010, and March 24, 2011 through April 26, 2011. Specifically, the claimant has failed to prove that during these intervals she continued within her "healing period" from her compensable injury of April 20, 2009, and was also rendered temporarily totally

disabled by this compensable injury.

9. The respondents have controverted the claimant's entitlement to any medical services after January 21, 2010, her entitlement to any additional temporary total disability benefits after November 28, 2010, and her entitlement to any temporary total disability benefits at a weekly rate in excess of \$263.00 and any permanent partial disability benefits at a weekly rate in excess of \$197.00.
10. The appropriate fee for the claimant's attorney is the statutory attorney's fee on the difference between any temporary total disability benefits and permanent partial disability benefits previously paid by the respondents, at the weekly rates of \$263.00 and \$197.00, and the appropriate amount of these benefits, at the weekly rates of \$285.00 for temporary total disability and \$214.00 for permanent partial disability.

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 20, 2011 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

Commissioner McKinney concurs in part and dissents in part.

CONCURRING 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 has failed to prove by a preponderance of the evidence that she was entitled to additional temporary total disability benefits. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment and the finding that the claimant's average wage was \$428. After conducting a de novo review of the record, I find that the claimant has failed to meet her burden of proof.

With regard to the claimant's additional medical treatment, I cannot find that the claimant is entitled to any additional medical treatment after January 21, 2010. The evidence demonstrates that Dr. Routsong treated the claimant for back and neck problems for several months after her compensable injury. He noted that the claimant had bilateral pars defect but stated that the claimant was asymptomatic with regard to these findings. Dr. Routsong prescribed physical therapy and gave the claimant instructions as to activities. By July of 2009, her problems had pretty

much resolved. Physical therapy was continued and the claimant's condition continued to improve over several months of physical therapy, medication, use of a TENS unit and an epidural steroid injection. On December 10, 2009, Dr. Routsong opined that the claimant had reached maximum medical improvement and was continuing to report right hip and low back. On January 13, 2010, Dr. Routsong assessed the claimant with a 7% permanent anatomical impairment rating and opined that the claimant's condition indicated no further medical treatment.

Since Dr. Routsong released the claimant at maximum medical improvement on January 13, 2010, she has only seen him twice. On these occasions, Dr. Routsong did not relate her symptoms to the compensable injury of April 20, 2009.

It is undisputed that the respondents accepted and paid all medical treatment for the claimant through January 21, 2010. Since that time, Dr. Routsong has not recommended any additional treatment for the claimant's compensable injury and as of January 13, 2010, opined that no medical treatment was clinically indicated for the claimant's compensable injury. Therefore, I find that the claimant has failed to meet her burden of proof

that additional medical treatment is for her compensable in April of 2009. Accordingly, I must respectfully dissent from the majority's award of benefits.

With respect to the claimant's average weekly wage, I find that the majority, by adopting the Administrative Law Judge's opinion, did not calculate the claimant's average weekly wage correctly.

A.C.A. § 11-9-518 (Repl. 2002) provides:

(a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract for hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying the hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time

of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The Commission should use the calculations approved by the Court of Appeals in Lankford v. Crossland Construction Company 2011 Ark. App. 416, ___ S.W.3d ___ (2011). In Lankford, the claimant worked varying hours at different rates of pay. The claimant received a raise in the 51 weeks leading up to his 2007 injury. The Commission took the claimant's pay for 51 weeks proceeding the injury, added it together and divided that number by 51 to calculate the claimant's average weekly wage. The Court of Appeals affirmed the Commission's calculation of the claimant's average weekly wage. The majority failed to note that during the work week 40 reflected on the wage record, the claimant did not earn any income but was paid short-term disability benefits during the time. The claimant worked varying hours each week at four different wage rates. The majority has erroneously computed her average weekly wage based upon 24 weeks, including one

week the claimant did not work but drew short-term disability benefits. That week should have been excluded from the computation and the total amount of the claimant's wages earned in 48 weeks should have been added together and then divided by 48. Based upon that calculation, the claimant's correct average weekly wage would be \$393.63.

Therefore, after considering all the evidence of record, I must respectfully dissent from the majority's finding that the claimant's average weekly wage was \$428.00.

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 opinion. I specifically concur in the finding that the claimant proved by a preponderance of the evidence that she is entitled to additional medical treatment. I also agree that the claimant's average weekly wage was \$428.

However, as I would award temporary total disability benefits, I must respectfully dissent on this issue.

"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 reached MMI but then re-entered two healing periods due to a fall which made her symptoms worse. Dr. Rodney Routsong notes in his November 29, 2010 report that the claimant would be taking several days off to recover from her fall. Her fall would not have required time off work if not for her existing work injury to her back. Dr. Routsong took the claimant off work until December 20, 2010. He then again takes her off work from March 24, 2011 through April 26, 2011, due to inability to work because of her back pain. I would award temporary total disability benefits for these time periods.

For the aforementioned reasons, I must concur,
in part, and dissent, in part, from the majority
opinion.

PHILIP A. HOOD, Commissioner